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. 2:21-cv-00574-SPL
Hon. Steven P. Logan

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CORPORATE DISCLOSURE STATEMENT

Appellees Caremark, LLC, Caremark PHC, LLC, CaremarkPCS Health, LLC, Caremark RX, LLC, Aetna, Inc., and Aetna Health, Inc., are all wholly owned indirect subsidiaries of CVS Health Corporation. CVS Health Corporation is a publicly traded company, but no publicly traded corporation owns 10% or more of its stock. CVS Health Corporation is the only publicly traded corporation that owns (directly or indirectly) a 10% or more interest in Appellees.

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INTRODUCTION

"[A]rbitration is strictly a matter of consent." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019). And appellants—the Chickasaw Nation and five pharmacies it owns and operates—consented to arbitrate all disputes with appellees Caremark, LLC and its affiliates many times, in many ways, over many years. The contracts in this case govern how pharmacies join and participate in the pharmacy networks that Caremark runs as a pharmacy benefits manager (PBM). Tens of thousands of pharmacies voluntarily join these networks to obtain myriad economic and logistical benefits. For instance, participating pharmacies can send all reimbursement claims for dispensing prescription drugs directly to Caremark, instead of bearing the administrative costs of contacting every customer's insurer.

Appellants took that offer. They all signed "Provider Agreements" setting forth the basic terms for joining Caremark's pharmacy networks. Those Provider Agreements expressly incorporated the terms of "Provider Manuals"—longer documents that flesh out how the Provider Agreement operates. All Manuals in effect when appellants signed included clear, unambiguous arbitration provisions mandating that pharmacies arbitrate their disputes with Caremark. Those Manuals also include so-called

delegation clauses reserving to the arbitrators any disagreements over whether a particular dispute is arbitrable. Thus, from the very start of their contractual relationship with Caremark, appellants consented to arbitrate.

What is more, appellants repeatedly reiterated their consent to arbitration. The Provider Manuals that appellants agreed to when signing the Provider Agreement also detail how Caremark can amend Provider Manuals—something that happens every few years to account for changes in the business and legal landscape that affect the granular details of a massively complex pharmacy network with many thousand members. The process is for Caremark to propose amendments and send the updated Manual to pharmacies; pharmacies then assent by receiving the updated version and continuing to submit claims to Caremark thereafter.

Appellants all agreed to that process at the outset. And, since 2014 alone, they have undisputedly received four updated Manuals, all of which contain arbitration provisions that unambiguously require arbitration. Every time, rather than lodging objections or seeking to negotiate over specific terms, appellants responded by submitting some $173 million in total claims. 2-ER-109.

Yet now, after reaping the benefits from these agreements—benefits that appellants obtained by following the Manual's terms—appellants deny ever agreeing to the Manual's arbitration provisions. Months ago, they filed a lawsuit in federal district court in Oklahoma, seeking millions of dollars from appellees under the theory that appellees wrongly denied reimbursement claims and that the Recovery Act, 25 U.S.C. § 1621e, allows tribal entities like appellants to recover the amounts they paid as a result. Appellants do not dispute being bound by the Provider Agreements or Provider Manuals in general—nor could they, since they obtained hundreds of millions of dollars from appellees under this foundational contractual relationship. Nor do appellants dispute that the arbitration provisions in successive Provider Manuals are clear, unambiguous, and plentiful.

Instead, appellants brandish tribal sovereign immunity, arguing that they cannot be forced to pursue their claims in arbitration unless they expressly waived immunity by signing a document that on its face features an arbitration provision. Appellants agree they are bound by the rest of the agreement; they just disclaim assenting to the arbitration provision. Appellants deem agreements that incorporate arbitration provisions by reference—like the Provider Agreements—as insufficiently clear to waive

immunity. Appellants further contend that the Recovery Act renders unenforceable any agreement that would require arbitration of Recovery Act claims, as the parties' arbitration agreements do.

But, as the district court concluded, those challenges have no place in court, because appellants agreed again and again that arbitrators would decide these sorts of threshold challenges to arbitration. Appellants wrongly classify their sovereign-immunity arguments as calling into question whether the parties agreed to arbitration at all—a question courts do resolve. But sovereign immunity is a defense against facing claims in a particular forum, not a challenge to contract formation.

Similarly, appellants claim that arbitrators should not be able to decide whether the Recovery Act forecloses arbitration, based on specious attacks on the procedures in arbitration that have no bearing on appellants' pursuit of their Recovery Act claims. This Court in *Brice v. Haynes Investments*, __ F. 4th __, 2021 WL 4203337 (9th Cir. Sept. 16, 2021), just rejected similar arguments. If appellants' creative framing of their objections is enough to defeat the parties' agreement to delegate threshold challenges to arbitrators, most delegation clauses will become a nullity, threatening the stability of untold agreements.

Even if this Court resolves appellants' challenges to arbitrating, those challenges lack merit. Tribal sovereign immunity has no role to play here, because appellants are *plaintiffs* who face no threat of damages or injunctions against them. Regardless, appellants waived any immunity they have many times over, by repeatedly assenting to arbitration provisions in multiple Provider Manuals. Appellants' contrary arguments ignore key facts and mischaracterize the record.

Appellants' Recovery Act objections also fail. They have no coherent explanation for how commonplace features of arbitration—like limits on available damages and discovery, six-month filing deadlines, awarding fees and costs to the winner, and confidentiality—somehow obstruct sophisticated, well-resourced actors like appellants from pursuing multi-million-dollar Recovery Act claims in arbitration. If appellants' objections were enough for courts to refuse to honor arbitration agreements, few arbitration agreements would survive. As the Supreme Court has repeatedly explained, Congress enacted the Federal Arbitration Act in 1925 to ensure that courts do not treat arbitration as a second-class forum for dispute resolution. *See, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). This Court should reject appellants' attempt to turn back the clock and affirm the judgment below.

STATEMENT OF JURISDICTION

Appellees filed a petition to compel arbitration under 9 U.S.C. § 4, invoking the district court's jurisdiction under 28 U.S.C. § 1331. That court entered final judgment compelling arbitration and terminated the action. This Court has jurisdiction under 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(3).

STATEMENT OF THE ISSUES

1. Whether the district court correctly determined that, pursuant to the parties' delegation clause, the arbitrators must resolve appellants' challenges to arbitrating this dispute.
2. Whether appellants can invoke tribal sovereign immunity to block arbitration of the claims they have brought against appellees.
3. Whether the Recovery Act, 25 U.S.C. § 1621e(c), bars arbitration of appellants' Recovery Act claims.

STATEMENT OF THE CASE

A. Caremark's Network Contracts With Pharmacies

1. Caremark is a pharmacy benefit manager (PBM); the other appellees are related Caremark affiliates. PBMs manage prescription drug benefits for health insurers, Medicare Part D drug plans, large employers and others by contracting with individual pharmacies to create networks of participating pharmacies. *See Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 478-79

(2020). Appellants are the Chickasaw Nation and five pharmacies owned and operated by the Nation that contracted to participate in Caremark's networks.

Through these network contracts, pharmacies agree to preferential pricing for patients enrolled in Caremark-supported health plans. In exchange, Caremark pays the pharmacies directly for prescription drugs. Pharmacies thus avoid the administrative costs of submitting reimbursement claims to hundreds of individual insurers. PBMs also pass cost savings on to health plans, whose members can get discounts or lower prices by using in-network pharmacies. *See In re Express Scripts/Anthem ERISA Litig.*, 285 F. Supp. 3d 655, 662-63 (S.D.N.Y. 2018). Caremark has created the country's largest pharmacy-benefit-management network, featuring tens of thousands of participating pharmacies nationwide. *Crawford Pro. Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 254 (5th Cir. 2014).

2. Three interlocking documents govern the relationships between Caremark and pharmacies like appellants that participate in its network: the Provider Agreement, the Provider Manual, and Network Enrollment Forms.

a. **The Provider Agreement** is a three-page agreement setting forth the general terms of the relationship. For instance, the Provider Agreement states that participating pharmacies can receive payments from patients for

prescriptions and obtain reimbursements from Caremark. 3-ER-146. In turn, Caremark agrees to pay in-network pharmacies "for Covered Items dispensed to Eligible Persons pursuant to the Agreement in accordance with" a complex reimbursement formula. 3-ER-146.

The Provider Agreement directs the parties to the Provider Manual, a much longer, more specific set of provisions incorporated by reference. Pharmacies that sign the Provider Agreement agree that "[t]his Agreement, the Provider Manual, and all other Caremark Documents constitute the entire agreement between Provider and Caremark, all of which are incorporated by this reference as if fully set forth herein and referred to collectively as the 'Provider Agreement' or 'Agreement.'" 3-ER-147.

For instance, the Provider Agreement states that "capitalized terms used in the Agreement"—such as "Provider," "Eligible Person," and "Covered Item"—"shall have the meanings set forth in the Glossary of Terms contained in the Provider Manual." 3-ER-146. The Provider Agreement also requires signatory pharmacies to agree to "comply with all applicable Laws, including but not limited to those Laws referenced in … the Provider Manual." *Id.* And the Provider Agreement "will remain in effect until terminated in accordance with the Provider Manual." 3-ER-147.

The Provider Agreement also contains a severability clause, which states: "Should any provision of this Agreement be held unenforceable or invalid under applicable Law, the remaining provisions shall remain in full force and effect." 3-ER-147.

Finally, the Provider Agreement requires signatory pharmacies to expressly confirm that they not only agree to all terms, but also "acknowledge[] receipt of the Provider Manual" by signing. 3-ER-148; *see also* 3-ER-152.

b. **The Provider Manual** is a more specific, hundred-plus-page document incorporated into the Provider Agreement that governs nearly every aspect of a pharmacy's relationship with Caremark, including the submission of reimbursement claims and regulatory requirements with which participating pharmacies must certify compliance. 2-SER-11–14. Because many of these details can change in response to legal or industry developments, the Manual gets updated every few years.

Without reviewing the Provider Manual, pharmacies would have no idea how to implement key elements of the Provider Agreement. For instance, the Provider Agreement obligates pharmacies to certify compliance with various laws, 3-ER-146, 3-ER-151, but only the Manual defines the specific laws with

which pharmacies must certify compliance, SER-103. Similarly, under the Provider Agreement, the amount a pharmacy will be reimbursed turns on the "AWP," the "AWP Discount," the "Dispensing Fee," the "Patient Pay Amount," the "MAC," and the "U&C price"—terms that only the Manual defines. *Compare* 3-ER-149, 3-ER-153 (Provider Agreements) *with* 2-SER150–51 (Manual defining terms). Indeed, it would have been impossible for appellants to operate under the Provider Agreement without regularly reviewing the Manual.

Two key provisions recur in every Manual:

The Arbitration Provision. Every Manual since 2003—the earliest version applicable to any appellant—has expressly included an arbitration agreement. All Manuals require arbitration of "[a]ny and all controversies in connection with or arising out of the Provider Agreement" in Scottsdale, Arizona, under American Arbitration Association rules. 3-ER-133 (2003); *accord* 3-ER-138 (2004); 3-ER-142 (2009); 3-ER-330 (2020). While later Manuals elaborate on other disputes also subject to arbitration, this core language has remained constant.

Since 2014, all Manuals have included additional language even more expressly delegating to the arbitrator all threshold questions concerning

arbitration. That language states: "The arbitrator(s) shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of the agreement to arbitrate." 3-ER-320 (2014); *accord* 3-ER-323 (2016); 3-ER-326 (2018); 3-ER-330 (2020).

The 2020 Manual's arbitration provision reads in relevant part:

> Any and all disputes between Provider [pharmacy] and Caremark … will be exclusively settled by arbitration. This arbitration provision applies to any dispute arising from events that occurred before, on or after the effective date of this Provider Manual…
>
> Unless otherwise agreed to in writing by the parties, the arbitration shall be administered by the American Arbitration Association ("AAA") pursuant to the then applicable AAA Commercial Arbitration Rules and Mediation Procedures including the rule governing Emergency Measures of Protection (available from the AAA). In no event may the arbitrator(s) award indirect, consequential, or special 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.
>
> 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. . . . The arbitrator(s) must follow the rule of Law, and the award of the arbitrator(s) will be final and binding on the parties, and judgment upon such award may be entered in any court having jurisdiction thereof. Any such arbitration must be conducted in Scottsdale, Arizona and Provider agrees to such jurisdiction, unless otherwise agreed to by the parties in writing.

> …
> **Arbitration with respect to a dispute is binding and neither Provider nor Caremark will have the right to litigate that dispute through a court. In arbitration, Provider and Caremark will not have the rights that are provided in court, including the right to a trial by judge or jury. In addition, the right to discovery and the right to appeal are limited or eliminated by arbitration. All of these rights are waived and disputes must be resolved through arbitration.**

3-ER-330 (emphasis in original).

The Amendment Provision. Every Manual since 2003 also authorizes Caremark (or its predecessor entities) to "amend the Provider Agreement, including the Provider Manual . . . by giving notice to Provider of the terms of the amendment and specifying the date the amendment becomes effective." 3-ER-132 (2003); *accord* 3-ER-137 (2004); 3-ER-320 (2014); 3-ER-323 (2016); 3-ER-326 (2018); 3-ER-329 (2020).

Every Manual further informs pharmacies that they accept the terms of the relevant amendments by continuing to process claims pursuant to the Provider Agreement and Provider Manual. 3-ER-132 (2003); *accord* 3-ER-320 (2014); 3-ER-323 (2016); 3-ER-326 (2018); 3-ER-329 (2020). Because thousands of pharmacies participate in Caremark's network, this amendment process ensures efficiency and uniformity, while allowing individual pharmacies to raise objections on a case-by-case basis.

c. **Network Enrollment Forms** are the final documents integrated into the Provider Agreement. They comprise a single page, and specify which specific Caremark network the pharmacy is joining and any network-specific reimbursement terms. *E.g.*, 3-ER-237. By signing these forms, the pharmacy again certifies that it "understands and agrees that all the terms and conditions established in the Caremark Provider Agreement shall apply to Pharmacy Services provided." *Id.*

B. Caremark's Contracts With Appellants

All five appellant pharmacies signed Provider Agreements with Caremark or its predecessors-in-interest. Br. 12-13. In July 2003, appellants Ardmore Health Clinic Pharmacy ("Ardmore"), the Chickasaw Nation Online Pharmacy Refill Center and the Tishomingo Health Clinic ("Tishomingo") signed Provider Agreements with Advance PCS Network, which Caremark acquired in March 2004.[1] *See* 2-ER-103 (Harris Decl.). In December 2005, the Purcell Health Clinic ("Purcell") signed a Provider Agreement with Caremark

[1] These Provider Agreements are not in the record, but Caremark submitted an unrebutted declaration from company executive Stephanie Harris confirming that those Provider Agreements would have contained the same terms as the two later Provider Agreements in the record that other appellants signed. 2-ER-103–104. Appellants (at 37) dispute whether the declaration is sufficient evidence of the contractual terms.

Inc. (now Caremark, LLC). 3-ER-152. And, in August 2010, the Chickasaw Nation Medical Center signed a Provider Agreement with Caremark, LLC and Caremark PCS LLC. 3-ER-148.

By signing, appellant pharmacies agreed that the Provider Agreement, along with "the Provider Manual, and all other Caremark Documents, constitute the entire agreement between Provider and Caremark, all of which are incorporated … as if fully set forth herein." 3-ER-147; 3-ER-152; *see* 2-ER-105–106 (Harris Decl.). Appellant pharmacies also agreed that "[b]y signing below," they "acknowledge[] receipt of the Provider Manual" then in effect. 3-ER-152; 3-ER-148.

Thus, appellants Ardmore, Chickasaw Nation Online Pharmacy Refill Center, and Tishomingo would have acknowledged receipt of the 2003 Provider Manual. *See* 2-ER-103–04 (Harris Decl.). Appellant Purcell "acknowledge[d] receipt" of the 2004 Manual in effect as of Purcell's 2005 agreement. 3-ER-152. And appellant Chickasaw Nation Medical Center "acknowledge[d] receipt" of the 2009 Manual in effect as of its 2010 agreement. 3-ER-148. All of those Manuals mandate that all disputes relating to the Provider Agreement must be arbitrated, and that any ensuing amendments to the Manual will follow the prescribed amendment process whereby

pharmacies assent by receiving the new editions and then submitting claims. *See* 3-ER-133 (2003); 3-ER-138 (2004); 3-ER-142 (2009) (arbitration provisions); 3-ER-132 (2003); 3-ER-137 (2004); 3-ER-142 (2009) (amendment provisions).

Appellant pharmacies then received amended Provider Manuals and submitted claims thereafter. Caremark sent all appellant pharmacies updated editions of Provider Manuals in 2004, 2007, 2009, 2011, 2014, 2016, 2018, and 2020. 2-ER-106–108. Appellants do not dispute receiving amended Manuals from 2014 onwards, or continuing to operate pursuant to the Manual's terms after receipt. Br. 15; 2-ER-58.

Pharmacies—including pharmacies run by States or tribes—can and sometimes do object to amendments, triggering further negotiations with Caremark. For instance, representatives of state government-run health systems sometimes object to Manual terms that would require States to pay attorneys' fees that might be awarded in arbitration. In those situations, Caremark evaluates case-by-case whether to agree to the change.

Appellants never appear to have objected or requested changes upon receipt of revised Manuals. Instead, every appellant continued submitting claims to Caremark after receipt. 2-ER-101. Between 2014 and 2020,

appellants collectively submitted $173 million in claims seeking reimbursement from Caremark. *See* 2-ER-109.

Every appellant also signed successive network enrollment forms reaffirming their agreement to "all the terms and conditions established in the Caremark Provider Agreement," *e.g.*, 3-ER-275. Ardmore, the Chickasaw Nation Online Pharmacy Refill Center, and Tishomingo signed new enrollment forms in 2003, 2004, 2008, 2010, 2014, and 2020. 3-ER-104-05. Purcell signed new enrollment forms in 2006, 2008, 2010, 2014 and 2020. 3-ER-105. And the Chickasaw Nation Medical Center signed network enrollment forms in 2010 and 2014. 3-ER-106.

C. Procedural History

On December 29, 2020, appellants sued the Caremark appellees and others in the U.S. District Court of the Eastern District of Oklahoma, claiming violations of the Recovery Act, 25 U.S.C. § 1621e. Appellants alleged that appellees improperly denied claims that appellants submitted on behalf of tribal members who participate in Caremark-managed pharmacy benefit plans, and that the Recovery Act authorizes appellants to recover the amounts that appellants themselves expended to provide prescription drugs. 2-ER-64–67. And appellants alleged that appellees' discount programs improperly

shifted costs for certain drugs from individuals' health plans (via Caremark) to appellants. 2-ER-70-75. Appellants seek millions of dollars in allegedly unreimbursed amounts, as well as punitive damages, based on claims dating back to 2014. *Id.*

On April 2, 2021, Caremark and other defendants filed a petition to compel arbitration under the Federal Arbitration Act in the U.S. District Court for the District of Arizona, the forum that the Provider Manual designates for arbitration. 2-ER-25.[2]

On July 2, 2021, the federal district court in Arizona granted the petition to compel arbitration and rejected appellants' objections to arbitration. The court concluded that each appellant pharmacy "has a current contract with Caremark" that "contain[s] an arbitration agreement" specifying Scottsdale, Arizona as the venue for arbitration. 1-ER-4; *accord* 1-SER-2 (stay order). The court thus denied appellants' request to dismiss or transfer the case (a ruling that appellants do not challenge). 1-ER-6–7.

[2] On April 26, 2021, the Choctaw Nation and its pharmacies—also represented by appellants' counsel—filed a similar complaint against Caremark in the Eastern District of Oklahoma, despite signing materially identical contracts containing identical arbitration clauses. *See Choctaw Nation v. Caremark PHC, LLC*, 21-cv-00128 (filed Apr. 26, 2021) (ECF No. 1).

The district court then held that, under the delegation clause in the parties' arbitration agreement, arbitrators—not courts—must resolve appellants' threshold challenges to arbitrating this dispute. 1-ER-7–8. The court emphasized that the delegation clause unambiguously gave "[t]he arbitrator(s) … 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." 1-ER-8.

Appellants timely appealed, then moved to stay the Arizona district court's order compelling arbitration. On August 4, 2021, the district court denied appellants' stay motion, concluding that appellants were unlikely to succeed on the merits because "an arbitrator must decide the threshold issue of arbitrability where the parties clearly so agreed." 1-SER-4. The court explained that all of appellants' objections "challenge[d] whether the agreement as a whole can be enforced," and thus presented classic "challenge[s] … for the arbitrator" to resolve. 1-SER-4–5. The court thus rejected appellants' characterization of their objections as going to the formation of an arbitration agreement, not its enforceability. *See id.*

Appellants sought a stay from this Court, which granted appellants' motion without explanation and ordered expedited briefing. *See* Dkt. 24.

SUMMARY OF ARGUMENT

I. The district court correctly held that arbitrators, not courts, must resolve appellants' challenges to arbitration in the first instance.

A. Since at least 2003, the arbitration provisions in every Provider Manual have contained delegation clauses that vest arbitrators, not courts, with the authority to resolve threshold challenges to arbitrating a dispute. As the Supreme Court and this Court have repeatedly held, courts must honor such delegation clauses and let arbitrators decide threshold challenges to arbitrability, absent some challenge to the formation of a valid arbitration agreement or some specific basis for concluding that the delegation clause itself is unenforceable. Those exceptions are exceedingly narrow.

B. Appellants' challenges to arbitration fall in the heartland of challenges that arbitrators, not courts, decide. Appellants invoke sovereign immunity and attack the validity of the process for amending Provider Manuals. But, contrary to appellants' characterizations, their arguments challenge only the *enforceability* of the arbitration agreement here, not whether the parties formed that agreement at all.

C. Appellants also assert that the Recovery Act precludes arbitration of their Recovery Act claims because the procedural rules in arbitration governing filing deadlines, damages, fees and costs, discovery, and confidentiality purportedly hamper appellants' chances of prevailing. But the arbitrators must resolve that challenge, too, because appellants cannot show that the Recovery Act specifically invalidates the delegation clause, which is a separate, severable mini-contract. Even if those arbitration rules hurt appellants' chances on the merits (they do not), those rules do not impede appellants' ability to pursue their threshold arbitrability challenges before the arbitrators. Accepting appellants' contrary approach would render virtually any delegation clause a dead letter.

II. Even if courts could resolve these threshold challenges, this Court should reject them and affirm the district court's order compelling arbitration.

A. Appellants validly agreed to arbitrate this dispute several times over. They all signed Provider Agreements expressly incorporating the Provider Manual as part of the agreed-upon terms. Every Manual in effect when appellants signed those agreements contained unambiguous arbitration provisions. Nor could appellants claim unawareness of those terms; by signing Provider Agreements, appellants expressly confirmed receipt of the Manual.

That valid agreement alone is enough to affirm the district court's order compelling arbitration.

Every Manual, moreover, also contains an amendment provision explaining that pharmacies assent to amendments by receiving an updated Manual and submitting claims thereafter. Appellants agreed to that process by agreeing to the Provider Agreement. Over many years, appellants repeatedly followed the process for assenting: they received updated Manuals, then sent $173 million in claims to Caremark pursuant to those terms.

B. Appellants' principal objection is that, while they concededly signed valid Provider Agreements, they never waived their tribal sovereign immunity. Even though the arbitration provisions plainly cover the claims in appellants' federal lawsuit, appellants say those provisions do not apply to them because they did not waive their immunity clearly enough.

Appellants' expansive interpretation of tribal sovereign immunity would explode established limits on that doctrine. Because sovereign immunity is a defense *against* suit, it does not apply when, as here, the tribe is the plaintiff pursuing claims against someone else.

Even were sovereign immunity relevant, the idea that appellants could only waive immunity by signing an agreement that expressly features an

arbitration provision is nonsensical. Incorporating an arbitration provision by reference "as if fully set forth herein," 3-ER-147—as the Provider Agreements did here—is more than clear enough. And appellants' conduct assenting to amendments to the Provider Manual would independently suffice. Nor can appellants evade arbitration by claiming that their signatory had no actual authority to agree to waive immunity.

Appellants' more granular factual objections are irrelevant and untrue. Appellants confirmed receipt of the pre-2014 Provider Manuals when they signed the Provider Agreements, and in any event waived any immunity many times post-2014. Appellants object that earlier Manuals had different terms, but they all provide for arbitration, and any differences are immaterial. Appellants misread the contracts in contending that amendments to the Manual's arbitration provisions are valid only if appellants initialed them. Appellants' objections that they did not sign agreements directly with some appellees, or that some early Provider Agreements are not in the record, ignore that appellees are related corporate entities that have undisputedly used materially identical Provider Agreements at all relevant times.

Finally, appellants' argument that the agreement-amendment process is an invalid unilateral contract modification is groundless. The process is not

unilateral. Appellants must (and did) assent, by receiving revised Manuals, then submitting claims. Nearly a dozen courts have rejected indistinguishable challenges to the exact agreements at issue.

C. The Recovery Act, 25 U.S.C. § 1621e, does not bar arbitration of appellants' Recovery Claims, either. That Act entitles tribal entities like appellants to bring civil suits to recoup "reasonable charges billed … in providing health services" that health plans or PBMs should have provided. The Supreme Court has repeatedly rejected arguments that other federal statutes impliedly repeal the Federal Arbitration Act's bedrock rule that arbitration agreements are enforceable. The Recovery Act is no exception.

Appellants alternatively contend that the arbitration agreement here is unenforceable because the procedural rules in arbitration would indirectly hamper appellants' ability to obtain relief under the Recovery Act. Appellants target arbitration rules governing the filing period, fees and costs, damages, discovery, and confidentiality. But the Supreme Court has held that far more onerous procedural rules do not prevent parties from pursuing federal statutory rights in arbitration. Appellants' extreme position would threaten countless arbitration agreements that contain similar versions of these garden-variety procedural provisions. This Court should affirm.

ARGUMENT

I. The Parties' Delegation Clause Mandates That the Arbitrators Must Decide Whether Appellants' Claims Are Arbitrable

The parties repeatedly agreed to express delegation clauses. Appellants object that their sovereign immunity precludes them from being required to arbitrate their claims. They alternatively contend that the Recovery Act renders unenforceable any agreement to arbitrate appellants' Recovery Act claims. Under the delegation clauses, arbitrators, not courts, must resolve both of these challenges.

A. The Delegation Clauses Here Unambiguously Authorize the Arbitrators to Decide All Threshold Issues

A delegation clause is an agreement to delegate "threshold arbitrability questions" to "an arbitrator, rather than a court." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019). Delegation clauses are their own separate mini-agreements, and function as "an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Id.* at 529; *see Rent-A-Ctr. W., Inc. v. Jackson*, 561 U.S. 63, 68-71 (2010). When the delegation clause assigns threshold arbitrability questions to the arbitrator using "clear and unmistakable" language, courts generally must honor that agreement. *Henry Schein*, 139 S. Ct. at 528. Indeed, "[i]f there is a delegation clause, the motion to compel arbitration should be

granted in almost all cases." *Edwards v. Doordash, Inc.*, 888 F.3d 738, 744 (5th Cir. 2018).

Here, appellants repeatedly agreed to unambiguous delegation clauses from the outset of their relationship with Caremark. When first signing the Provider Agreement, appellants agreed to be bound by the extant version of the Provider Manual, and confirmed receiving that Manual. 3-ER-152. Each of those Manuals included delegation clauses stating that "[a]ny and all controversies in connection with or arising out of the Provider Agreement … will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association." 3-ER-133 (2003 Manual applicable to Ardmore, Tishomingo, and Chickasaw Nation Online Pharmacy); *accord* 3-ER-138 (same language in 2004 Manual applicable to Purcell); 3-ER-142 (same language in 2009 Manual applicable to Chickasaw Nation Medical Center). Those delegation clauses are undoubtedly valid. As this Court has held, because the AAA rules provide that the arbitrator shall have the authority to decide threshold arbitrability disputes, "incorporation of [those] rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability." *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015).

Appellants are thus incorrect (at 24 & 37 n.10) that no delegation clause existed until 2014. Instead, Provider Manuals from 2014 onwards contained even more express delegation clauses vesting "[t]he arbitrator(s)" with "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement to arbitrate." 3-ER-320 (2014 Manual); *accord, e.g.*, 3-ER-323 (2016); 3-ER-326 (2018); 3-ER-330 (2020). Appellants repeatedly agreed to those clauses by (1) agreeing to the amendment process as part of the Provider Agreement, and (2) following the terms for assenting to amendments thereafter, i.e., receiving updated Manuals and submitting claims thereafter. *Supra* p. 14-15.

B. Appellants' Challenges Fall Within the Delegation Clause

Appellants raise two broad challenges to arbitrating this dispute: (1) their sovereign immunity protects them against having to arbitrate, Br. 29-43; and (2) the Recovery Act precludes arbitration of appellants' claims, Br. 43-58. Appellants do not dispute that the text of the delegation clauses encompass all these challenges. Instead, appellants (at 23-29) argue that their sovereign-immunity challenge fits within an exception: even in the face of a delegation clause, courts must decide challenges to whether the parties formed an agreement to arbitrate. Appellants (at 52-58) also say any delegation clause is

unenforceable as applied to their Recovery Act claims. These arguments do not justify disregarding the delegation clauses here.

1. Appellants' Sovereign-Immunity Arguments Do Not Challenge Contract Formation

As appellants note (at 23-29), courts, not arbitrators, must decide challenges to whether the parties *formed* an agreement to arbitrate. *See Granite Rock v. Int'l B'hood of Teamsters*, 561 U.S. 287, 296 (2010); Br. 23-27. Appellants (at 23) purport to raise a "threshold issue of whether the parties formed an arbitration agreement" based on appellants' putative failure to waive their sovereign immunity. But that challenge goes to the *enforceability* of the arbitration agreement, not to its formation—and appellants (at 23, 25, 29) agree that under the delegation clause, the arbitrators would resolve enforceability challenges in the first instance.

a. Formation challenges concern "whether any [arbitration] agreement … was ever concluded." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006). Arguments that "the alleged obligor" never "signed the contract," that "the signor lacked authority to commit the alleged principal" to the agreement, or that "the signor lacked the mental capacity to assent" to the arbitration agreement are classic formation challenges. *Id.*; *accord Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69, n.1 (2010). So are arguments

that an arbitration agreement requires a particular, unsatisfied condition—like a union ratification vote at a particular time—"to be considered validly formed." *Granite Rock*, 561 U.S. at 297, 297 n.4. Likewise, "undisputed evidence" that the "parties did not agree to the same terms" presents a formation challenge. *Rowland v. Sandy Morris Fin. & Estate Planning Servs., LLC*, 993 F.3d 253 (4th Cir. 2021). The same goes for arguments that a contract lacked valid consideration. *Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 252 (2d Cir. 2019).

By contrast, challenges to the *enforceability* of an arbitration agreement presuppose that the parties agreed to particular terms, but contend that the ensuing agreement is not "legally binding." *Rent-A-Center*, 561 U.S. at 69, nn.1 & 2. "[C]hallenges seeking to *avoid* or *rescind* a contract" fall in this column. *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1142 (9th Cir. 1991). Examples include arguments that an arbitration agreement is substantively or procedurally unconscionable. *See Rent-a-Center*, 561 U.S. at 73. So are arguments that the whole contract (including arbitration provisions) was procured by fraud. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-406 (1967).

b. As the district court concluded below, appellants' sovereign-immunity arguments "go[] to the enforceability of the agreement as a whole," 1-SER-5, not to whether the parties formed an arbitration agreement. Appellants concede that they have been operating under agreements with Caremark for years. They agree the Provider Agreements are valid, Br. 12-13, and have acknowledged that the Manuals also govern their relationships with Caremark. *See* 2-ER-84–85 (letter from Nation to CVS Health citing the "Provider Agreement, or CVS Caremark's Pharmacy Payment Provider Manual" as documents relevant to claims denials). Appellants could hardly deny agreeing to both documents as part of their agreement; they have relied on both to obtain over a hundred million dollars in reimbursements for decades. *See* 2-ER-109 (Harris Decl.).

Appellants (at 29-35) nonetheless argue that they cannot be required to arbitrate because these agreements do not waive tribal sovereign immunity in arbitration. Unless tribes "clearly and unequivocally agreed to arbitration," appellants contend, they retain their immunity, and appellants deny assenting to arbitration clearly enough here. Br. 30. Specifically, appellants say, only expressly signing or initialing an agreement mentioning arbitration would suffice to waive immunity. Br. 27-28, 30-32, 34-35, 42-43. Appellants similarly

contend (at 32) that Chickasaw Nation representatives who signed the Provider Agreements could bind the Nation generally, but lacked authority to waive immunity. Appellants (at 32-34, 37-38) decry the purported lack of evidence of the contents of some Provider Agreements or proof that they received pre-2014 Provider Manuals. And appellants object (at 36-38, 40-41) that some agreements were with Caremark predecessors-in-interest, or that agreements pre-dated Caremark's acquisition of other appellees (like Aetna).

But appellants' sovereign-immunity defense concerns the *enforceability* of the arbitration agreement, not whether appellants agreed to arbitration at all. Tribal sovereign immunity is a defense to being subjected to proceedings in a particular forum, such as arbitration—not a defense to contract formation. *See, e.g.*, *Pistor v. Garcia*, 791 F.3d 1104, 1110-11 (9th Cir. 2015). Thus, ordinary contract-law principles govern whether tribes entered into an arbitration agreement. Then a different standard governs the ensuing waiver question: entering into an arbitration agreement waives tribal immunity only if the "clear import" of the agreement is that the tribe will submit to arbitration, as is the case here. *See C&L Ents. Inc v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 414 (2001); *infra* pp. 43-44.

For instance, tribes might agree to a contract containing an arbitration provision that reserves their immunity in some circumstances or preserves tribal immunity in all cases unless the tribe waives immunity on a case-by-case basis. *E.g.*, *Elem Indian Colony of Pomo Indians v. Pac. Dev. Partners X LLC*, 2009 WL 10692978, at *3 (N.D. Cal. June 23, 2009). In those examples, the tribe would have unquestionably entered into arbitration agreements, but would not have waived immunity in ensuing arbitrations. Whether a tribe has waived that defense is a separate question from the antecedent issue of whether the parties agreed to arbitrate at all. *See id.* (upholding delegation clause and reserving questions about waiver of tribal immunity to arbitrators).

Accordingly, upholding the district court's order compelling arbitration would not waive the tribe's immunity. Rather, arbitrators would then decide whether the terms of the agreements here were clear enough to waive immunity. As the district court explained, there is no reason why "submitting the threshold issue of arbitrability to the arbitrator, all while invoking sovereign immunity and maintaining their position that they are not bound by the agreement, will waive the Nation's immunity." 1-SER-5.

Appellants (at 35-36) do make one putative contract-formation argument that would apply to private parties, namely that the amendment process is an

invalid unilateral modification. First, even were this argument correct (it is not), this Court should still honor the delegation clauses. This argument only impugns the amendment process. But appellants already agreed to delegate arbitrability issues to the arbitrator from the moment they signed Provider Agreements, which incorporated the operative Provider Manuals containing delegation clauses and arbitration agreements. *Supra* p. 25-26.

Second, even on its own terms, appellants' unilateral-modification argument does not counsel against delegation, because it is not really a contract-formation challenge. Appellants do *not* challenge "the very existence of an agreement" to arbitrate, but instead challenge only whether the nature of the amendment process renders ensuing amendments unenforceable. *See Arnold v. HomeAway, Inc.*, 890 F.3d 546, 550 (5th Cir. 2018). This Court held as much on analogous facts in *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1989), where the Court reasoned that arbitrators, not courts, should resolve challenges to whether the parties finalized a version of their agreement containing an arbitration provision. The parties clearly had a contractual relationship; the only question was whether the parties had finalized the draft agreement containing the arbitration provision. *See id.*

So too here, appellants' unilateral-modification argument does not call into question the *existence* of the parties' agreement: appellants concede (at 14-15) that the Provider Agreement governs the parties' relationship and purports to incorporate the Provider Manual. *See also* 2-ER-84–85. Appellants instead argue that only a particular version of the agreement governs, i.e., the signed Provider Agreement excluding all provisions incorporated by reference through the Provider Manual. Thus, appellants do *not* challenge the existence of the parties' agreement and do not raise any "challenge to the arbitration provision which is *separate* and *distinct* from any challenge to the underlying contract." *Teledyne,* 892 F.2d at 1410.

Thus, appellants are incorrect (at 29) that "[t]he district court failed to follow the distinction between (i) contract formation and (ii) issues of arbitrability (such as validity and enforceability)." The district court correctly held that appellants' arguments concern enforceability, not formation, and that arbitrators must decide these questions. 1-SER-3–4; 2-ER-7–8.

2. Appellants' Recovery Act Challenges Do Not Show that the Delegation Clause Itself Is Unenforceable

a. Appellants (at 52-58) alternatively claim that the Recovery Act bars arbitration of any issues in this case, including threshold arbitrability questions. Specifically, appellants contend that the Recovery Act precludes

arbitration of appellants' claims, and that the arbitration agreement is also unenforceable because arbitration would prevent appellants from effectively vindicating their Recovery Act claims.

Appellants (at 54) concede that these arguments challenge the enforceability of the arbitration agreement, not its formation. But delegation clauses require courts to delegate all enforceability challenges to the arbitrators unless parties specifically challenge the enforceability of the delegation provision, and "*that specific delegation provision* is itself unenforceable." *Brice*, 2021 WL 4203337, at *2 (emphasis in original); *see Brennan*, 796 F.3d at 1132-33. Because delegation clauses are their own distinct mini-agreements, challenges to arbitration agreements do not necessarily invalidate the delegation clause. *Rent-A-Center*, 561 U.S. at 69-70.

Thus, if a party bound by a delegation clause argues "that the entire arbitration agreement, including the delegation clause, [is] unconscionable," that is an argument for arbitrators, not courts, to decide in the first instance. *Id.* at 73 (emphasis omitted). If courts went beyond challenges specific to the delegation clause and resolved challenges that affect the entire arbitration agreement, they would usurp the arbitrators' role and defeat the whole point of the delegation clause. *See id.* at 70; *Buckeye*, 546 U.S. at 448-49.

b. Neither of appellants' Recovery Act challenges establish that the delegation clause itself is unenforceable. First, appellants (at 52-55) argue that the Recovery Act forecloses arbitration of Recovery Act claims, and only courts can decide whether statutes preclude arbitration of certain claims. But this argument has nothing to do with the delegation clause specifically. Rather, appellants focus on the Recovery Act's language barring "contract[s]" that "prevent or hinder" appellants' "right of recovery," 25 U.S.C. § 1621e(c), and say that language renders the whole arbitration agreement here unenforceable. But generic indictments of arbitration agreements do not impugn delegation clauses specifically, so arbitrators should resolve them. *Brice*, 2021 WL 4203337, at *4.

Appellants' authorities (at 52-54) do not help them. Most involve whether disputes fall within categories of cases that the Federal Arbitration Act itself deems non-arbitrable under 9 U.S.C. § 1, such as employment contracts. *E.g.*, *In re Van Dusen*, 654 F.3d 838, 844 (9th Cir. 2011); *New Prime*, 139 S. Ct. at 537-38. Those cases do not show that courts must always decide claims that statutes bar arbitration. Those cases merely show that courts must decide whether the *FAA itself* bars arbitration, because the FAA deprives courts of the authority to compel arbitration in any case falling within

an FAA-exempt category. *New Prime*, 139 S. Ct. at 537-38; 9 U.S.C. §§ 1, 4. Appellants' other Supreme Court authorities (at 52, 55) are even less illuminating; the parties in those cases did not raise delegation provisions. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 223 (1987); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97-98 (2012).

Appellants' out-of-circuit cases are also far afield. Appellants cite a case involving a state statute barring *any* arbitration of any issue, but the objecting party there successfully framed the statute as a prohibition specifically on delegation clauses, as well as arbitration agreements. *See Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 456-57 (4th Cir. 2017) (cited at Br. 53). And *In re McZeal*, 2017 WL 2372375 (N.D. Ohio Bankr. May 31, 2017) (cited at Br. 53), contravenes this Court's and the Supreme Court's precedents; that court never considered whether the objecting party specifically challenged the delegation provision, or whether the delegation provision itself conflicted with the Bankruptcy Code. *See id.* at *9.

c. Appellants (at 55-57) alternatively contend that arbitrating this dispute would prevent them from effectively vindicating their Recovery Act

rights, rendering the arbitration agreement unenforceable. Under that effective-vindication (or "prospective waiver") theory, arbitration agreements are unenforceable if they prevent parties from pursuing federal claims in arbitration. *See Am. Express Co. v. Italian Colors*, 570 U.S. 228, 235-36 (2013).

But this Court just held that effective-vindication challenges do *not* impugn the validity of delegation clauses, and thus arbitrators should resolve those challenges. *See Brice*, 2021 WL 4203337, at *10-*11. *Brice* thus disagreed with many cases appellants cite (at 55). As *Brice* explains, just because an arbitration agreement might prevent appellants from effectively pursuing a federal claim in arbitration does not mean that *delegating that issue to the arbitrator* to decide would impair that federal claim. *Id.* at *4. Because arbitrators may "consider[] enforceability disputes based on federal law," parties' "rights to pursue their federal prospective waiver argument remains intact at this stage of the proceedings and the delegation provision is not facially a prospective waiver." *Id.* at *5.

So too here, allowing arbitrators to decide whether arbitration would prevent appellants from effectively pursuing their Recovery Act claims does not compromise those claims. Appellants (at 47-52) assert that the arbitration rules impermissibly shorten the Recovery Act's statute of limitations, hamper

access to discovery, constrain the availability of damages, and require confidentiality. Those objections are specious, *infra* p. 55-67, and in all events come nowhere close to showing that the delegation clauses are unenforceable.

To start, the permissibility of a shorter limitations period or damages limits are irrelevant at this stage. Appellants never explain what discovery they could need for the arbitrators to resolve their *arbitrability challenges*, which appellants pitch as purely legal arguments. Appellants (at 56-57) object to the fee-and-cost rule requiring them to deposit $50,000 in escrow to initiate arbitration. Why this refundable deposit is so unconscionable as to invalidate a delegation clause is not apparent. Appellants are sophisticated companies with extensive resources, and can recover that deposit (plus attorney's fees) if the arbitrator deems the dispute non-arbitrable.

Appellants' complaint that requiring confidentiality in arbitration prevents appellants from learning about similar cases and hurts their chances on the merits is also spurious. Appellants cannot plausibly claim some entitlement to compare notes about how different arbitral panels decide arbitrability questions. Regardless, any such argument would come nowhere close to the sky-high bar the Supreme Court has set for such procedural challenges. *See Italian Colors*, 570 U.S. at 236-37.

II. Even if Courts Must Decide Appellants' Challenges, the District Court Correctly Compelled Arbitration

Even if a court must resolve appellants' challenges, they are meritless. Appellants agreed to arbitration several times over. Sovereign immunity is not a bar to arbitration. Nor does the Recovery Act foreclose arbitration.

A. Appellants Agreed to Arbitrate This Dispute

Appellants agreed to arbitration immediately upon signing Provider Agreements with Caremark (or its predecessor, Advance PCS). Appellants (at 12-13) admit signing those Provider Agreements, and admit their validity. Those Provider Agreements expressly incorporate the Provider Manual in effect at the time. *E.g.*, 3-ER-152. And every Manual contained clear and unmissable arbitration provisions. *Supra* p. 14-15, 25. As the Fifth Circuit observed when analyzing these Manuals, "the arbitration provision is clearly marked, both in the Provider Manual's table of contents and via a boldface heading later in the agreement, and appears in the same font and size as other sections of the parties' agreement." *Crawford*, 748 F.3d at 265. Adding icing to the cake, by signing the Provider Agreement, appellants expressly certified that they had indeed received these Manuals. *E.g.*, 3-ER-152-53.

Thereafter, appellants kept agreeing to arbitrate. They all agreed to the process for amending Provider Manuals because the Provider Agreement

incorporated the Manual's amendment provision, too. *Supra* p. 14-15. Then appellants followed that process and agreed to multiple amended Manuals, all of which included arbitration agreements. Even just looking post-2014, appellants concededly received four updated Manuals, then submitted millions of dollars in claims each time—fulfilling the exact requirements that every Manual tells pharmacies would qualify as assent. If appellants had concerns about any amendments, they could have negotiated. Instead, since 2014, appellants have submitted some $173 million in reimbursement claims to Caremark pursuant to the terms of these Manuals. 2-ER-109. It is too late for appellants to selectively disavow only the arbitration and amendment provisions—but not the parts of the deal they like.

B. Appellants' Sovereign-Immunity Objections Are Meritless

Appellants throw up a litany of objections to arbitrating. Virtually all of these arguments are variations on the theme that appellants did not waive their sovereign immunity with sufficient clarity. The exception is appellants' denunciation of the Provider Manual amendment process as an impermissible unilateral modification that cannot bind anyone, sovereign or not. All of these objections miss the mark.

1. ***Tribal Sovereign Immunity Generally.*** Appellants (at 30-36) contend that, as tribal sovereigns, they are "not bound to arbitrate absent a showing that [the tribe] clearly and unequivocally agreed to arbitration." But this case does not implicate sovereign immunity, which appellants aptly describe as "[i]mmunity *from suit*." Br. 38 (emphasis added). As appellants note, "Suits *against* Indian tribes are … barred by sovereign immunity absent a clear waiver." Br. 30-31 (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)) (emphasis added)). And "an Indian tribe is *subject to suit* only where Congress has authorized the suit or the tribe has waived its immunity." Br. 29 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (emphasis added)). Thus, tribal sovereign immunity is "an immunity *from suit*" that "may be viewed as an affirmative defense." *Pistor*, 791 F.3d at 1110-11 ((emphasis added). Appellants' authorities (at 30-31, 41-42) thus all involve tribes asserting immunity to avoid *defending* against claims that threaten them with money damages or prospective injunctive relief in resolving liability.

Here, however, the Chickasaw Nation is the *plaintiff* seeking millions of dollars in damages against Caremark. Appellants are in the driver's seat, voluntarily pressing those claims with no risk of money damages or an

injunction against them if they lose. Appellants sued in their preferred venue: federal court in Oklahoma. Telling appellants they must bring their claims in arbitration instead does not convert appellants into de facto defendants; appellants remain the masters of their complaint no matter the forum, and appellees have made no claims against appellants. Appellants cite no case in which a tribe has invoked sovereign immunity as a plaintiff. This Court should not allow appellants to transform sovereign immunity from a shield against liability into a forum-shopping sword to cut out disfavored forums for bringing suits for tactical reasons.

2. ***No Express Waiver or Signed Arbitration Agreement***. Appellants (at 30-31) contend that tribes waive immunity only by assenting to arbitration in some particularly "clear and unequivocal" manner, like signing an agreement that expressly features an arbitration provision. Br. 29-31, 41-42. Appellants are incorrect.

First, appellants misapprehend the relevant standard. A tribe's waiver of immunity must be "clear" from the *language* of the arbitration agreement. *C&L Ents.*, 532 U.S. at 418; *accord, e.g.*, *Cosentino v. Pechanga Band of Luiseno Mission Indians*, 637 F. App'x 381, 382 (9th Cir. 2016) (cited at Br. 31). The agreement need not expressly waive sovereign immunity to satisfy

this standard; indeed, "no case has ever held that" a waiver must, "to be deemed explicit," use the words "'sovereign immunity.'" *C&L*, 532 U.S. at 420. When tribes enter into an agreement that clearly provides for arbitration, that language is clear enough to waive immunity. *See id.* at 418. By contrast, ambiguous language in an agreement—like provisions that simultaneously seem to waive immunity, yet include language proclaiming "No Waiver of Sovereignty or Jurisdiction Intended"—is insufficiently clear to waive tribal immunity. *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1009 (10th Cir. 2015) (cited at Br. 31).

But it does not follow that the tribe must *assent* to an agreement whose terms clearly waive immunity in some particularly express manner. *Contra* Br. 30-31. Appellants (at 35-36) contend that tribes cannot waive immunity by signing an agreement that incorporates an arbitration provision by reference, as appellants' Provider Agreements did here. But in *C&L,* the Supreme Court rejected the argument that the "four corners of the contract" excluded AAA rules, which the contract incorporated by reference. 532 U.S. at 418 n.1. The Court instead relied on AAA rules to find that the tribe waived immunity, explaining that those rules "are not secondary interpretive aides … they are prescriptions incorporated by the express terms of the agreement itself." *Id.*

C&L thus confirms that whether drafters expressly include an arbitration provision in the signed document or incorporate an arbitration provision by reference, the result is the same: clear arbitration provisions waive tribal immunity. Here, by signing a Provider Agreement that expressly incorporated the Provider Manual and its arbitration provisions, appellants waived any immunity they could assert.

Appellants (at 41-42) also wrongly assert that tribes cannot waive immunity through conduct, i.e., by assenting to Provider Manual amendments by submitting claims after receiving amended Provider Manuals with arbitration provisions. Tribes can and do waive immunity purely through conduct when, as here, the import of the conduct is sufficiently clear. *See, e.g.*, *Pistor*, 791 F.3d at 1111 ("A defendant may …be found to have waived sovereign immunity if it does not invoke its immunity in a timely fashion and takes actions indicating consent to the litigation."); *Oglala Sioux Tribe v. C&W Enters., Inc.*, 542 F.3d 224, 231 (8th Cir. 2008) (tribe waived immunity by not objecting to arbitration demand and instead raising arbitral counterclaims).

So too here, appellants submitted claims knowing and agreeing from the start how the Provider Manual amendment process would work, and what counts as assent. That is no mere "course-of-dealing argument," *cf.* Br. 41-42.

Rather, appellants unambiguously agreed to this amendment process, then engaged in conduct that they knew and agreed would qualify as assent.

3. ***No Authorized Waiver of Immunity***. Appellants (at 43) object that, "as a matter of Chickasaw Nation law," only the Chickasaw Nation Governor or Legislature can waive immunity. But neither appellants' brief nor the declaration they cite (2-ER-18–20) identifies any provision of Chickasaw law actually restricting waiver of immunity this way. Nor do the Chickasaw Constitution or Code appear to contain such a provision. Chickasaw Nation, Office of the Governor, Chickasaw Code, https://tinyurl.com/59npnc7b; Constitution of the Chickasaw Nation, https://tinyurl.com/4yevm2zr. That is a fatal shortcoming, because cases accepting this lack-of-authorized-waiver argument have rested on tribal laws that expressly provide in advance that only designated tribal officials have authority to waive immunity. *E.g.*, *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1288 (11th Cir. 2001).

If tribes wish to restrict their immunity this way, they must enact laws in advance doing so, rather than springing undisclosed limitations on contractual performance years later, as appellants did here. Nation representatives Chris Anoatubby (then Chief of Pharmacy Services for the Chickasaw Nation Department of Health), and Michelle Sparks (Collections

Coordinator for the Department of Health), signed the Provider Agreements as "authorized agent[s]." 3-ER-152, 3-ER-168. Appellants, all sophisticated entities, seemingly agree (at 12-13) that these signatories could bind the Chickasaw Nation for all other purposes. Indeed, Caremark provided services to appellants based on appellants' unqualified contractual commitments, including appellants' commitment to arbitrate disputes. Appellants never substantiate why these signatories nonetheless lacked authority to waive appellants' immunity.

4. ***No Proof of Delivery for Pre-2014 Manuals***. Next, appellants (at 32) object there is no proof they received "Provider Manuals containing an arbitration provision" before 2014. It is unclear how this argument implicates tribal sovereign immunity. Regardless, this point is untrue. Appellants expressly agreed when signing the Provider Agreement that "[b]y signing below," they "acknowledge[] receipt of the Provider Manual." 3-ER-152; 3-ER-148. At a minimum, appellants agreed to the arbitration provisions in the 2003, 2005, and 2010 Manuals when signing their respective Provider Agreements. *Supra* p. 14-15, 25.

Indeed, it is hard to fathom how appellants could have operated under the Provider Agreement for almost two decades without reviewing the Manual

from the get-go and applying updated versions. Without the Manual, appellants would have no idea what laws they agreed to certify they were following, how to submit claims and how reimbursement formulae work.

Finally, even if appellants did not receive revised Manuals before 2014, appellants' claims only date to 2014. Appellants undisputedly received all versions of the Manual applicable to those claims and submitted those claims after receipt, fulfilling both conditions of the amendment process.

5. ***Different Terms in Earlier Arbitration Provisions***. Appellants (at 32-34) acknowledge that the 2004, 2007, 2009, and 2011 Provider Manuals all contain arbitration provisions, but object that their terms differ from the current 2020 Manual. But if appellants agreed to those earlier provisions, they agreed to arbitration and waived whatever immunity they might assert.

Appellants (at 32-33) also mischaracterize these differences, which have no obvious bearing on immunity. Pre-2014 Provider Manuals *do* contain delegation clauses. *Supra* p. 25. And it is irrelevant whether the arbitration provisions mandate arbitrating disputes "in connection with" the Provider Agreement or use some broader language, *contra* Br. 33. This dispute arises "in connection with" the Provider Agreement because appellants' Recovery Act claim is, at bottom, a claim that the reimbursement appellants received

pursuant to the Provider Agreement is somehow insufficient under the Recovery Act, 25 U.S.C. § 1621e(a). The other distinctions appellants raise (like purported differences in discovery and damages rules) likewise do not refute that appellants agreed to clear arbitration provisions.

6. ***Amendments Must Be Initialed***. Appellants (at 34-35) contend that they never clearly waived immunity because they never initialed changes to Provider Manuals, as the Provider Agreement and Network Enrollment Forms purportedly require. But all the Provider Agreement states is that "Any changes to this agreement must be initialed." 3-ER-148; *accord* 3-ER-155 ("No alterations to this Network Enrollment Form shall be binding … unless initialed"). Appellants seemingly suggest this language supplants the Provider Manual amendment process. But "[w]hen contract provisions appear to contradict each other," courts must "try to harmonize all parts of the contract by a reasonable interpretation in view of the entire instrument." *Wilshire Ins. Co. v. S.A.*, 227 P.3d 504, 506 (Ariz. Ct. App. 2010). Here, the provisions harmonize sensibly by providing complementary amendment processes. If nothing else, the Provider Manual governs amendments *to the Provider Manual* itself, *see, e.g.*, 3-ER-329.

7. ***Agreements With Different Entities***. Appellants (at 36) claim that because Caremark did not acquire appellees Aetna, Inc. and Aetna Health, Inc. until 2018—after appellants signed Provider Agreements—appellants at least did not clearly agree to arbitration with these appellees. That argument is doubly incorrect.

First, all Provider Manuals from 2014 on expressly mandate arbitration of claims against not only Caremark, but also all "Caremark's current, future, or former employees, parents, subsidiaries, affiliates, agents, and assigns," 3-ER-330, including the Aetna entities. Second, even absent this express language, non-signatories like the Aetna entities can compel arbitration under principles of equitable estoppel where, as here, "the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided." *Sun Valley Ranch 308, Ltd. P'ship ex rel. Englewood Props., Inc. v. Robson*, 294 P.3d 125, 134-35 (Ariz. Ct. App. 2012); *accord Crawford*, 748 F.3d at 260-62.

Appellants (at 37) similarly object that three appellant pharmacies signed agreements with "AdvancePCS Network," not Caremark. *Cf.* Br. 37-

38. But Caremark acquired AdvancePCS in 2004, then sent all pharmacies (including appellants) a notice informing them that the AdvancePCS Provider Agreement would continue in force as the "Caremark Provider Agreement." 3-ER-135. Appellants (at 37-38) object that the notice did not mention arbitration or a waiver of tribal immunity, but the notice did not need to do so. By agreeing to the AdvancePCS Provider Agreements, appellants agreed to the operative Provider Manuals, including the operative amendment and arbitration provisions. And by receiving later Provider Manuals and submitting reimbursement claims to Caremark, appellants assented to those revisions, including updated arbitration provisions.

At bottom, appellants' objections to which Caremark entities signed the Provider Agreements prove too much. If the Provider Agreements and Provider Manuals never applied to the Aetna entities or if the AdvancePCS Provider Agreement did not carry over to Caremark, appellants have no basis for submitting millions of dollars in reimbursement against the Aetna entities or to Caremark after the 2004 AdvancePCS acquisition. Yet appellants, unsurprisingly, do not seek to unwind those parts of the parties' agreement. Indeed, appellants acknowledge that they have operated under the terms of the Provider Agreement and Provider Manual. *See, e.g.*, 2-ER-84–85.

8. ***Insufficient Record Evidence of Some Provider Agreements.*** Appellants (at 37-38) say there is insufficient evidence that three of the five appellant pharmacies—Ardmore, Tishomingo, and the Chickasaw Nation Online Pharmacy Retail Center—agreed to Provider Agreements incorporating Provider Manuals, because the 2003 agreements that these appellants concededly signed are not in the record.

But Caremark submitted a declaration from executive Stephanie Harris confirming that those agreements would have contained the same terms as the later Provider Agreements in the record. 2-ER-103–104. Appellants do not deny this fact; they just deem the declaration too speculative to support finding a waiver of sovereign immunity. Br. 37. But courts routinely credit declarations unless the declaration "provide[s] no indication how [the declarant] knows [the] facts to be true" or are "flatly contradicted by the declarant's prior testimony"—defects not present here. *See SEC v. Phan*, 500 F.3d 895, 909-10 (9th Cir. 2007).

Despite diligent review, Caremark was unable to locate the 2003 AdvancePCS Provider Agreements nearly two decades later. But appellants presumably have them, and if the terms differed in some material way from later Provider Agreements, appellants had every incentive to say so. Further,

the two later Provider Agreements in the record between Caremark and appellants Purcell and Chickasaw Nation Medical Center, corroborate this declaration by illustrating Caremark's consistent practice of incorporating the Manual into the Provider Agreement. 3-ER-147, 3-ER-152.

9. ***Challenges to the Amendment Process***. Finally, appellants (at 35-36) raise one argument that they distinguish from sovereign-immunity-related challenges: they challenge Caremark's amendment process as unilateral contract modifications that would be invalid as to any parties. That argument does not warrant reversing the district court's order compelling arbitration, since appellants still would have agreed to arbitration under the *original* Manuals incorporated into the Provider Agreements they signed. "[A] provision permitting the unilateral amendment of any term of contract does not, without more, render a separate provision, such as an arbitration provision unenforceable on procedural grounds." *Paduano v. Express Scripts, Inc*, 55 F. Supp. 3d 400, 417 (E.D.N.Y. 2014) (analyzing Caremark Provider Agreement); *accord* 3-ER-152 (Provider Agreement severability clause).

Regardless, Arizona law—which appellants agree applies, *see* Br. 36—only prohibits "one party to a contract alter[ing] its terms without the assent of the other party." *Yeazell v. Copins*, 402 P.2d 541, 545 (Ariz. 1965). But

appellants *agreed* in advance to this amendment process. They all signed Provider Agreements incorporating Provider Manuals, and those Manuals all spelled out how successive Manuals could be amended. *Supra* p. 14-15. Under Arizona law, "[i]f a party consents to . . . incorporation by reference, the party is presumed to know its full purport and meaning." *Edwards v. Vemma Nutrition*, 2018 WL 637382, at *3 (D. Ariz. Jan. 31, 2018).

Further, appellants inaccurately portray the amendment process as unilateral. Under every version of the Provider Manual, amendments to the Manual are effective only if (1) pharmacies receive the new edition and (2) manifest assent by submitting claims thereafter. *Supra* p. 14-15; *see* 3-ER-132, 137, 140, 142, 144, 320, 323, 326, 329. Thus, Caremark must "give notice of the terms of any amendment and the effective date. . . . Then, if a pharmacy does not agree to the new terms, it may simply reject the amendment by ceasing to submit claims." *Grasso Enters., LLC v. CVS Health Corp.*, 143 F. Supp. 3d 530, 538 (W.D. Tex. 2015).

Appellants were free to object to changes to the Provider Manual and to propose adjusted terms, but declined to do so. Instead, appellants followed the procedures that their original agreement—as well as every successive edition of the Provider Manual—identified as manifesting assent to the

changes. Under Arizona law, those steps qualify as valid assent. *E.g.*, *W. Va. CVS Pharm., LLC v. McDowell Pharm., Inc.*, 238 W. Va. 465, 475 (2017) (Provider Manual's amendment provision is "enforceable under Arizona law").

Based on these features of the amendment process, numerous courts interpreting these exact contracts have held that appellees "do not have the ability to unilaterally amend the Provider Manual and bind pharmacies to those amendments." *Grasso,* 143 F. Supp. 3d at 538 (enforcing arbitration agreement at issue). At least *ten* courts have uniformly concluded that the Provider Agreement validly incorporates the arbitration agreement within the Provider Manual by reference and binds the parties to that contract.[3]

[3] *See, e.g.*, *Bowie's Priority Care Pharm., L.L.C. v. CaremarkPCS, L.L.C.*, 2018 WL 1964596 (N.D. Ala. Apr. 26, 2018); *W. Va. CVS Pharm., LLC v. McDowell Pharm., Inc.*, 238 W. Va. 465 (W. Va. 2017); *RX Pros, Inc. v. CVS Health Corp.*, 2016 WL 316867 (W.D. La. Jan. 26, 2016); *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249 (5th Cir. 2014); *Grasso Enters., L.L.C. v. CVS Health Corp.*, 143 F. Supp. 3d 530 (W.D. Tex. 2015); *Hopkington Drug, Inc. v. CaremarkPCS, L.L.C.*, 77 F. Supp. 3d 237 (D. Mass. 2015); *Uptown Drug Co., Inc. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172 (N.D. Cal. 2013); *Burton's Pharm., Inc. v. CVS Caremark Corp.*, 2015 WL 5430354 (M.D.N.C. Sept. 15, 2015); *Medfusion Rx, LLC v. Aetna Life Ins. Co.*, 2012 U.S. Dist. LEXIS 191045 (S.D. Miss. Dec. 21, 2012); *CVS Pharm., Inc. v. Gable Fam. Pharm.*, 2012 U.S. Dist. LEXIS 191047 (D. Ariz. Oct. 22, 2012); *Muecke Co., Inc. v. CVS Caremark Corp.*, 2012 WL 12535439 (S.D. Tex. Feb. 22, 2012).

C. The Recovery Act Does Not Bar Arbitration

The Recovery Act, 25 U.S.C. § 1621e, provides that when individuals have health-insurance benefits that cover certain health services, but tribes end up providing those services instead, tribes can sue insurers, PBMs, or others to recover "reasonable charges billed … in providing health services." *Id.* § 1621e(a). The Recovery Act further prohibits contracts that "prevent or hinder the right of recovery … of an Indian tribe." *Id.* § 1621e(c). The Recovery Act also authorizes "civil action[s] for injunctive relief and other relief" to effectuate the Act's provisions. *Id.* § 1621e(e)(1)(B).

Appellants contend that, even if they agreed to arbitrate this dispute, the Recovery Act supersedes that agreement. Appellants alternatively contend that some combination of the Recovery Act and the so-called "effective vindication" doctrine prevent enforcing the arbitration agreement here because arbitration would purportedly hamper appellants' chances of success on the merits of their Recovery Act claims. Neither argument should bar arbitration here.

1. The Recovery Act does not foreclose arbitration of Recovery Act claims, *contra* Br. 43-52. The FAA commands that courts "rigorously … enforce arbitration agreements according to their terms." *Epic Sys. Corp. v.*

Lewis, 138 S. Ct. 1612, 1621 (2018). The Supreme Court has repeatedly held that later-enacted statutes (like the Recovery Act) supersede the FAA's mandate and displace arbitration only if Congress "clearly expressed . . . [an] intention" to do so. *See id.* at 1624. Thus, if a later-enacted statute "does not express approval or disapproval of arbitration" or "even hint at a wish to displace the Arbitration Act," it is virtually certain that the arbitration agreement remains enforceable. *Id.* at 1624. The Supreme Court "has rejected *every* . . . effort" to "conjure conflicts between the Arbitration Act and other federal statutes." *Id.* at 1627 (collecting cases).

Appellants do not even try to satisfy this exacting standard; the Recovery Act undisputedly contains no such express language. Instead, appellants (at 44) contend that ordinary statutory-interpretation principles do not apply "in cases involving Indian law," and that the Recovery Act should "be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (quoting *Montana v. Blackfleet Tribe of Indians*, 471 U.S. 759, 766 (1985)). But the Supreme Court has declined to apply this canon when it conflicts with the strong and overriding rule disfavoring implied repeals. *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

Appellants (at 43) fleetingly suggest that by authorizing tribes to "enforce the right of recovery" by "instituting a separate civil action," 25 U.S.C. § 1621e(e)(1)(B), Congress barred all arbitration of Recovery Act claims. But the Supreme Court has often held that statutes providing for private actions do not thereby supplant the FAA. *See Epic Sys.*, 138 S. Ct. at 1627 (collecting cases). And the Recovery Act does not mention arbitration, "an important and telling clue that Congress has not displaced the [FAA]." *Id.* at 1627. Further, the Recovery Act states that a tribe "*may* enforce the right of recovery" by filing civil actions, not that tribes *must* choose only that route. *See* 25 U.S.C. § 1621e(e)(1)(B).

Appellants (at 45) also press an as-applied argument that the Recovery Act bars enforcement of the arbitration agreements at issue. Appellants (at 45) point to 25 U.S.C. § 1621e(c), which prohibits "any contract, insurance or health maintenance organization policy," as well as any healthcare plan, from "prevent[ing] or hinder[ing] the right of recovery of … an Indian tribe." *Id.* Appellants (at 46-52) assert that the arbitration agreement here "hinder[s]" appellants' "right of recovery" by prescribing procedures that undercut appellants' purported "procedural rights" under the Recovery Act.

That argument misreads the Recovery Act. The "right of recovery" to which the Recovery Act refers is "the right to recover from an insurance company … or any other responsible or liable third party … the reasonable charges billed by … an Indian tribe … in providing health services." 25 U.S.C. § 1621e(a). Section 1621e(a)'s title ("Right of Recovery") underscores the point. Appellants are thus wrong (at 47) that "procedural rights" that the Recovery Act identifies in other provisions "are themselves part of 'the right of recovery' that Congress sought to protect."

Put simply, the arbitration agreement here is not a prohibited contract that "prevents or hinders" tribes from claiming the recovery terms the Act prescribes. That agreement does not prohibit arbitrating Recovery Act claims or offer only part of the "reasonable expenses" that the statute authorizes. *See* 25 U.S.C. § 1621e(a). Arbitrators are equally capable as courts to resolve such federal statutory claims. *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

2. Appellants (at 46-52) alternatively contend that procedural rules in arbitration *indirectly* undermine their chances on the merits of their Recovery Act claims. In appellants' telling, the arbitration agreement is unenforceable because the arbitration rules purportedly "substantially rais[e] the cost of

litigation and hamper[] the Nation's ability to prove its case." Br. 47. To make this argument, appellants meld together the word "hinder" in the Recovery Act with an FAA rule—the "effective vindication" doctrine—whereby "an arbitration agreement that waives a party's 'right to pursue [federal] statutory remedies' is unenforceable." *Brice*, 2021 WL 4203337, at *4.

This theory also fails. As *Brice* recently explained, the Supreme Court has drawn "a distinction between agreements that make it more difficult *to prove* a statutory remedy and those that eliminate the right *to pursue* that remedy." *Id.* And the Supreme Court has "implied that the doctrine's primary focus is on those agreements that completely eliminate the right to pursue a statutory remedy." *Id.* The Supreme Court has never found a violation of the effective-vindication doctrine, and has suggested that any procedural barrier would have to rise to the level of "mak[ing] access to [arbitration] impracticable." *Italian Colors*, 570 U.S. at 236.

Thus, despite objections that various procedural rules prevented plaintiffs from "effectively vindicating" federal rights, the Supreme Court has upheld discovery limitations, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991), hefty fees as a prerequisite to arbitration, *Italian Colors*, 570 U.S. at 235-36, waivers of class-litigation rights, *id.*, and forum-selection

clauses requiring international arbitration, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 532-36 (1995). None of the arbitration rules that appellants target come remotely close to de facto bars to proceeding in arbitration at all. And if any particular provision came too close to the line, the Provider Agreement and Manuals contain severability clauses. *E.g.*, 3-ER-147 (Provider Agreement); 3-ER-330 (Manual). So the result would be to sever individual provisions, not to refuse to enforce the whole arbitration agreement.

Statute of Limitations. With respect to "all other disputes" not specified, including Recovery Act claims, the 2020 arbitration provision prescribes a six-month filing deadline "from the date of the issuance of the Dispute Notice," which must be filed "within six (6) months from the date on which the facts giving rise to the dispute first arose." 3-ER-330. Appellants (at 47) claim this deadline prevents them from effectively vindicating their rights, citing the Recovery Act's six-year limitations period for civil "actions commenced under this section," 25 U.S.C. § 1621e(j). But this requirement does not purport to displace the Recovery Act's statute of limitations.

Even if the arbitration clause did shorten the limitations period, parties may contract for shorter limitations periods unless the statute expressly prohibits reducing the default limitations period or the agreed-upon period is

"unreasonably short." *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 109 (2013). Here, appellants offer no argument why the six-month period they agreed to is "unreasonably short." Nor do they explain why a six-month filing deadline would make arbitration impracticable for them. Appellants are sophisticated pharmacies with immediate knowledge of claims denials and every incentive to challenge purportedly improper denials as soon as possible.

Appellants (at 47) cite *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247–48 (9th Cir. 1994), *as amended* (Mar. 13, 1995) and *Anderson v. Comcast Corp.*, 500 F.3d 66, 77 (1st Cir. 2007). But *Graham Oil* concerned a shorter, 90-day limitations period. 43 F.3d at 1247-48. And *Anderson* invalidated an arbitration provision for conflicting with a *state*-law statute of limitations, 500 F.3d at 76. This Court has since held that federal courts "have no earthly interest … in vindicating a state law" that conflicts with the FAA, *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 936 (9th Cir. 2013).

Fee and Cost Provisions. The arbitration agreement provides that the losing party will cover all arbitration costs and the other side's "reasonable attorneys' fees." 3-ER-330. Further, the party initiating arbitration will put at least $50,000 in escrow to cover any loss. 3-ER-331. Appellants (at 48)

object that these provisions "supersed[e] the Recovery Act's fee and cost provisions," which reward prevailing plaintiffs but not prevailing defendants.

But the arbitration agreement's fee-and-cost provisions are commonplace, and hardly thwart arbitration of Recovery Act claims. The Supreme Court has held that even an arbitration agreement requiring parties to bear expenses greater than the ultimate amount likely to be recovered does not "constitute the elimination of the *right to pursue* that remedy." *Italian Colors*, 570 U.S. at 236; *see also Vimar*, 515 U.S. at 532, 536. It strains credulity that these standard administrative costs would deter appellants from pursuing Recovery Act claims totaling hundreds of millions of dollars.

Appellants (at 48) decry fee-shifting provisions as substantively unconscionable. But appellants are sophisticated players that pay out millions of dollars in claims annually. And, unlike in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178 (9th Cir. 2003) (cited at Br. 48), the cost and fees provisions apply equally to both parties; if appellants win, they bear no costs at all.

Discovery. The arbitration agreement limits discovery "to documents and information for which there is a direct, substantial, and demonstrable need," among other limitations. 3-ER-330. Appellants (at 49) deem these procedures uniquely plaintiff-unfriendly, but concede that "the Supreme

Court has held that limitations on discovery do not necessarily render an arbitration provision invalid." Br. 49 (citing *Gilmer*, 500 U.S. at 31). That is putting it mildly: as other courts of appeals have explained, "the Supreme Court has … foreclosed limited discovery as a ground for opposing the enforcement of an arbitration clause." *Kristian v. Comcast Corp.*, 446 F.3d 25, 42 (1st Cir. 2006). Just because "arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009).

Anyway, appellants never reveal why the discovery procedures here hamper their Recovery Act claims. Arbitrators can order discovery of any document that is actually necessary for appellants to prove their claim, and can order depositions beyond a corporate representative in "exceptional circumstances." 3-ER-330. Appellants do not even explain what kind of discovery they need here, let alone how it "eliminate[s] the right *to pursue*" a Recovery Act claim. *Brice*, 2021 WL 4203337, at *4. Appellants' authorities (at 49-50) are equally unilluminating. Their cited cases void discovery limitations as unconscionable—*not* because the limitations prevented vindication of federal rights. Those cases generally involve more serious restrictions on discovery, *e.g.*, *Ostroff v. Alterra Healthcare Corp.*, 433 F.

Supp. 2d 538, 545-46 (E.D. Pa. 2006) (prohibiting *any* fact depositions and prescribing unequal timelines the parties' expert depositions). Some do not rest on discovery restrictions at all. *E.g.*, *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 619-20 (D.S.C. 1998) (refusing to compel arbitration because of separate provision making the arbitration a "sham arbitration").

Damages. Appellants (at 50) incorrectly object that the arbitration agreement's damages provisions would purportedly prevent appellants from recovering the "highest amount" a third party would pay for healthcare services under 25 U.S.C. § 1621e(a). But the rules here do no such thing: arbitrators may not "award indirect, consequential, or special damages of any nature … lost profits or savings, punitive damages, injury to reputation, or loss of customers or business, *except as required by Law*." 3-ER-330 (emphasis added).

Appellants (at 50) also object that the arbitration agreement bars punitive damages, but never explain why punitive damages are essential for litigants to vindicate their rights under the Recovery Act—especially since the "right of recovery" under the Recovery Act does not mention such damages. *See* 25 U.S.C. § 1621e(a). If punitive damages *were* "required by Law," appellants could seek them in arbitration. 3-ER-330.

Appellants' authorities (at 50) pertain to *federal* statutes that expressly provide for punitive damages, and are thus inapposite since the Recovery Act contains no analogous provision. *See Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478-79 n.14 (5th Cir. 2003) (Title VII); *Kristian*, 446 F.3d at 44, 47–48 (Clayton Act); *In re Zetia (Ezetimibe) Antitrust Litig.*, 2018 WL 4677830, at *7–8 (E.D. Va. Sept. 6, 2018) (Clayton Act); *Gorman v. S/W Tax Loans, Inc.*, 2015 WL 12751710, at *5 (D.N.M. Mar. 17, 2015) (Truth in Lending Act).

Confidentiality Provisions. Finally, appellants (at 51) object that the arbitration agreement's confidentiality provisions "preclude[] the Nation from learning the results of other proceedings involving similar claims" and thus hamper its chances. But appellants' citations (at 51-52) do not support appellants' sweeping attack. *Anderson v. Regis Corp.*, 2006 WL 8457208, at *6 (N.D. Okla. Apr. 26, 2006), deemed a challenge to distinguishable confidentiality rules premature. Meanwhile, *Longnecker v. Am. Exp. Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014) and *DeGraff v. Perkins Coie LLP*, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012), did not involve allegations that confidentiality rules would prevent effective vindication of federal rights. Rather, those cases held confidentiality provisions that lopsidedly benefited employers unconscionable under state law.

The paucity of cases supporting appellants is unsurprising. It is unfathomable that the confidentiality provision here would ever effectively bar arbitration of federal claims. Confidentiality is a hallmark of most arbitration rules. *E.g.*, American Association of Arbitrators, Commercial Mediation Procedures M-10. Were this a valid basis for refusing to honor arbitration agreements, no agreement would be safe.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order compelling arbitration.

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DATED: October 1, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ *Sarah M. Harris* **Date** October 1, 2021
(use "s/[typed name]" *to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that 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 on October 1, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: October 1, 2021

Respectfully submitted,

By: /s/ *Sarah M. Harris*
SARAH M. HARRIS