No. 21-16209

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAREMARK LLC, ET AL.,

Petitioners-Appellees,

v.

CHICKASAW NATION, ET AL.,

Respondents-Appellants.

On Appeal from the United States District Court
for the District of Arizona
No. CV-21-00574-PHX-SPL
Hon. Steven P. Logan

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This case presents the questions whether a sovereign Native American tribe asserting federal statutory rights in a federal court action in the Eastern District of Oklahoma may be forced into an arbitration proceeding in Arizona, even though (1) the tribe never signed any document containing an arbitration agreement, much less "clearly" and "unequivocally" agreed to arbitration, as required by governing Supreme Court precedent, *see* *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001), and (2) the federal statute under which the tribe has sued in Oklahoma authorizes a federal claim in federal court and bars enforcement of any contractual provision that would "prevent or hinder the right of recovery," 25 U.S.C. § 1621e(c), as arbitration would do here. The district court in this case erred by compelling arbitration without even deciding the important questions presented. By Order of August 20, 2021, this Court has already granted a stay of the district court's judgment. This Court should now reverse.

The Chickasaw Nation ("the Nation") is a sovereign and federally recognized Native American tribal nation comprised of more than 70,000 citizens, headquartered in Oklahoma. ER 44. The Nation owns and operates health care facilities, including pharmacies, serving its members and seeking reimbursement from the members' private insurers pursuant to the Indian Health Care Improvement

Act, 25 U.S.C. §§ 1601, *et seq*. ("IHCIA"). ER 41. The IHCIA contains a financial recoupment mechanism codified in 25 U.S.C. § 1621e (known as the "Recovery Act") authorizing Indian tribes to recover the cost of healthcare services from private insurers.

The Nation has brought suit in the Eastern District of Oklahoma pursuant to the Recovery Act against the Caremark Appellees[1] (collectively, "Caremark") alleging improper denial of claims for reimbursement.[2] The complaint alleges that Caremark violated the Nation's statutory rights under the Recovery Act, forcing the Nation's pharmacies to operate at a loss and threatening their ability to provide healthcare services to the Nation's members. The Recovery Act authorizes a federal cause of action in court to vindicate statutory rights. 25 U.S.C. § 1621e(a); *id.* at § 1621e(e)(1)(B). Caremark countered with a separate action in the District of Arizona to compel arbitration, insisting that the Nation had agreed to arbitrate its statutory claims. The Nation enjoys sovereign immunity and cannot be forced to arbitrate without a clear and unequivocal agreement to do so. Yet Caremark did not

[1] Caremark is a vertically integrated corporate group containing one of the country's largest chain of retail pharmacies, the largest pharmacy benefits manager ("PBM"), which processes claims for reimbursement, and the nation's third-largest health insurance company and fourth-largest individual Medicaid Part D insurer. The Caremark entities in this action are Caremark, LLC; Caremark PHC, LLC; CaremarkPCS Health, LLC; Caremark RX, LLC; Aetna, Inc.; Aetna Health, Inc.

[2] *The Chickasaw Nation v. CVS Caremark LLC, et al.*, No. 20-cv-488-PRW (E.D. Okla.). ER 36.

produce any agreement signed by the Nation, any of its pharmacies, or any of its officials that contained an arbitration provision. Instead, Caremark pointed to "Provider Manuals" containing arbitration clauses that Caremark contends it unilaterally sent to the Nation's pharmacies after they had signed their initial contracts with Caremark. But no one from the Nation or its pharmacies had ever signed or expressly agreed to the arbitration provisions to which Caremark points.

Despite the Nation's argument that no "clear" and "unequivocal" agreement to arbitrate had been formed between the parties, the district court granted Caremark's petition to force arbitration, reasoning that the parties had somehow "agreed" to submit to an arbitrator the threshold issue of whether the dispute is subject to arbitration. That decision was wrong. Uniform case law requires the *court*, not the arbitrator, to determine whether the parties formed an agreement to arbitrate in the first instance. The district court's decision to the contrary is impermissibly circular, reasoning that the issue of whether the parties agreed to arbitrate is subject to arbitration because the supposed arbitration provision says so. But that assumes that the parties agreed to the arbitration in the first place. The Nation argued that it did *not* agree to arbitration, and the district court did not find that it did. Yet the court nonetheless (and improperly) delegated to an arbitrator the question of whether the parties had formed an agreement to arbitrate.

Moreover, the district court failed to account for the Nation's sovereign immunity. Indeed, the court failed to address the issue at all, apparently believing that submitting the threshold issue of arbitrability to the arbitrator does not implicate sovereign immunity. That reasoning is fundamentally incorrect.

The district court also failed to address the effect of the Nation's statutory recovery rights on Caremark's request for arbitration. The Recovery Act creates a federal cause of action in court to redress statutory violations and bars enforcement of any contractual provision that would "prevent or hinder the right of recovery," 25 U.S.C. § 1621e(c). The Nation made a compelling showing that forcing it to arbitrate in Arizona would hinder its recovery rights under the statute. It was error for the district court to ignore that argument and delegate the Recovery Act issue to the arbitrator as well.

JURISDICTIONAL STATEMENT

Caremark invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on July 2, 2021, and the Nation filed a timely notice of appeal on July 20, 2021.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The Federal Arbitration Act provides that "[a]n appeal may be taken from . . . a final decision with respect to an arbitration." 9 U.S.C. § 16(a)(3). Section 16(a)(3) authorizes

appeal of a final decision "regardless of whether the decision is favorable or hostile to arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000).

The *Green Tree* court explained that "the term 'final decision' has a well-developed and longstanding meaning. It is a decision that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'" *Id.* (internal citations omitted). Thus, "where, as here, the District Court has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final' within the meaning of § 16(a)(3), and therefore appealable." *Id.* at 89; *see Am. Airlines, Inc. v. Mawhinney*, 904 F.3d 1114, 1119 (9th Cir. 2018) ("[A]n order compelling arbitration is no longer interlocutory once a district court—like the district court in this case—dismisses the action and enters judgment."). And "if the motion to compel arbitration in a given case is the only claim before the district court, a decision to compel arbitration is deemed to dispose of the entire case, and permit appellate review under 9 U.S.C. § 16(a)(3)." *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994) (citations omitted).

The district court's July 2, 2021, order is final under section 16. The court resolved the only issue presented to it: whether the Nation must be compelled to arbitrate its claims. That issue was independent, and there were no other claims in the case. Moreover, the Court not only granted the petition to compel arbitration, it directed the clerk "to enter judgment in favor of Petitioners and terminate this action

accordingly." ER 9. That holding falls squarely within the definition of a "final decision" in *Green Tree*.

That is true even though the Nation's lawsuit remains pending in the Eastern District of Oklahoma. "That factually related claims may be pending in some other forum, such as at DOL, has no impact on the finality of the district court's decision." *Am. Airlines*, 904 F.3d at 1119; *Lai*, 42 F.3d at 1302; *Clarendon Nat'l Ins. Co. v. Kings Reinsurance Co*., 241 F.3d 131, 134 (2d Cir. 2001); *see also Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1105 (9th Cir. 2003). Because the district court ordered the entry of judgment on the only pending claim and directed the termination of the litigation, its order is a final, appealable decision.

ISSUES PRESENTED

1. Whether the district court erred in ordering that claims brought by the Nation in its Eastern District of Oklahoma lawsuit seeking to enforce its statutory right to reimbursement for pharmacy expenses must be submitted to arbitration, where the district court refused to consider the Nation's argument that it never entered into an arbitration agreement.

2. Whether the Nation did not "clearly" and "unequivocally" waive its sovereign immunity and agree to arbitration where "Provider Manuals" that no representative of the Nation signed included arbitration provisions unilaterally added by Caremark.

3. Whether the Recovery Act, which creates a federal court cause of action and prohibits any contractual provision that hinders a tribe's statutory right of recovery, supersedes any agreement to arbitrate claims for recovery under the statute, and whether the district court erred in delegating this question to the arbitrator for decision.

STATEMENT OF THE CASE

A. Background: The Right To Financial Recoupment Under The Indian Health Care Improvement Act.

Congress has long recognized the Federal Government's "commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole." 25 U.S.C. § 5302(b). The IHCIA, enacted in 1976, reflects that commitment.

Congress recognized that many Native Americans, especially those residing in very remote and rural locations, were eligible for but could not access federally-funded healthcare services without traveling sometimes hundreds of miles to qualified providers located off reservation. Acting to alleviate long-standing health care disparities and to provide increased and more effective health care services to Native Americans, *see id*. § 1601(2)-(3), Congress (among other things) amended the Social Security Act to permit reimbursement by Medicare and Medicaid for services provided to Native Americans by the Indian Health Service ("IHS") and tribal health care facilities. *See* 42 U.S.C. §§ 1396d(b),1396j.

In 1988, Congress amended the IHCIA to add a key reimbursement mechanism (referred to as the "Recovery Act"). Recognizing that health care was available to many Native Americans through employers who provided health insurance plans to their employees, Congress gave the United States the right to recover the "reasonable expenses incurred by the Secretary in providing health services" to eligible Indians and Alaska Natives. Indian Health Care Amendments of 1988, Pub. L. No. 100–713, 102 Stat. 4811 (1988), codified at 25 U.S.C. § 1621e(a). As a Senate report explained, "insurers that collect premium payments from IHS-eligible Indian individuals or from tribal governments for coverage of IHS-eligible employees are being paid for insurance coverage which they are not providing. Given the well-documented insufficiency of resources that are available to tribal governments and Indian citizens, expenditures for insurance coverage that provides no benefits to the insured constitute an obvious waste of scarce resources." S. REP. NO. 100-508, at 15 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 6183, 6197.

Shortly thereafter, Congress became aware that some insurance companies were refusing to reimburse healthcare expenses paid by tribes on the ground that the Recovery Act was limited to claims made to insurers by the federal government.[3]

[3] *E.g.*, Indian Health Amendments of 1991: Joint Hearing on H.R. 3724 Before the Comm. on Interior and Insular Affairs and the Subcommittee on Health and the Environment of the Comm. on Energy and Commerce, 102nd Cong. 206–09 (1992) (statement of Yukon-Kuskokwim Health Corporation) ("The problem is

Accordingly, Congress amended the Recovery Act in 1992 to make clear that "an Indian tribe, or tribal organization" has the same right of recovery as the federal government. Pub. L. No. 102–573, Title II, § 209, 106 Stat. 4526 (1992); H.R. REP. NO. 102–643, pt. 1, at 75 (1992) (explaining that "the Act is amended by this section to allow Indian tribes and tribal organizations the same rights as the Secretary to recover reasonable expenses incurred for the provision of health services to any individual through third party reimbursement").[4]

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this. The statutory language provides that 'the United States' shall have a right to recover against third party insurance companies. 25 U.S.C. § 1621e. There is no explicit language referring to tribes or tribal organizations. On this technicality, certain IHS officials have indicated that, in their view, tribal health contractors do not have a right to recover. Moreover, several private insurance companies have refused to pay these claims, as noted above [. . . .] The Administration has placed great emphasis on third party collections, with the Administration's FY 1993 proposed budget, as you know, calling for major increases in third party collections from private insurance companies. The language we propose is consistent with this policy of enhancing collection efforts."); Indian Health Care Act Amendments of 1992: Hearing on S. 2481 Before the Select Comm. on Indian Affairs, 102nd Cong. 259 (1992) (statement of the Cherokee Nation) ("The Cherokee Nation endorses inclusion of this much needed opportunity for tribes and tribal organizations to recover their health service delivery expenses to the same extent that any governmental provider of services would be eligible to receive reimbursement or indemnification.").

[4] *See* H.R. REP. NO. 102–643, pt. 1, at 45–46 (1992); S. REP. NO. 102-392, at 20-21 (1992) (identical language in second sentence only) ("The Committee has been informed of insurance companies refusing to pay tribal contractors for services and officials within the Indian Health Service questioning the contractor's right to recover in the absence of legislation. Therefore, the Committee Amendment includes language which clarifies that tribal health contractors have the same right to recover against private insurance companies that IHS enjoys."); 138 CONG. REC. S18314-02

This recovery mechanism is essential to the ability of tribal governments to protect the health of Native Americans. Members of any Native American nation who visit the Nation's ITU Pharmacies pay no co-pay or other fee for their prescription medications and medical devices. ER 41.

To offset the cost of this important privilege, the Nation received the right under the Recovery Act to obtain cost recovery from responsible third parties. The Recovery Act thus permits Native American nations to recoup the cost of services they provide Members from any applicable insurance coverage the Member may have. In this regard, the Nation is a payor of last resort. 25 U.S.C. § 1623(b).

Congress created a statutory "[r]ight of recovery" for tribes, 25 U.S.C. § 1621e(a), and provided for enforcement by authorizing tribes to "institut[e] a separate civil action, including a civil action for injunctive relief and other relief." 25 U.S.C. § 1621e(e)(1)(B). In addition, Congress provided that "no provision of any contract, insurance or health maintenance organization policy, employee benefit plan, self-insurance plan, managed care plan, or other health care plan or program

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(daily ed. Oct. 29, 1992) (statement of Sen. Daniel Inouye) ("Although original section 206 has not raised problems for most third-party payors, in a few instances such payors have refused to meet their statutory obligation to pay, resulting in many accumulated claims. The section 209 clarifying amendment will assure that these payors do not escape their obligations under the law. Mr. President, I am thankful for this opportunity to clarify the intent of the Congress with regard to the rights of tribal self-determination contractors who exercise their rights of recovery for third-party insurance purposes.").

entered into or renewed after November 23, 1988, shall prevent or hinder the right of recovery of the United States, an Indian tribe, or tribal organization under subsection (a).” 25 U.S.C. § 1621e(c).

B. The Chickasaw Nation’s Health Care System.

The Nation “has invested significant resources in the development and expansion of its Tribal health care system infrastructure.” ER 18. The Nation serves “not only Chickasaw citizens but—pursuant to our self-governance compacts with the Indian Health Services—Native persons throughout our region.” *Id*. The Nation operates a robust and sophisticated network of health clinics and “ITU” Pharmacies,[5] including Respondents the Ardmore Health Clinic, the Chickasaw Nation Medical Center, Purcell Health Clinic, and Tishomingo Health Clinic. ER 41, 61. The Chickasaw Nation Department of Health operates Respondent the Chickasaw Nation Online Pharmacy Refill Center. The Chickasaw Nation’s ITU Pharmacies provide services to members of federally recognized Native American nations (“Members”), including many citizens of Oklahoma. ER 41.

The Nation guards its sovereign immunity carefully. Chickasaw Nation law provides that only the Nation’s Governor or the Chickasaw Tribal Legislature may

[5] An IHS/Tribal/Urban Indian Health (“I/T/U” or “ITU”) Pharmacy means a pharmacy operated by the Indian Health Service, an Indian tribe or tribal organization, or an urban Indian organization, all of which are defined in Section 4 of the Indian Health Care Improvement Act, 25 U.S.C. § 1603.

waive its sovereign immunity. ER 17. As a matter of policy, "the Chickasaw Nation does not sign any agreement that would subject itself, as a Tribal sovereign, to the laws of any other sovereign." ER 18.

The Nation's standing policy is not to sign arbitration agreements except in extraordinary circumstances, such as intergovernmental agreements (rather than commercial agreements). ER 17. When the Nation waives its sovereign immunity for dispute resolution purposes, it has selected a forum convenient to the Nation, such as its own tribal courts or another Oklahoma-based forum. *Id*.

Many members of the Nation maintain health insurance policies (typically through their employers) issued by Aetna or UnitedHealth Group or one of their affiliates. ER 22. These insurers will not reimburse the Nation for any qualifying expense unless the Nation submits claims through the insurer's pharmacy benefit manager ("PBM"). *Id*. The Nation therefore effectively has no choice but to enter into a contract with each insurer's PBM. *Id*.

As a result, the Nation and its pharmacies signed various provider agreements to facilitate reimbursement of expenses. In July 2003, Ardmore Health Clinic Pharmacy, the Chickasaw Nation Online Pharmacy Refill Center (under the names CNHS Family Practice Clinic and Carl Albert Indian Hospital), and the Tishomingo Health Clinic signed Provider Agreements with an entity known as "AdvancePCS Network" (which was subsequently acquired by Caremark). ER 101. In December

2005, Purcell Indian Health Clinic signed a Provider Agreement with Caremark Inc. and CaremarkPCS. ER 101, 149. And in August 2010, the Chickasaw Nation Medical Center signed a Provider Agreement with Caremark LLC and CaremarkPCS LLC. ER 101, 144. In addition, each of the pharmacies identified above signed "Network Enrollment Forms" beginning in 2003 and continuing through 2020.[6]

However, none of those agreements (indeed, no document signed by any representative of the Nation) contained an arbitration provision, or any reference to "arbitration." Neither the Nation nor any of its pharmacies ever signed a document containing an arbitration provision. Nor has the Nation ever authorized any person to sign any agreement with Caremark waiving the Nation's sovereign immunity. ER 17. Moreover, each provider agreement states that "[a]ny changes to this agreement must be initialed." ER 146, 154. In addition, the Network Enrollment forms stated that "[n]o alterations to this Network Enrollment Form shall be binding on either party unless initialed by duly authorized representatives of Provider and Caremark."

[6] Ardmore Health Clinic signed Network Enrollment Forms in 2003, 2004, 2008, 2010, 2014, and 2020. ER 100. The Carl Albert Pharmacy/Chickasaw Nation Online Refill Center signed Network Enrollment Forms in 2003, 2004, 2008, 2010, 2014, and 2020. *Id*. Other pharmacies also signed forms in multiple years leading to 2020. ER 101-02.

See, e.g., ER 153, 157, 160-64, 166, 179, 187-88, 217, 219, 242-44, 258. Those initialization procedures were never followed in this case.

Caremark has relied on an arbitration provision contained – not in any document signed by the Nation or its pharmacies – but in a "Provider Manual" which Caremark asserts was sent to the Nation's pharmacies after they signed their initial contracts with Caremark entities. The 2020 version of the Provider Manual states that "[a]ny and all disputes . . . arising out of, or relating in any way to . . . the Provider Agreement[s] . . . will be exclusively settled by arbitration." ER 328. Further, the Manual contains a delegation clause providing:

> The arbitrator(s) shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of the agreement to arbitrate, including but not limited to, any claim that all or part of the agreement to arbitrate is void or voidable for any reason.

Id.

Neither the Nation nor its pharmacies signed or expressly agreed to this provision. Nonetheless, Caremark has pointed to the Provider Agreements for the Chickasaw Nation Medical Center and Purcell Health Clinic, which contained a provision entitled "Entire Agreement" purporting to incorporate by reference Caremark's Provider Manual.[7] Caremark asserts that other provider agreements

[7] *See* ER 127, 132 ("This Agreement, the Provider Manual, and all other Caremark Documents constitute the entire agreement between Provider and

signed by other Nation pharmacies "would have contained the same language," ER 102, but those Provider Agreements are not in the record.

Caremark contends that in 2004 all pharmacies then in the Caremark or CaremarkPCS networks were sent the 2004 Caremark Provider Manual and that in 2007, 2009, and 2011 all pharmacies were sent new Provider Manuals by Federal Express. ER 105. Caremark has also submitted into the record the 2003 AdvancePCS Provider Manual. ER 129. However, Caremark has not offered delivery confirmations for any Provider Manuals until the year 2014. ER 105 ("Since 2014, Caremark has maintained proofs of delivery of the Provider Manual . . . ."). Moreover, the arbitration provisions in the Caremark Provider Manuals for years 2004, 2007, 2009, and 2011 (and in the 2003 AdvancePCS Provider Manual) varied in their language and terms and are not the same as the arbitration provision in the 2020 Provider Manual. *See* ER 131, 136, 138, 140, 142, 318-319, 321-322, 324-25, 328-29. For example, there is no delegation clause in the Caremark Provider Manuals for years 2004, 2007, 2009, and 2011 (or in the 2003 AdvancePCS Provider Manual) purporting to vest the arbitrator with the authority to resolve issues regarding the agreement's interpretation, application, enforceability, or formation.

Caremark, all of which are incorporated by this reference as if fully set forth herein . . . .").

As the Nation's General Counsel made clear, "[n]either the Chickasaw Nation Governor nor the Chickasaw Tribal Legislature has waived the Chickasaw Nation's sovereign immunity relative to any Petitioner named in the above-referenced matter [referring to Caremark], nor have the Chickasaw Nation Governor nor the Chickasaw Tribal Legislature signed any agreement with any Petitioner named in the above-referenced matter that contained any waiver of the Chickasaw Nation's sovereign immunity." ER 17. Moreover, "[n]either the Chickasaw Nation Governor nor the Chickasaw Tribal Legislature authorized any person to sign any agreement with any Petitioner named in the above referenced matter that contained any waiver of the Chickasaw Nation's sovereign immunity." *Id*.

C. The Nation's Oklahoma Complaint and Caremark's Action In The District of Arizona Seeking To Compel Arbitration.

On December 29, 2020, the Nation filed a complaint in the Eastern District of Oklahoma against 11 defendants, including the Caremark Petitioners. ER 38. The complaint sought to vindicate the Nation's rights under the Recovery Act. The Nation's complaint alleged that the defendants had violated its rights under the Recovery Act by improperly denying claims for reimbursement and by wrongfully applying insurance discounts that force tribal pharmacies to operate at a loss. The complaint states that "[t]he Nation consents to this Court's exercise of jurisdiction over it for the purposes of this suit," but the complaint contains no other waiver of sovereign immunity. ER 51.

The Recovery Act provides tribes with important statutory rights that are not guaranteed in arbitration, such as: (1) a one-way fee- and cost-shifting provision for plaintiffs (but not defendants), 25 U.S.C. § 1621e(g); (2) a six-year statute of limitations; (3) fulsome discovery rights; (4) damages in the *higher* amount of "the reasonable charges billed by . . . an Indian tribe, or tribal organization in providing health services" "or, if higher, the highest amount the third party would pay for care and services furnished by providers other than governmental entities," 25 U.S.C. § 1621e(a), as well as punitive damages; and (5) open and public hearings in court, as opposed to confidential arbitration proceedings.

Caremark responded by moving to stay the Oklahoma litigation pending arbitration, asserting the same arguments it has made in this case. The Oklahoma district court in that action has not yet ruled on the motion.

Caremark then brought an action in the District of Arizona to compel arbitration, insisting that the Nation had agreed to arbitrate the claims asserted in the Eastern District of Oklahoma. ER 23. Caremark pointed to arbitration clauses in Provider Manuals, to which the Nation had never manifested clear and unequivocal consent or signed. Caremark did not submit any contract or document actually signed by the Nation that even contained the word "arbitration." Nor did Caremark provide any evidence that the Nation had waived its well-recognized sovereign immunity.

The Nation responded to the petition to compel arbitration by showing that it had not signed or agreed to arbitration provisions slipped into the Provider Manuals, and that the question was one for the court and not the arbitrator. It also pointed out that the Caremark Petitioners could not show a clear and unequivocal waiver of sovereign immunity as required by well-established precedent. *E.g.*, *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (a tribe's waiver of immunity must be "clear" and "unequivocal"). Finally, the Nation argued that the Recovery Act expressly precludes the application of any contractual provision (including the arbitration and delegation provisions cited by Caremark) that hinders or prevents the ability to recover under the statute.

D. The District Court's Decision Compelling Arbitration.

The district court entered judgment for the Caremark Petitioners. After rejecting the Nation's argument that the "first to file" rule precluded the District of Arizona action in deference to the district court in Oklahoma, the district court held that because the parties had agreed that the arbitrator would have the exclusive authority to decide "the interpretation, applicability, enforceability, or formation of the agreement to arbitrate," the arbitrator and not the court should decide whether the claim is subject to arbitration. ER 7-8. The court then granted the Petition to Compel Arbitration, entered judgment for the Caremark Petitioners, and ordered the

case terminated. ER 8. The district court subsequently denied the Nation's motion for a stay pending appeal.

On August 20, 2021, this Court granted the Nation's motion for stay pending appeal.

SUMMARY OF THE ARGUMENT

The district court erroneously delegated to an arbitrator two threshold questions that must be resolved by a court: whether the parties actually agreed to arbitration and whether Congress, in the Recovery Act, displaced any arbitration obligation here. *See* 25 U.S.C. § 1621e(c) ("no provision of any contract … shall prevent or hinder the right of recovery").

The district court's decision to delegate these questions was error. This Court has ruled that "[o]nly a court" can decide "the threshold issue of the existence of an agreement to arbitrate." *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140–41 (9th Cir. 1991). Otherwise, "Party A could forge party B's name to a contract and compel party B to arbitrate the question of the genuineness of its signature." *Id.* at 1140. The presence of a delegation clause does not change the analysis. "Arguments that an agreement to arbitrate was never formed . . . are to be heard by the court *even where a delegation clause exists*." *Edwards v. Doordash, Inc.*, 888 F.3d 738, 744 (5th Cir. 2018) (emphasis added).

Similarly, the district court erred in delegating to an arbitrator the statutory interpretation question of whether the Recovery Act displaced any arbitration obligation here. This Court has explained that a "delegation clause [cannot] confer authority [to order arbitration] upon a district court that Congress chose to withhold." *In re Van Dusen*, 654 F.3d 838, 844 (9th Cir. 2011).

The district court did not decide either threshold question. Instead, in a remarkable display of circular logic, the district court held that the Nation must have agreed to delegate these questions to an arbitrator because the supposed arbitration agreement said so – even though the Nation protested that it never signed any document with Caremark containing the word "arbitration" and the supposed arbitration provision was slipped in by Caremark as part of an unsigned 144-page "Provider Manual" delivered to the Nation's pharmacies (according to Caremark) after they had signed Caremark contracts. The initial contracts with various Caremark entities and predecessors (only one of which sued in the district court to compel arbitration) were dated July 2003, December 2005, and August 2010. Caremark offers no confirmation that "Provider Manuals" containing an arbitration provision were delivered to the Nation's pharmacies until the year 2014. And the earlier Provider Manuals identified by Caremark (2004, 2007, 2009, and 2011) did not contain the "delegation clause" on which the district court (erroneously) placed critical reliance in its decision.

A tribe is not bound to arbitration absent a "clear" and "unequivocal[]" showing of agreement. *C&L Enterprises*, 532 U.S. at 418. In *C&L Enterprise*, the tribe itself drafted the arbitration provision. This case is the opposite situation: here, the tribe did not even sign a contract containing an arbitration provision. This case is more like the examples distinguished in *C&L Enterprises*, *see id.* at 423 (an "adhesion contract" or a "form contract, designed principally for private parties who have no immunity to waive"). Caremark has repeatedly relied on a course-of-dealing argument, suggesting that the parties' operations indicated an implied agreement by the Nation to all the terms of the Provider Manual, but it is settled that waivers of sovereign immunity must be express, not implied, and nothing in the parties' conduct suggested an agreement *to arbitration* in particular.

Even if an arbitration agreement existed in this case (and it does not), it would be displaced by the Recovery Act. Congress created the right of tribes to institute a federal civil action and provided a special one-way fee- and cost-shifting provision for plaintiffs, a six-year statute of limitation, damages rules, and fulsome discovery rights for the benefit of tribes. The statutory guarantee of these procedural rights would be lost in arbitration. The loss of these rights – by itself – means that arbitration would "prevent or hinder the right of recovery," 25 U.S.C. § 1621e(c), because the procedural rights are themselves part of "the right of recovery" that Congress sought to protect from contractual interference. Moreover, the loss of these

rights would also "hinder" the Nation's ability to pursue the substance of its claims by substantially raising the cost of litigation and hampering the Nation's ability to prove its case.

Arbitration policy is weakened, not promoted, when important safeguards – like the duty of courts to ensure the existence of an arbitration agreement and to protect statutory rights – are not observed. As the drafters of the Revised Uniform Arbitration Act ("RUAA") commented, "[w]ithout these safeguards, arbitration loses credibility as an appropriate alternative to litigation." Uniform Arbitration Act § 6 (revised 2000), 7 U.L.A. 26 (2000). To compel arbitration in this case "would undermine, not advance, the federal policy favoring alternative dispute resolution." *Hooters of Am., Inc. v. Phillip*s, 173 F.3d 933, 941 (4th Cir. 1999) (Wilkinson, C.J.).

This Court has already granted a stay of the district court's judgment pending appeal. This Court should now reverse the district court's judgment and hold that arbitration is impermissible here because there is no "clear" and "unequivocal" showing of agreement, as required by the Nation's sovereign immunity under *C&L Enterprises*, and that any arbitration obligation is displaced by the Recovery Act. Alternatively, at a minimum, this Court should vacate the district court's judgment and direct that it resolves the threshold questions it mistakenly delegated to an arbitrator to decide.

ARGUMENT

I. WHETHER THE PARTIES AGREED TO AN ARBITRATION PROVISION AT ALL MUST BE DECIDED BY A COURT AND NOT BY AN ARBITRATOR.

The district court committed reversible error in failing to address the threshold issue of whether the parties formed an arbitration agreement in the first place, which is always for the court to decide. The district court erred in delegating that issue to the arbitrator.

Section 4 of the Federal Arbitration Act ("FAA") expressly requires a court to "satisf[y]" itself that an agreement to arbitrate exists prior to ordering arbitration. 9 U.S.C. § 4 ("*The court* shall hear the parties, and *upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.") (emphasis added). This antecedent inquiry regarding the *formation* of an arbitration agreement is distinct from whether the arbitration agreement itself is *valid* or *enforceable*. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 n.2 (2010) ("The issue of [an] agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded' . . . . ") (citation omitted); *Buckeye Check Cashing, Inc. v. Cardegna*,

546 U.S. 440, 444 n.1 (2006) (same). The formation issue is for a court (not an arbitrator) to decide, particularly in a case involving the assertion of sovereign immunity and the need for a "clear" and "unequivocal[]" showing of an agreement to arbitrate. *C&L Enterprises*, 532 U.S. at 418.

The district court reasoned that the delegation clause in Caremark's 2020 Provider Manual required submission of all threshold issues to the arbitrator. ER 8. There are multiple flaws in the court's reasoning.

First, the court overlooked the fact that earlier Caremark Provider Manuals submitted by Caremark (for years 2004, 2007, 2009, and 2011) *did not contain* the "delegation clause" on which the district court relied in its decision. *See* ER 131, 136, 138, 140, 142. The delegation clause did not appear in any Provider Manual until 2014. ER 318. Thus, even if the Nation's pharmacies had somehow agreed to the terms unilaterally inserted by Caremark in the Provider Manual – and they did not, as discussed in Part II, *infra* – the district court never addressed the key point that the arbitration provision in the Provider Manuals in existence at the time the Nation's pharmacies signed their initial contracts with Caremark *did not contain a delegation clause*. The district court's emphasis on the delegation clause as the crucial element of its decision was therefore completely misplaced.

In any event, the fact that an arbitration provision contains a clause delegating certain issues of arbitrability to an arbitrator, as in this case, does not relieve the

court of its essential obligation to determine whether the parties formed an agreement to arbitrate (and thus whether the parties even agreed to a delegation clause). "A delegation clause is merely a specialized type of arbitration agreement, and the Act 'operates on this additional arbitration agreement just as it does on any other.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (citation omitted).

In *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 299 (2010), the Court made clear its "precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue." (citation omitted). When a party "contests either or both matters, 'the court' must resolve the disagreement." *Id.* at 299-300 (emphasis in original; internal citations omitted). *Granite Rock* thus explicitly distinguished between (i) threshold questions relating to formation and (ii) questions relating to enforceability and/or scope, "noting that the parties may agree to arbitrate the latter in a parenthetical conspicuously *not* applicable to the former." *Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 251 (2d Cir. 2019) (emphasis in original).

Although the district court characterized formation as an issue of arbitrability that may be delegated, numerous courts of appeals since *Granite Rock* have held that formation is *always* an issue for the court, notwithstanding the presence of a

delegation clause. Thus, in *Doctors Associates*, the Second Circuit held that "parties may *not* delegate to the arbitrator the fundamental question of whether they formed the agreement to arbitrate in the first place." *Id.* (emphasis added; citing *Granite Rock*). Similarly, in *Edwards v. Doordash, Inc.*, 888 F.3d 738, 744 (5th Cir. 2018), the Fifth Circuit observed that "[a]rguments that an agreement to arbitrate was never formed . . . are to be heard by the court *even where a delegation clause exists*." (emphasis added). As the Fourth Circuit explained in *Rowland v. Sandy Morris Financial & Estate Planning Services, LLC*, 993 F.3d 253, 258 (4th Cir. 2021), "[t]here is a difference between disputes over arbitrability and disputes over contract formation":

> While parties may agree to have an arbitrator decide . . . gateway questions of arbitrability, such an agreement does not preclude a court from deciding that a party never made an agreement to arbitrate any issue. That is, it does not erase the court's obligation to determine whether a contract was formed under 9 U.S.C. § 4. Thus the incorporation of the rules of the American Arbitration Association, which allow the arbitrator to rule on questions of arbitrability, does not obviate the need for courts to decide the threshold issue of contract formation.

(citations and internal quotation marks omitted; ellipsis in original). *See also Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1105-06 (10th Cir. 2020) ("The issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged such a clause.

. . . [I]ssues concerning the formation of an arbitration contract cannot be delegated to an arbitrator.") (citing *Granite Rock*).

The Nation is not aware of any circuit holding post-*Granite Rock* that an arbitrator rather than a court may decide the issue of formation. This Court should not be the first. As this Court has observed, "[r]equiring a party to contest the very existence of an arbitration agreement in a forum dictated by the disputed arbitration clause would run counter to" the principle that arbitration is a matter of contract. *Textile Unlimited, Inc. v. A..BMH & Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001). "[B]ecause an arbitrator's jurisdiction is rooted in the agreement of the parties, . . . a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make that decision." *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co*., 925 F.2d 1136, 1140–41 (9th Cir. 1991) (internal quotations and citations omitted). A contrary rule would lead to "untenable" results:

> Party A could forge party B's name to a contract and compel party B to arbitrate the question of the genuineness of its signature. Similarly, any citizen of Los Angeles could sign a contract on behalf of the city and Los Angeles would be required to submit to an arbitrator the question whether it was bound to the contract, even if its charter prevented it from engaging in any arbitration.

Id. at 1140. Or, this Court might have added, Party A could sign a contract with Party B, wait a decade, then send Party B a 144-page "manual" purporting to contain an arbitration agreement with a delegation clause, and insist thereafter that Party B has

lost its right to have a court decide whether the parties agreed to arbitration. Such a result would be untenable, particularly when Party B is a sovereign whose consent to arbitration must be "clear" and "unequivocal."

Despite the Nation's emphatic denial of the formation of any agreement to arbitrate, the district court did not undertake the required analysis under *C&L Enterprises* and *Granite Rock* with respect to formation of the alleged arbitration provision. Instead, it concluded (1) the parties must have agreed to delegate "arbitrability" (ER 8) because the delegation clause says so, and (2) the arbitrators should decide in the first instance whether the parties agreed to arbitrate their dispute. But the district court's logic was impermissibly circular; "[r]eliance on a delegation clause assume[d] a binding contract was formed, which simply elides the issue." *King v. AxleHire, Inc.*, No. 18-cv-01621-JD, 2019 WL 1925493, at *2 (N.D. Cal. Apr. 30, 2019).

None of the cases cited by the district court supports its erroneous conclusion that an arbitrator may decide the formation issue. The district court cited the Supreme Court's decision in *Rent-A-Center*, but that case was limited to the proposition that the parties may delegate the issue of "validity" (561 U.S. at 70-73 & n.2), not *contract formation*, to an arbitrator. The Court did *not* say that a delegation clause could be used to vest an arbitrator with the authority to decide the *formation question* and made clear it was not addressing "whether any agreement

between the parties 'was ever concluded.'" 561 U.S. at 70 n.2 (citation omitted). *Rent-A-Center* involved an *unconscionability* challenge, not the *formation* issue presented here.

And in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995), the Court held that the party resisting arbitration "did not clearly agree to submit the question of arbitrability to arbitration," and thus the issue of arbitrability of the dispute "was subject to independent review by the courts."

The district court failed to follow the distinction between (i) contract formation and (ii) issues of arbitrability (such as validity and enforceability), and ignored *Granite Rock*, decided three days after *Rent-A-Center*, which reiterated that critical distinction.

II. THE NATION NEVER AGREED TO ARBITRATE AND DID NOT WAIVE ITS SOVEREIGN IMMUNITY.

A. The Nation Is Not Bound To Arbitrate Absent A Showing That It "Clearly" And "Unequivocally" Agreed To Arbitration.

Federally recognized tribal nations (such as the Chickasaw Nation) exercise "sovereign functions," *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2466 (2020), and are entitled to "inherent sovereign immunity." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

In this case, Caremark does not contend that Congress has abrogated the Nation's tribal immunity. Instead, Caremark argued to the district court that the Nation waived sovereign immunity by agreeing to the arbitration provision contained in its Provider Manual, which was purportedly incorporated by reference into the Provider Agreement previously signed by the Nation. This argument, which the district court did not address, disregards the heightened standards governing waivers of tribal sovereign immunity and should be rejected.

Before finding a waiver, this Court "demand[s] clarity that [a] tribe gave up its immunity." *Quinalt Indian Nation v. Pearson*, 868 F.3d 1093, 1098 (9th Cir. 2017). Thus, a tribe is not bound to arbitrate absent a showing that it "clearly" and "unequivocally" agreed to arbitration. C*&L Enterprises,* 532 U.S. at 418. Implied assent is not enough; "[i]t is well settled that a waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed. That expression must also manifest the tribe's intent to surrender immunity in 'clear' and unmistakable terms." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016) (internal quotation marks and citations omitted; "tribal" bracketed in original); *see also Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) ("[W]aivers of tribal sovereign immunity may not be implied"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (waiver must be "'must be unequivocally expressed'") (citation omitted); *Potawatomi*, 498 U.S. at 509 ("Suits against Indian tribes are . . .

barred by sovereign immunity absent a clear waiver by the tribe.") (citation omitted); *see also Puyallup Tribe, Inc. v. Dept. of Game of State of Wash.*, 433 U.S. 165, 172–73 (1977); *United States v. U. S. Fidelity & Guar. Co*., 309 U.S. 506, 512–13 (1940).

The waiver standard is a stringent one. Thus, in *Ute Indian Tribe of the Uintah and Ouray Reservation*, 790 F.3d 1000 (10th Cir. 2015), then-Judge Gorsuch held that a forum selection clause did not clearly and unequivocally waive tribal immunity, even though it provided: "[o]riginal jurisdiction to hear and decide any disputes or litigation arising pursuant to or as a result of this Agreement shall be in the United States District Court for the District of Utah." *Id.* at 1009.

B. The "Clear" And "Unequivocal" Standard Cannot Be Met.

The record in this case clearly establishes that the Nation never "clearly" and "unequivocally" agreed to arbitrate, and thus never waived its sovereign immunity. *See Cosentino v. Pechanga Band of Luiseno Mission Indians*, 637 F. App'x 381, 382 (9th Cir. 2016) (affirming dismissal of petition to compel arbitration because "[a] tribe's waiver of immunity must be 'clear'") (citation omitted). Caremark drafted the agreements and slipped in an arbitration provision as one small part of an unsigned, separate "Provider Manual" running to nearly 150 pages that it contends was sent to the tribes after they signed their initial contracts with Caremark entities. This cannot establish "clear" and "unequivocal" consent, particularly given the key facts:

(1) Neither the Nation nor any of its pharmacies ever signed a document containing an arbitration provision, or even the word "arbitration."

(2) The Nation never authorized any person to sign any agreement with any defendant named in the Oklahoma Action waiving the Nation's immunity. ER 17.

(3) The initial contracts between the Nation's pharmacies and various Caremark entities and predecessors were dated July 2003, December 2005, and August 2010. Caremark offers no confirmation that "Provider Manuals" containing an arbitration provision were delivered to the Nation's pharmacies *until the year 2014*. ER 105.

(4) Caremark's Petition to Compel Arbitration relied on the arbitration provision in the 2020 Provider Manual. But the earlier Provider Manuals identified by Caremark (2004, 2007, 2009, and 2011) contained markedly different arbitration provisions from the one Caremark is now seeking to enforce. For example:

- The earlier Provider Manuals did not contain the "delegation clause" on which the district court relied in its decision. ER 131, 136, 138, 140, 142.

- The arbitration provision in the 2004 and 2007 Provider Manuals (ER 136, 138) is a single brief paragraph lacking many of the restrictions that Caremark is now seeking to enforce, including prohibitions on damages[8] and

[8] By comparison, the current version of the Provider Manual – which Caremark is suing to enforce – precludes "indirect, consequential, or special

strict limits on discovery.[9] Moreover, the arbitration provisions in the 2004 and 2007 Provider Manuals apply only to disputes "in connection with or arising out of the Provider Agreement." *Id.* But the Nation's complaint does not arise out of or in connection with the Provider Agreement. In fact, it expressly disclaims any reliance on the Provider Agreement: "The Nation does not bring suit under these contracts, or any other contract. Rather, the Nation brings suit under 25 U.S.C. § 1621e, which creates a private right of action for the Nation in this regard." ER 56 n.17. Further, the 2004 and 2007 Provider Manuals create an exemption for arbitral jurisdiction where "otherwise agreed to by the parties in writing or mandated by Law." ER 126, 138. Here, an exemption is mandated by the Recovery Act.

• The arbitration provision in the 2009 and 2011 Provider Manuals is limited to "[a]ny and all disputes in connection with or arising out of the Provider Agreement" (ER 140, 142), and therefore does not cover the

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damages of any nature (even if informed of their possibility), lost profits or savings, punitive damages, injury to reputation, or loss of customers or business, except as required by Law." ER 310.

[9] By comparison, the current version of the Provider Manual states: "Discovery shall be limited to documents and information for which there is a direct, substantial, and demonstrable need . . . Absent a showing of exceptional circumstances, as determined by the arbitrator(s), the parties shall be limited to one corporate representative deposition per party with each deposition subject to a four-hour time limit . . . [T]he right to discovery and the right to appeal are limited or eliminated by arbitration." ER 310.

Nation's claim. However, if Caremark believes that the claim arises under the Provider Agreement, then the 2009 and 2011 Provider Manuals expressly provide for court actions to seek injunctive relief: "nothing in this provision shall prevent either party from seeking injunctive relief for breach of this Provider Agreement in any state or federal court of law." *Id.* Like the 2004 and 2007 Provider Manuals, the 2009 and 2011 Provider Manuals also lack many of the restrictions that Caremark is now seeking to enforce, including restrictions on damages and strict limits on discovery.

Caremark has never provided any justification for binding the Nation to an ever-changing series of arbitration provisions, many of which would not cover the Nation's claim or prevent it from proceeding in court. Caremark cannot show that the Nation "clearly" and "unequivocally" agreed to give Caremark the unilateral power to rewrite the arbitration provision over and over again at its discretion. Indeed, under Caremark's theory, it could unilaterally insert virtually any provision it wanted into the Provider Manual, and the Nation would be deemed to have agreed to it. Such a far-reaching theory is utterly incompatible with principles of sovereign immunity.

(5) The Provider Agreements signed by the Nation's pharmacies state "[a]ny changes to this agreement must be initialed" (ER 146, 150), and the Network Enrollment Forms similarly state that "[n]o alterations to this Network Enrollment

Form shall be binding on either party unless initialed by duly authorized representatives of Provider and Caremark" (ER 153, 157, 160-62, 164, 179, 187-188, 217, 219, 341-343, 258)—indicating both parties would need to affirmatively and explicitly assent to any changes, such as the addition of an arbitration provision. No such procedure was ever followed, and Caremark has never suggested otherwise.

This case stands in stark contrast to *C&L Enterprises,* where the Supreme Court held that a tribe's waiver of its sovereign immunity was "clear" where the *Tribe itself* had prepared the contract containing the arbitration provision. 532 U.S at 420, 423. That provision expressly provided that all claims or disputes would be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") and that an award could be enforced in any state or federal court having jurisdiction. *Id*. at 419. In concluding that the contract's language "clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court," *id*. at 423, the Court observed that the tribe did not "find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; *C&L* foisted no form on a quiescent Tribe." *Id.*

In contrast to *C&L*, in this case Caremark slipped an arbitration provision into unsigned Provider Manuals. *C&L* does not suggest that unilateral provisions incorporated by reference are sufficient to waive tribal sovereign immunity. Indeed,

Caremark's theory that it could alter the parties' agreement by unilaterally sending Provider Manuals is untenable even as applied to private parties—let alone a sovereign tribe. *See also Demasse v. ITT Corp.*, 984 P.2d 1138, 1144 (Ariz. 1999) (once a contract is formed, "a party may no longer unilaterally modify the terms" unless there is assent to and consideration for the offer to modify); *Yeazell v. Copins*, 402 P.2d 541, 545 (Ariz. 1965) ("A contract cannot be unilaterally modified nor can one party to a contract alter its terms without the assent of the other party.").

Accordingly, Caremark cannot show that the Nation "clearly" and "unequivocally" agreed to arbitration.

C. Caremark Cannot Establish An Agreement To Arbitrate With The Relevant Parties Seeking Arbitration.

A separate fatal flaw in Caremark's arbitration argument is that it cannot establish the existence of arbitration agreements between the Nation's pharmacies and the relevant entities seeking to compel arbitration.

(1) Two of the parties seeking to compel arbitration are Aetna, Inc. and Aetna Health, Inc., which Caremark did not even acquire until 2018. ER 45. Caremark has never explained how the Nation's pharmacies could have "clearly" and "equivocally" agreed to arbitration with the Aetna entities, which were not part of the Caremark corporate family when the pharmacies signed Provider Agreements with various Caremark entities. The claims against Aetna, Inc. and Aetna Health, Inc. cannot possibly meet the standard of *C&L Enterprises.*

(2) Caremark contends that a number of the Nation's pharmacies—the Ardmore Health Clinic Pharmacy, Tishomingo Health Clinic, and the Chickasaw Nation Online Pharmacy Retail Center under the names "CNHS Family Practice Clinic" and "Carl Albert Hospital"—signed Provider Agreements with a predecessor entity known as "AdvancePCS" in 2003. ER 101. But AdvancePCS is not a defendant in the Oklahoma action or a petitioner seeking arbitration in this case.

Moreover, Caremark has *not produced any of those 2003 Provider Agreements*. Rather, its declarant merely asserted—without any discernible basis—that those agreements "would have" had language incorporating the applicable Provider Manual into the agreement. ER 102. But waiving sovereign immunity and compelling arbitration cannot rest upon speculation as to what agreements "would have" contained.[10]

Caremark therefore argues it sent notices to all AdvancePCS pharmacies in 2004 when it acquired AdvancePCS. ER 133. But nothing in the one-page notice Caremark submitted in this case even hints that its recipients are agreeing to arbitration provisions, let alone that the Nation's pharmacies are agreeing to waive sovereign immunity with respect the Caremark entities now seeking to compel

[10] In any event, as discussed *infra*, the mere incorporation by reference of an arbitration provision in a provider manual is an insufficient basis upon which to waive sovereign immunity and compel arbitration. And since the AdvancePCS provider manual does not have a delegation clause, it cannot form a basis for the district court's decision to send the gateway issue to the arbitrator.

arbitration. The notice merely stated that "both companies will be using the same base pharmacy provider agreement effective August 1, 2004." *Id.* This "new agreement," according to Caremark, "will consist of the AdvancePCS Provider Agreement, along with Exhibit B to the Caremark Participating Pharmacy Agreement, all Attachments to this Exhibit B, and any fee schedules which you have previously entered into with Caremark Inc." *Id*. Caremark has not submitted Exhibit B to its "Participating Pharmacy Agreement," nor has it argued that it contains an arbitration clause. Nothing in Caremark's 2004 communication would lead a recipient to conclude that merely by receiving the notice the party had agreed to arbitration, much less a waiver of sovereign immunity.

More fundamentally, a unilateral notice reporting that Caremark had acquired AdvancePCS cannot establish the Nation's express, unequivocal agreement to arbitration and waiver of sovereign immunity. Immunity from suit is one of "the core aspects of sovereignty that tribes possess." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). It is the Nation's and not Caremark's to waive. *Bodi,* 832 F.3d at 1016-17 ("absent a clear and unequivocally expressed waiver *by a tribe* or congressional abrogation," a tribe is not subject to suit) (emphasis added). Caremark cannot accomplish a waiver merely by sending a notice.

Lacking provider agreements signed by Ardmore, CNHS, Carl Albert, and Tishomingo, Caremark points to network enrollment forms these entities signed with

AdvancePCS and later with certain Caremark entities. *See* ER 153-77, 179-95, 234-62. But none of these documents mentions arbitration or expressly incorporates any arbitration agreement. Moreover, those forms incorporate the terms and conditions of the Caremark Provider *Agreements* and not the Caremark Provider *Manuals* (where the arbitration provision was located). *See* ER 153-77 (Ardmore), ER 179-95 (Carl Albert), ER 234-43, 257-62 (Tishomingo).[11]

Caremark's reliance on the enrollment forms asks the Court to adopt a theory of incorporation by reference that is two steps removed from the actual arbitration provision. The enrollment forms, which contain no arbitration provision, incorporate

[11] The 2010 Ardmore enrollment form contained an addendum incorporating the definition of "retail pharmacy" from the Provider Manual and stating that the provider "may only terminate network participation as in accordance with the 'Termination' section of the Provider Manual and the 'Network Participation' sub-section of the *'Medicare Part* D' section of the Provider Manual." ER 149. An addendum to the 2020 Carl Albert Hospital's form contains the same language. *See* ER 176. But nothing in that language (which does not appear in the forms for other years that Caremark submitted) purports to incorporate the Provider Manual generally. If anything, the need to refer to specific provision of the Provider Manual implies that other provisions of the Manual do not apply unless expressly incorporated.

Two addenda to Tishomingo's 2005 network enrollment form contained a provision defining the "entire agreement" as including the Provider Manual (*see* ER 226, 238), but the enrollment forms for Tishomingo submitted by Caremark for 2003, 2004, 2008, 2010, 2013, and 2020 do not contain this language – creating the negative inference that the "entire agreement" for those years does not include the arbitration provision located in the Provider Manual.

the Provider Agreements, which also say nothing about arbitration, which in turn incorporate the Provider Manuals, where Caremark has placed an arbitration clause. This attenuated chain of cross-references and incorporations by reference hardly constitutes "clear and unequivocal" consent to arbitrate.

(3) Similar defects invalidate Caremark's attempt to compel arbitration with the other Nation pharmacies. For example, in December 2005, Purcell Indian Health Clinic signed a Provider Agreement with Caremark Inc. and CaremarkPCS, which are not named as defendants in the Oklahoma action or petitioners suing to compel arbitration. ER 101, 149. Caremark argues that the Purcell Clinic subsequently signed network enrollment forms in 2006, 2008, 2010, 2014, and 2014. ER 103. But those forms did not mention arbitration, let alone expressly incorporate an arbitration agreement. Rather, they merely stated that all the terms and conditions established in "the Caremark Provider Agreement" applied to pharmacy services provided by the Purcell Clinic. ER 103. However, the arbitration provision was located in the Provider *Manual*, not the Provider *Agreement*. Moreover, the enrollment forms referred vaguely to the "Caremark Network," without clearly informing the Purcell Clinic that any agreement extended beyond the two Caremark entities with which it had originally dealt in 2005 (Caremark Inc. and CaremarkPCS). ER 205-232. The enrollment forms did not represent a "clear" and "unequivocal" waiver of sovereign immunity with respect to the Caremark entities now seeking to compel arbitration.

(4) The Chickasaw Nation Medical Center signed a Provider Agreement with Caremark LLC and Caremark PCS, LLC in August 2010. ER 101. But only Caremark LLC is a petitioner seeking to compel arbitration.

In short, Caremark cannot establish the existence of arbitration agreements between the Nation's pharmacies and the relevant entities seeking to compel arbitration.

D. The Authorities Cited By Caremark Are Inapposite.

In the district court, Caremark pointed to numerous cases from other courts that it characterized as confirming the validity and enforceability of its arbitration provisions. *See, e.g., Crawford Pro. Drugs, Inc. v. CVS Caremark Corp.,* 748 F.3d 249, 259–63 (5th Cir. 2014); *Grasso Enters., LLC v. CVS Health Corp.,* 143 F. Supp. 3d 530, 544 (W.D. Tex. 2015); *Hopkinton Drug, Inc. v. CaremarkPCS, L.L.C.,* 77 F. Supp. 3d 237, 249 (D. Mass. 2015); Dist. Ct. Dkt. No. 13, at 12-13. But every one of those cases involved an ordinary private party, not a sovereign tribe whose waiver must be "clear and unequivocal[]." *Bodi*, 832 F.3d at 1016.

Caremark has also resorted to a course-of-dealing argument, arguing that by doing business with Caremark, the Nation has impliedly agreed to all terms in the Provider Manual. But this argument fails both factually and legally. Nothing in the parties' conduct suggested an agreement *to arbitration* in particular. Moreover, waivers of tribal immunity must be explicit, not implicit. *Bodi*, 832 F.3d at 1016

("[A] waiver of [tribal] sovereign immunity cannot be implied . . . .") (citation omitted) ("tribal" bracketed in original); *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1087 (9th Cir. 2013) ("Waivers of tribal sovereign immunity must be explicit and unequivocal."); *Miller v. Wright*, 705 F.3d 919, 925 (9th Cir. 2013) (requiring "clear and explicit waiver of immunity"); *Allen*, 464 F.3d at 1047 ("[W]aivers of tribal sovereign immunity may not be implied"); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 557 (9th Cir. 1990) ("[T]ribes are immune from suit unless they explicitly waive sovereign immunity"). In *Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.*, No. C10-995RAJ, 2011 WL 4001088, *6 (W.D. Wash. Sept. 7, 2011), the court found no waiver of sovereign immunity when a tribe did not expressly agree to a "Working Agreement" containing a waiver of immunity, even though the tribe had previously signed other contracts with the same counterparty, and they had a longstanding commercial relationship.

Caremark has cited an April 2016 complaint letter from the Nation protesting Caremark's conduct (and not mentioning arbitration). ER 82-83. But that letter manifests no intent, much less a "clear" one, to agree to arbitration. It simply recites that the Nation's pharmacies are operating under a Provider Agreement with Caremark and objects that no provision of the Provider Agreement or Provider Manual justified Caremark's denial of claims. It says nothing about arbitration (and does not even contain the word "arbitration"), and indeed refers to the Nation's rights

under the Recovery Act, which provides a cause of action in *federal court*. Caremark ignores the undisputed evidence that, as a matter of Chickasaw Nation law, only the Chickasaw Nation Governor or the Chickasaw Tribal Legislature may waive the Chickasaw Nation's sovereign immunity, and neither did so here. ER 17. *See Missouri River Servs., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001) (reversing on sovereign immunity grounds a district court order enforcing an arbitration award, opining that the tribe's conduct in the arbitration could not effect a waiver of immunity because "immunity cannot be waived by [tribal] officials"; rather, a tribe's waiver of sovereign immunity by agreeing to arbitration "must be clear") (internal quotation marks and citations omitted) ("tribal" bracketed in original).

The Nation did not "clearly" and "unequivocally" agree to arbitration.

III. THE RECOVERY ACT DISPLACES ANY AGREEMENT TO ARBITRATE.

Even if the Nation had entered into a valid arbitration agreement, the Recovery Act prevents its implementation here. Congress made clear that a tribe "may enforce the right of recovery" by "instituting a separate civil action, including a civil action for injunctive relief and other relief." 25 U.S.C. § 1621e(e)(1)(B). Thus, the Act gives the Nation the remedy of an action in federal court, not arbitration. In addition, the Recovery Act expressly states that "no provision of any contract . . .

shall prevent or hinder the right of recovery of the United States, an Indian tribe, or tribal organization" under the Recovery Act. 25 U.S.C. § 1621e(c).

Two principles govern the interpretation of this provision. First, "the standard principles of statutory construction do not have their usual force in cases involving Indian law . . . The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (internal quotations marks and citations omitted). Thus, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* The "prevent or hinder" language therefore must be construed in the Nation's favor.

The special solicitude due to Indian tribes is particularly relevant in light of the purpose of the Recovery Act. "Congress enacted § 1621e as part of an effort to improve health care for Native Americans and Alaska Natives, and specifically to preserve scarce financial resources for their health care by precluding insurers from collecting premiums only to deny coverage for medical services . . . ." *Yukon-Kuskokwim Health Corp., Inc. v. Tr. Ins. Plan for S.W. Alaska*, 884 F. Supp. 1360, 1367 (D. Alaska 1994); *see also McNabb v. Bowen*, 829 F.2d 787, 793 (9th Cir. 1987) ("Congress has expressed its desire to provide all assistance necessary to enable Indians to take advantage of non-federal sources of health assistance.").

Second, Congress intended to give the Nation recovery rights identical to those of the United States. "The 1992 amendments are meant to assure Indian tribes and tribal organizations the *same right of recovery* established by Congress in 1988." *Yukon-Kuskokwim*, 884 F. Supp. at 1367 (emphasis added); *see also* H.R. Rep. No. 102–643, pt. 1, at 75 (1992) ("[T]he Act is amended by this section to allow Indian tribes and tribal organizations the *same rights* as the Secretary to recover reasonable expenses incurred for the provision of health services to any individual through third party reimbursement") (emphasis added). Courts interpreting the Recovery Act should therefore bear in mind that the provision was designed to foster the right of recovery of sovereign authorities and not merely commercial actors. Indeed, Caremark's own documents show that claims made by the federal government under the Recovery Act are not subject to arbitration. *See* ER 288 ("IHS [Indian Health Services] shall not be required to submit any disputes between the parties to binding arbitration."). The Recovery Act gives the Nation the same reimbursement rights as the federal government.

By its plain terms, the statute is not limited to overriding contractual provisions that *preclude* recovery, but rather also displaces provisions that "prevent *or hinder*" recovery. 25 U.S.C. § 1621e(c) (emphasis added). Because statutory construction must give effect to every word of the statute, *Loughrin v. United States*, 573 U.S. 351, 358 (2014), courts should interpret "hinder" as involving less

interference than action that "prevents" recovery. Indeed "hinder" implies a much more modest degree of burden than "prevent." *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 283 n.15 (1993) ("hindering" can include "imped[ing]" short of "overwhelm[ing]" or "supplant[ing]"); *United States v. Gwyther*, 431 F.2d 1142, 1144 n.2 (9th Cir. 1970) ("'hinder' means to obstruct, hamper, block") (citation omitted).

In addition to the "prevent or hinder" standard, the "effective vindication" test "permits the invalidation of an arbitration agreement when arbitration would prevent the 'effective vindication' of a federal statute." *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 936 (9th Cir. 2013). The "effective vindication" test "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013).

In this case, the roadblocks placed by arbitration and the delegation clause meet both the "prevent or hinder" and the "effective vindication" standards, so that the Recovery Act precludes arbitration.

A. Caremark's Arbitration Provision Would Hinder The Nation's Rights Under The Recovery Act.

The Recovery Act provides tribes with important statutory rights that are not guaranteed in arbitration. The loss of the guarantee of these rights – by itself – means

that arbitration would "prevent or hinder the right of recovery," 25 U.S.C. § 1621e(c), because the procedural rights are themselves part of "the right of recovery" that Congress sought to protect from contractual interference. Moreover, the loss of these rights would also "hinder" the Nation's ability to pursue the substance of its claims by substantially raising the cost of litigation and hampering the Nation's ability to prove its case.

(1) *The Statute of Limitations*. The Recovery Act permits actions to be brought within "six years and ninety days" after a cause of action accrues. *See* 25 U.S.C. § 1621e(j) (incorporating the limitations period of 28 U.S.C. § 2415). Yet Caremark's arbitration provision would impose a limitations period of 6 months. *See* ER 329. Thus, for any claim that arose more than six months prior to the Nation's Oklahoma lawsuit, the arbitration not only hinders but *precludes* recovery. That result meets both the "prevent or hinder" standard and the "effective vindication" standard. *See, e.g., Graham Oil Co. v. ARCO Prods. Co., a Div. of Atl. Richfield Co.*, 43 F.3d 1244, 1247–48 (9th Cir. 1994), *as amended* (Mar. 13, 1995) ("the arbitration clause expressly forfeits Graham Oil's statutorily-mandated right to a one-year statute of limitations on its claims against ARCO. The clause reduces the time in which a claim can be brought from one year to 90 days, or in some cases six months"); *Anderson v. Comcast Corp.*, 500 F.3d 66, 77 (1st Cir. 2007).

(2) *Superseding the Recovery Act's fee and cost provisions*. The Recovery Act permits a prevailing plaintiff to recover attorneys' fees and costs. 25 U.S.C. § 1621e(g). But Caremark's purported arbitration clause adds up-front costs and risks that go beyond the Recovery Act and deter potential claimants from filing suit. Caremark eliminates the Recovery Act's one-way fee provision by providing that the defendant in the arbitration receives fees if it prevails. And Caremark would also require any litigant to place funds in escrow up front to cover estimated arbitration costs and Caremark's potential attorneys' fees (with a minimum deposit of $50,000). ER 329. This Court has recognized that provisions such as these improperly discourage lawsuits in instances where Congress intended plaintiffs to gain access to a judicial forum. *See, e.g., Ingle v. Cir. City Stores, Inc*., 328 F.3d 1165, 1178 (9th Cir. 2003) ("By itself, the fact that an employee could be held liable for Circuit City's share of the arbitration costs should she fail to vindicate employment-related claims renders this provision substantively unconscionable."); *see also Blair v. Scott Specialty Gases*, 283 F.3d 595, 605–06 (3d Cir. 2002). Those cases apply with equal force here, where Congress intended to provide a forum to tribal Nations to vindicate their right to recovery.

(3) *Restricting the Nation's access to the discovery*. While the Nation in a Recovery Act suit could use the robust discovery permitted by the Federal Rules of Civil Procedure, Caremark would severely restrict the Nation's access to discovery,

creating a process even more restrictive than the AAA Commercial Dispute Procedures. For instance, Caremark's arbitration clause requires a showing of "direct, substantial, and demonstrable need" to receive any documents, and absent a showing of "exceptional circumstances" limits depositions to one corporate representative deposition per party, limited to four hours. ER 328. Provisions such as these disproportionately disadvantage plaintiffs (such as the Nation) who need discovery to prove their cases.

While the Supreme Court has held that limitations on discovery do not necessarily render an arbitration provision invalid, *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 31 (1991), the discovery provisions here are more restrictive than the provisions in *Gilmer,* which allowed for document production, information requests, depositions, and subpoenas. Courts have voided arbitration provisions that limit discovery as aggressively as Caremark attempts to do here. *See, e.g., Domingo v. Ameriquest Mortg. Co*., 70 F. App'x 919, 920 (9th Cir. 2003) (arbitration provision voided in part because of limits on discovery)*; Ostroff v. Alterra Healthcare Corp.,* 433 F. Supp. 2d 538, 541 (E.D. Pa. 2006) (arbitration agreement held unconscionable in part because agreement explicitly provided that "only depositions of experts [were] allowed," such that plaintiff could not depose other witnesses or defendant's employees) (citation omitted); *Hooters of Am., Inc. v. Phillips,* 39 F. Supp. 2d 582, 614 (D.S.C. 1998) (arbitration agreement voided in

part because it explicitly provided that plaintiff was entitled to only one deposition, and she had sued multiple defendants).

(4) *Limiting the Nation's damages*. Caremark's arbitration provision also hinders the Nation's right to recover damages under the statute. The Recovery Act permits the Nation to recover either "the reasonable charges billed by . . . an Indian tribe, or tribal organization in providing health services" "or, if higher, the highest amount the third party would pay for care and services furnished by providers other than governmental entities." 25 U.S.C. § 1621e(a). Caremark's arbitration clause does not permit recovery of the "highest amount" a third party would pay, and explicitly precludes recovery of punitive damages (which the Nation seeks in its Oklahoma lawsuit). ER 328.

Courts have held damage limitations such as these prevent effective vindication of statutory rights. *See, e.g., Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478-79 n.14 (5th Cir. 2003) (arbitration provision's "ban on punitive and exemplary damages" violated effective vindication doctrine in Title VII case); *Kristian v. Comcast Corp.*, 446 F.3d 25, 47–48 (1st Cir. 2006) (same for treble damages in Clayton Act case); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2018 WL 4677830, at *7–8 (E.D. Va. Sept. 6, 2018) (finding that arbitration provision providing that arbitrator is "not empowered to award damages in excess of compensatory damages" was invalid where antitrust statute provided for treble

damages); *Gorman v. S/W Tax Loans, Inc.,* No. 1:14-CV-00089-GBW-KK, 2015 WL 12751710, at *5 (D.N.M. Mar. 17, 2015) (arbitration agreement violated "effective vindication" doctrine where it limited damages that arbitrator could award to "actual compensatory, economic damages" and Truth in Lending Act allowed plaintiff to recover actual damages and "twice the amount of any finance charge in connection" with loan) (citations omitted). Because the arbitration provision would limit the Nation's damages, it hinders the Nation's rights under the Recovery Act.

(5) *Subjecting the Nation to a confidentiality provision favoring Caremark*. Caremark's arbitration provision requires confidentiality of "the existence, content or results of any dispute or arbitration hereunder" except as required by law. ER 328. This restriction precludes the Nation from learning the results of other proceedings involving similar claims and contracts. And it favors Caremark because, as repeat players, they know the results of all prior decisions, while tribes and tribal organizations are kept in the dark. The provision therefore hinders the Nation's recovery rights and runs afoul of the "effective vindication" standard. *Longnecker v. Am. Exp. Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014) (deeming confidentiality provision unconscionable because it would have one-sided effect by permitting defendant, who was repeat player, information on prior arbitrations, but denying that information to plaintiffs); *Anderson v. Regis Corp.*, No. 05-CV-646-TCK-SAJ, 2006

WL 8457208, at *6 (N.D. Okla. Apr. 26, 2006); *DeGraff v. Perkins Coie LLP*, No. C 12-02256 JSW, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

Thus, any contractual provision agreeing to arbitration (even if it did exist here) would be barred by the Recovery Act.

B. The District Court Erred In Refusing To Consider The Recovery Act's Displacement Of Arbitration.

The district court ignored the Nation's argument that arbitration is precluded by the Recovery Act, apparently concluding that the parties agreed to submit the question of arbitrability to the arbitrator. ER 7-8. That was error. First, as discussed above, the court overlooked the key point that the Nation never agreed to submit *any* questions to the arbitrator.

Second, the existence of a delegation clause does not override the will of Congress in expressly precluding any contractual provision that hinders a tribal government's rights under the Recovery Act. As this Court has observed, "private contracting parties cannot, through the insertion of a delegation clause, confer authority [to order arbitration] upon a district court that Congress chose to withhold." *In re Van Dusen*, 654 F.3d 838, 844 (9th Cir. 2011); *Van Dusen v. Swift Transp. Co., Inc.*, 544 F. App'x 724 (9th Cir. 2013) (reaffirming *In re Van Dusen* as the "law of the circuit"); *see Oliveira v. New Prime, Inc.*, 857 F.3d 7, 15 (1st Cir. 2017), *aff'd*, 139 S. Ct. 532 (2019) (quoting same language from *In re Van Dusen*); *see also Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("Like any

statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command."); *In re McZeal*, No. 14-15947, 2017 WL 2372375, at *9 (N.D. Ohio May 31, 2017) ("Even though [the parties] validly delegated gateway questions of arbitrability to arbitration, the Court must still determine whether Congress intended any of the trustee's claims to be nonarbitrable.") (citation omitted).

Thus, a delegation clause does not prevent the court from determining whether a statute precludes arbitration. *See New Prime Inc.*, 139 S. Ct. at 538 (delegation clause did not prevent the court from determining the antecedent question whether other sections of the FAA preclude arbitration); *see also Van Dusen*, 544 F. App'x at 724 (court must decide "whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA before it may consider Swift's motion to compel"). Similarly, where a party contends that an arbitration clause violates state law (which preempts the FAA under the McCarron Ferguson Act), a contention that the entire arbitration agreement is void encompasses a challenge to the delegation clause, and the court rather than the arbitrator must consider it. *See Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 455-57 (4th Cir. 2017) (holding that plaintiff's argument that a state statute "rendered void 'any' arbitration provision" "necessarily included

the delegation provision, which is simply 'an additional, antecedent agreement' to arbitrate").

It is therefore not surprising that where, as here, Congress has expressly precluded any contractual provision that hinders the right of recovery under the Recovery Act, the delegation provision is a nullity. Accordingly, the Supreme Court has repeatedly decided for itself questions about whether courts have authority to compel arbitration of particular claims under the FAA—even where the contract at issue contained a "delegation" clause purporting to vest authority to resolve all disputes in the arbitrator. For example, in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 101-02 (2012), which involved a delegation clause, the Supreme Court decided for itself whether the Credit Repair Organization Act contained "a 'congressional command' that the FAA shall not apply." *Id.*; Pets. Br., *CompuCredit Corp. v. Greenwood*, No. 10-948, 2011 WL 2533009, at *7-*8 (U.S. June 23, 2011) (quoting arbitration provision, including delegation clause); *see also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (reversing order compelling arbitration because "nothing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement"); *id.* at 282 n.1

(reprinting arbitration). Here, too, the Court should decide in the first instance whether the Recovery Act precludes arbitration.[12]

In addition, a delegation clause does not preclude the court from determining whether an arbitration provision effectively precludes the vindication of statutory rights. "Regardless of whether a delegation provision is clear and unmistakable on its own terms, it will not be enforced if it results in enforcing an arbitration agreement that prospectively waives plaintiffs' statutory rights and remedies." *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 969 (N.D. Cal. 2019); *see id*. at 973 ("I do not reach whether there is a clear and unmistakable delegation clause because that would not change the fact that the arbitration agreement is unenforceable as an unambiguous prospective waiver."); *see Williams v. Medley Opportunity Fund II, LP.*, 965 F.3d 229, 243 (3d Cir. 2020) ("The prospective waiver of statutory rights renders the entire arbitration agreement (delegation clause included) unenforceable because the prohibited waiver here is not severable."); *Brayman v. KeyPoint Gov't Sols., Inc.*, No. 18-CV-0550-WJM-NRN, 2019 WL 3714773, (D. Colo. Aug. 7, 2019) ("A federal court's power to strike a portion of an arbitration clause that

[12] Even Caremark's co-defendant UnitedHealth acknowledged in the Eastern District of Oklahoma action that federal statutory claims are not arbitrable where there is a "contrary congressional command." Dkt. 59 in E.D. Okla., United Mot., at 3, 13 (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. at 98). Here, the Recovery Act is clearly a "congressional command" precluding arbitration of the claims at issue in this matter.

prevents 'effective vindication' of rights (such as certain cost-shifting provisions) is a power the federal courts inherently possess, regardless of a clause delegating all disputes to the arbitrator.") (citing *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 378 (10th Cir. 2016)). Where the party opposing arbitration challenges the delegation clause in addition to the arbitration clause as a whole, the court must address the statutory waiver issue. *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 291–92 (4th Cir. 2020); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 671 (4th Cir. 2016).

Here, *both* the delegation clause and the arbitration clause hinder the right of recovery. Invoking the delegation clause to force the Nation to raise its statutory construction arguments in arbitration rather than in an Article III tribunal would itself override the congressional command of the Recovery Act, which authorizes a federal claim in federal court to enforce a tribe's rights – thereby ensuring that a federal judge, not an arbitrator, decides a tribe's statutory rights. Moreover, the arbitration clause requires a sizable deposit (a *minimum* of $50,000) to cover all of the defendants' potential attorney's fees and costs. ER 329. That requirement contains no exception for the time it will take to litigate gateway issues of arbitrability. The delegation itself triggers the cost requirement and hinders the Nation's right of recovery. Likewise, the limitations on discovery and the one-sided confidentiality provisions kick in at the moment of delegation. They hinder the Nation's ability to litigate not only its substantive claims, but the question of whether

the arbitration provision effectively precludes it from vindicating its statutory rights. Because the delegation clause itself hinders the Nation's ability to protect its rights, the court and not the arbitrator must decide that issue.

In the district court, Caremark argued that the Recovery Act cannot displace an arbitration provision because it does not use the word "arbitration." Dist. Ct. Dkt. # 26, at 16-17. Caremark cited the holding in *CompuCredit Corp.* for the proposition that, if a statute "is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced." 565 U.S. at 104. But that does not salvage the district court's decision to refuse to address the issue at all under the delegation clause. As noted above, in *CompuCredit Corp.*, courts – not arbitrators – decided whether a federal statute rendered arbitration agreements unenforceable, even though the arbitration agreement included a delegation clause.

In any event, Caremark is wrong that the Recovery Act is insufficiently specific. The statute expressly overrides "*any* contract" that hinders the right of recovery – without exception. 25 U.S.C. § 1621e(c) (emphasis added). An arbitration provision that hinders recovery plainly fails within that provision. And if there were any doubt, it must be resolved in the Nation's favor under the familiar principle of statutory interpretation that "statutes are to be construed liberally in favor of the

Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at 766.

Arbitration (and the delegation clause) would "hinder the right of recovery" under section 1621e(c) by denying the Nation the guarantees of the statutory rights provided by the Recovery Act.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment and, at a minimum, direct that it resolve the threshold questions it mistakenly delegated to an arbitrator to decide.

September 1, 2021

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STATEMENT OF RELATED CASES

A separate action brought by the Chickasaw Nation against Appellees (among others), seeking to enforce the Nation's rights under the Recovery Act, is pending in the Eastern District of Oklahoma. *See The Chickasaw Nation v. CVS Caremark LLC, et al.*, No. 20-cv-488-PRW (E.D. Okla).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,863 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using MS Word Times New Roman 14-point font.

September 1, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on September 1st, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Michael Burrage
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STATUTORY ADDENDUM

The "Recovery Act" Provisions of the Indian Health Care Improvement Act, 25 U.S.C. § 1621e

25 U.S.C. §1621e. Reimbursement from certain third parties of costs of health services

(a) Right of recovery

Except as provided in subsection (f), the United States, an Indian tribe, or tribal organization shall have the right to recover from an insurance company, health maintenance organization, employee benefit plan, third-party tortfeasor, or any other responsible or liable third party (including a political subdivision or local governmental entity of a State) the reasonable charges billed by the Secretary, an Indian tribe, or tribal organization in providing health services through the Service, an Indian tribe, or tribal organization, or, if higher, the highest amount the third party would pay for care and services furnished by providers other than governmental entities, to any individual to the same extent that such individual, or any nongovernmental provider of such services, would be eligible to receive damages, reimbursement, or indemnification for such charges or expenses if—

(1) such services had been provided by a nongovernmental provider; and

(2) such individual had been required to pay such charges or expenses and did pay such charges or expenses.

(b) Limitations on recoveries from States

Subsection (a) shall provide a right of recovery against any State, only if the injury, illness, or disability for which health services were provided is covered under—

(1) workers' compensation laws; or

(2) a no-fault automobile accident insurance plan or program.

(c) Nonapplicability of other laws

No law of any State, or of any political subdivision of a State and no provision of any contract, insurance or health maintenance organization policy, employee benefit plan, self-insurance plan, managed care plan, or other health care plan or program entered into or renewed after November 23, 1988, shall prevent or hinder the right of recovery of the United States, an Indian tribe, or tribal organization under subsection (a).

(d) No effect on private rights of action

No action taken by the United States, an Indian tribe, or tribal organization to enforce the right of recovery provided under this section shall operate to deny to the injured person the recovery for that portion of the person's damage not covered hereunder.

(e) Enforcement

(1) In general

The United States, an Indian tribe, or tribal organization may enforce the right of recovery provided under subsection (a) by—

(A) intervening or joining in any civil action or proceeding brought—

(i) by the individual for whom health services were provided by the Secretary, an Indian tribe, or tribal organization; or

(ii) by any representative or heirs of such individual, or

(B) instituting a separate civil action, including a civil action for injunctive relief and other relief and including, with respect to a political subdivision or local governmental entity of a State, such an action against an official thereof.

(2) Notice

All reasonable efforts shall be made to provide notice of action instituted under paragraph (1)(B) to the individual to whom health services were provided, either before or during the pendency of such action.

(3) Recovery from tortfeasors

(A) In general

In any case in which an Indian tribe or tribal organization that is authorized or required under a compact or contract issued pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) to furnish or pay for health services to a person who is injured or suffers a disease on or after March 23, 2010, under circumstances that establish grounds for a claim of liability against the tortfeasor with respect to the injury or disease, the Indian tribe or tribal organization shall have a right to recover from the tortfeasor (or an insurer of the tortfeasor) the reasonable value of the health services so furnished, paid for, or to be paid for, in accordance with the Federal Medical Care Recovery Act (42 U.S.C. 2651

et seq.), to the same extent and under the same circumstances as the United States may recover under that Act.

(B) Treatment

The right of an Indian tribe or tribal organization to recover under subparagraph (A) shall be independent of the rights of the injured or diseased person served by the Indian tribe or tribal organization.

(f) Limitation

Absent specific written authorization by the governing body of an Indian tribe for the period of such authorization (which may not be for a period of more than 1 year and which may be revoked at any time upon written notice by the governing body to the Service), the United States shall not have a right of recovery under this section if the injury, illness, or disability for which health services were provided is covered under a self-insurance plan funded by an Indian tribe, tribal organization, or urban Indian organization. Where such authorization is provided, the Service may receive and expend such amounts for the provision of additional health services consistent with such authorization.

(g) Costs and attorney's fees

In any action brought to enforce the provisions of this section, a prevailing plaintiff shall be awarded its reasonable attorney's fees and costs of litigation.

(h) Nonapplicability of claims filing requirements

An insurance company, health maintenance organization, self-insurance plan, managed care plan, or other health care plan or program (under the Social Security Act [42 U.S.C. 301 et seq.] or otherwise) may not deny a claim for benefits submitted by the Service or by an Indian tribe or tribal organization based on the format in which the claim is submitted if such format complies with the format required for submission of claims under title XVIII of the Social Security Act [42 U.S.C. 1395 et seq.] or recognized under section 1175 of such Act [42 U.S.C. 1320d–4].

(i) Application to urban Indian organizations

The previous provisions of this section shall apply to urban Indian organizations with respect to populations served by such Organizations in the same manner they apply to Indian tribes and tribal organizations with respect to populations served by such Indian tribes and tribal organizations.

(j) Statute of limitations

The provisions of section 2415 of title 28 shall apply to all actions commenced under this section, and the references therein to the United States are deemed to include Indian tribes, tribal organizations, and urban Indian organizations.

(k) Savings

Nothing in this section shall be construed to limit any right of recovery available to the United States, an Indian tribe, or tribal organization under the provisions of any applicable, Federal, State, or tribal law, including medical lien laws.