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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Chickasaw Nation ("the Nation"), a sovereign and federally recognized Native American tribe, may not be sued as a defendant in the District of Arizona to force it into an arbitration proceeding to which it did not "clear[ly]" and "unequivocally" agree. *See C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001). "[T]he FAA does not require parties to arbitrate when they have not agreed to do so." *Chamber of Commerce of the U.S. v. Bonta*, __F.4th __, No. 20-15291, 2021 WL 4187860, at *2 (9th Cir. Sept. 15, 2021) (citation omitted).

Accordingly, the district court erred by compelling arbitration without even deciding whether the Nation had assented to the arbitration agreement and instead deferring that question to the arbitrator. Further, the district court failed to consider whether the Recovery Act – the federal statute under which the Nation has sued in Oklahoma – displaces any agreement to arbitrate.

A central flaw cuts across the arguments in the Caremark Appellees' Brief: Caremark fails to acknowledge the Nation's sovereign status. It treats this case as though it involved private parties to an arbitration agreement, relying exclusively on cases enforcing its arbitration agreement against *private persons*. Appellees' Br. 54 n.7. It relies on a theory of constructive assent – that the Nation "assent[ed]" to arbitration "by receiving the updated version [of the Provider Manual] and

continuing to submit claims," Appellees' Br. 2 – that does not apply to sovereign entities. And Caremark would invoke the delegation clause to force the Nation to litigate disputed threshold issues in an arbitral forum to which it did not consent, in violation of its immunity.

Caremark asks this Court to reach an issue the district court did not decide – whether the Nation "clear[ly]" and "unequivocally" agreed to arbitration, as required by *C&L Enterprises*, 532 U.S. at 418. If this Court reaches that issue, it should hold the standard of *C&L Enterprises* cannot be met. It is undisputed that the documents the Nation's pharmacies actually signed do not contain the word "arbitration." Rather, Caremark slipped in an arbitration provision as one small portion of an unsigned, separate "Provider Manual" running to nearly 150 pages, for which Caremark has no proof of delivery until 2014 – long after the Nation's pharmacies signed their initial contracts in July 2003, December 2005, and August 2010. Moreover, the Nation never authorized any person to sign any relevant agreement waiving immunity. 2-ER-19.

Caremark claims the Nation's position undermines arbitration agreements involving private parties. Appellees' Br. 5. Not so. The heightened standard of C*&L Enterprises* and the special provisions of the Recovery Act apply uniquely to Native American tribes. Caremark does not cite any case involving enforcement of a comparable arbitration provision against a sovereign entity. Indeed, Caremark's

own documents show federal claims under the Recovery Act are not subject to arbitration, 3-ER-290, and the Recovery Act gives the Nation the same reimbursement rights as the federal government. Appellants' Opening Br. 9 & n.4. Just as exempting federal claims from arbitration does not undermine the arbitral scheme applicable to private pharmacies, neither would arbitration policy be imperiled by recognizing that Caremark has failed to meet the "clear" and "unequivocal" standard of *C&L Enterprises* and that the Recovery Act displaces any arbitration agreement here.

Sophisticated parties choosing to contract with sovereigns are well aware of immunity principles, the need for clear and unequivocal waivers, and the appropriate procedures for ensuring enforceable agreements. The shortcuts that Caremark seeks would "would undermine, not advance, the federal policy favoring alternative dispute resolution." *Hooters of America, Inc. v. Phillip*s, 173 F.3d 933, 941 (4th Cir. 1999).

By Order of August 20, 2021, this Court has already granted a stay of the district court's judgment. This Court should now reverse.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DELEGATING THE DISPUTED THRESHOLD ISSUES TO AN ARBITRATOR.

A. The District Court's Application of the Delegation Clause Violated the Nation's Sovereign Immunity.

Forcing the Nation to appear in arbitration to contest the threshold issues is itself an affront to sovereign immunity.

Caremark denies there is anything problematic about delegating to an arbitrator the "threshold question" of whether the Nation agreed to arbitration. Appellees' Br. 31. But sovereign immunity "'is an immunity from suit'" – not merely from entry of adverse judgments – and protects tribes from being haled into a forum without their consent. *Pistor v. Garcia*, 791 F.3d 1104, 1110-11 (9th Cir. 2015) (citation omitted). Caremark concedes "[t]ribal sovereign immunity is a defense to being subjected to proceedings in a particular forum, such as arbitration." Appellees' Br. 30. Requiring the Nation to litigate its immunity before an arbitrator is an independent violation of that immunity.

Caremark protests that immunity "does not apply when, as here, the tribe is the plaintiff." Appellees' Br. 21. But the Nation is not the plaintiff here. Caremark brought this action against the Nation in the District of Arizona and obtained an order compelling the Nation to arbitrate. A tribe may not be compelled to arbitrate absent a "clear" waiver of immunity. *Cosentino v. Pechanga Band of Luiseno Mission Indians*, 637 F. App'x 381, 382 (9th Cir. 2016) (quoting *C&L Enterprises*).

Caremark's petition sought an order "compelling Respondents to pursue in arbitration any dispute with the Petitioners relating to the claims in the complaint."

2-ER-37-38. Such relief is effectively the kind of "prospective injunctive relief" that Caremark admits triggers immunity. Appellees' Br. 41. And the district court's order stated it "will compel arbitration" and "Petitioners' Petition for Order to Compel Arbitration (Doc. 1) is granted." 1-ER-8. If the Nation violates that order, it is subject to the court's enforcement.

The Nation's separate suit as plaintiff in federal district court in Oklahoma does not eliminate its immunity in this case. *See Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1010 (10th Cir. 2015) (Gorsuch, J.) (immunity is a sovereign's "'personal privilege which it may waive at pleasure'") (citation omitted); *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of The Mississippi in Iowa*, 609 F.3d 927, 945-46 (8th Cir. 2010) (tribe's tort suit in one forum (tribal court) did not waive immunity from separate arbitration proceeding); *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 955 (9th Cir. 2000) (tribe's filing suit as plaintiff in tribal court "was insufficient to waive sovereign immunity in federal court"). The Nation's Oklahoma complaint states that "[t]he Nation consents to *this Court's* exercise of jurisdiction over it for the purposes of *this suit*." 2-ER-53 (emphasis added). "It is settled law that a waiver of sovereign

immunity in one forum does not effect a waiver in other forums." *West v. Gibson*, 527 U.S. 212, 226 (1999) (Kennedy, J., dissenting).[1]

B. The Nation Challenges Contract *Formation*, Which Caremark Admits Must Be Decided By a Court, Not an Arbitrator.

Even apart from sovereign immunity, the district court committed reversible error by failing to decide whether the parties formed an arbitration agreement in the first place. The district court explained that it "deferred that threshold question of whether the claims must be arbitrated, *including the question of whether the Nation agreed to arbitration*, to the arbitrator." 1-SER-5 (emphasis added).

Caremark admits this is "a question courts do resolve." Appellees' Br. 4. However, Caremark incorrectly insists the Nation challenges "only the *enforceability* of the arbitration agreement here, not whether the parties formed that agreement at all." *Id.* at 19. In fact, the Nation disputes whether there is a clear and unequivocal showing that it agreed to arbitration – *i.e.*, whether there were sufficient indicia of assent to enable contract *formation*. Caremark concedes that "[f]ormation

[1] *See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (tribe's initiation of lawsuit does not waive immunity even from compulsory counterclaims); *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1017 (9th Cir. 2016) (by filing suit, "a tribe does not automatically waive its immunity as to claims that could be asserted against it, even as to 'related matters . . . aris[ing] from the same set of underlying facts'") (citation omitted); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (tribe's participation in administrative proceedings does not waive immunity in subsequent court action reviewing agency proceedings).

challenges concern 'whether any [arbitration] agreement . . . was ever concluded.'" Appellees' Br. 27 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006)). That is exactly the issue here.

The cases cited in *Buckeye*, 546 U.S. at 444 n.1, prove the Nation's point: *Chastain v. Robinson–Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992) ("'ineffective assent to the contract'" must be resolved by court) (citation omitted); *Spahr v. Secco*, 330 F.3d 1266, 1274 (10th Cir. 2003) (whether party *ratified* arbitration agreement could not be resolved in arbitration).

Similarly, *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1002 (9th Cir. 2010), held that a court should decide whether an arbitration agreement "was not mutually entered into." *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1093 (9th Cir. 2014) (applied "contract formation" principles in deciding "whether a valid contract to arbitrate exist[ed]," where an employer unilaterally changed arbitration terms in the employee handbook) (citation omitted).

Under Caremark's view, every dispute over whether the parties "assented" to an agreement or had a meeting of the minds could be repackaged as an "enforceability" issue. That approach would allow a party to bury an arbitration provision with a delegation clause in an unsigned contractual addendum, send it to a sovereign entity, and then insist that via receipt the sovereign "agreed" to arbitration (and agreed to allow an arbitrator rather than a court decide whether an

arbitration agreement exists) – even worse than the scenarios this Court rejected in *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140–41 (9th Cir. 1991).

Arizona law, which Caremark invokes, Appellees' Br. 52, also rejects Caremark's position. The "ultimate element of contract formation [is] the question whether the parties manifested assent or intent to be bound." *Schade v. Diethrich*, 760 P.2d 1050, 1058 (Ariz. 1988). In *Demasse v. ITT Corp.*, 984 P.2d 1138 (Ariz. 1999), the Arizona Supreme Court rejected an attempt by an employer to add contractual terms by sending employees a handbook with new terms and made clear the issue concerned *formation*: "Even if the 1989 handbook constituted a valid offer, questions remain whether the [plaintiff] employees accepted that offer and whether there was consideration for the changes [the employer] sought to effect." *Id.* at 1144; *see also Rose v. Humana Ins. Co.*, 2018 WL 888982, at *2-3 (D. Ariz. Feb. 14, 2018) (characterizing assent to unilateral amendment of contract including arbitration provision as an issue relating to "whether parties have agreed to arbitrate") (citation omitted).

Caremark cites *Edwards v. Doordash, Inc.*, 888 F.3d 738 (5th Cir. 2018) (Appellees' Br. 25), but that case opined that "[a]rguments that an agreement to arbitrate was never formed . . . are to be heard by the court even where a delegation clause exists." *Id.* at 744 (citation omitted). Such formation arguments include

whether an agreement was signed and properly delivered, and whether one party "retained the ability to unilaterally modify it." *Id.* at 745.

Caremark concedes that arguments that a party "never signed the contract" or "that the signer lacked authority" are "classic formation challenges." Appellees' Br. 27. But Caremark offers no principled distinction between those issues and the question of assent raised by the Nation here. Indeed, the Nation has expressly argued that the officials who signed the Provider Agreements lacked the ability to waive the Nation's immunity by committing it to arbitration, 2-ER-19 – the very example cited as a contract *formation* issue by Caremark.

Caremark's citation of *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989), *amended*, 1990 (Appellees' Br. 32), undermines its argument. *Teledyne* affirmed that a court, not arbitration, is the proper forum where "there has been an independent challenge to the making of the arbitration clause itself." *Id.* at 1410 (citation omitted). That is exactly the situation here: the Nation challenges the arbitration provision slipped in after the fact by Caremark in the Provider Manual.

Caremark also suggests that the Nation should not be permitted to deny "assenting to the arbitration provision" without rejecting "the rest of the agreement" between the parties. Appellees' Br. 3. But there is nothing remarkable about the Nation's position. There are many cases where courts have found an arbitration

provision invalid but left the remaining contractual provisions in place.[2] "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye*, 546 U.S. at 445. That approach is especially appropriate here, where the purported arbitration provision was allegedly tacked on, after the fact, and not part of the original signed contract. Caremark itself points out the severability clauses in the Provider Agreement and Provider Manual, Appellees' Br. 60, under which the arbitration provision can be excised while leaving the remainder of the parties' contractual relationship intact.

C. The District Court Committed Further Error By Relying On a Delegation Clause That Did Not Exist When the Nation's Pharmacies Signed Their Agreements.

The district court's judgment should be reversed for a separate reason: the court relied on a post-2014 delegation clause that did not exist when the Nation's pharmacies signed their Provider Agreements with Caremark's predecessors in July 2003, December 2005, and August 2010. The district court, at Caremark's urging, relied on the delegation clause in the 2020 Caremark Provider Manual. 1-ER-8. But there was no comparable delegation language in any Caremark arbitration provision until 2014. Appellees' Br. 11 (citing 3-ER-320).

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[2] *E.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013); *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1002 (9th Cir. 2010); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1276 (9th Cir. 2006); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248 (9th Cir. 1995).

Citing *Brennan v. Opus Bank*, 796 F.3d 1125, 1130-31 (9th Cir. 2015), Caremark insists that language in the pre-2014 Provider Manuals – requiring arbitration of "[a]ny and all controversies in connection with or arising out of the Provider Agreement" under the Rules of the American Arbitration Association ("AAA") – qualifies as a "delegation clause." Appellees' Br. 25. But *Brennan* concerned unconscionability, not the kind of issue presented here.

Further, the language quoted by Caremark makes clear that the pre-2014 arbitration provision *does not cover the Nation's claims at all*. The claims do not arise out of or in connection with the Provider Agreement. In fact, the complaint 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." 2-ER-58 n.17.

A claim does not "arise out of or relate to" a contract if the claim "'is completely independent of the contract and could be maintained without reference to a contract.'" *Tittle v. Enron Corp.*, 463 F.3d 410, 422 (5th Cir. 2006) (citation omitted). The Nation's legal counts in the complaint do not even cite the Provider Agreement (2-ER-76-81) and can be maintained without any reference to it. The Nation alleges that "[t]he statute provides positive, objective standards for conduct

on Defendants' part . . . . The standard of duty . . . is fixed and defined by law; it is the same in all circumstances." 2-ER-78.

Confirmation that the Nation's claims fall outside the scope of the pre-2014 arbitration provision is the substantially broader language that Caremark inserted beginning in 2014 and on which it urged the district court to rely: "Any and all disputes between Provider and Caremark . . . including but not limited [to] disputes in connection with, arising out of, or *relating in any way to*, the Provider Agreement or *to Provider's participation in one or more Caremark networks* . . . ." 3-ER-320 (emphasis added). The telling contrast between the two provisions strongly supports the Nation's argument.

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

A. Caremark Cannot Meet the "Clear" and "Unequivocal" Standard.

Under *C&L Enterprises,* Caremark must show the Nation "clear[ly]" and "unequivocally" agreed to an arbitral forum. 532 U.S. at 418. "There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States ex rel. Dep't of Interior*, 255 F.3d 801, 811 (9th Cir. 2001) (citation omitted).

That demanding standard cannot be met here.

1. Caremark repeatedly insists that the Nation, like private pharmacies in the Caremark network, "assent[ed]" to arbitration "by receiving the updated version [of

the Provider Manual] and continuing to submit claims." Appellees' Br. 2; *see also id*. at 12, 15, 21, 23, 40, 53-54. Caremark is wrong.

(a) The Nation is not comparable to a private party. For a sovereign entity, simply receiving an updated Provider Manual and seeking reimbursement from Caremark fall far short of an express and unequivocal waiver of immunity or proof of an agreement to arbitrate. According to Caremark, it can place whatever language it chooses in the Provider Manual, and a sovereign entity such as the Nation will be deemed to "assent" to whatever Caremark includes. Such a theory makes a mockery of the *C&L Enterprises* standard of "clear" and "unequivocal" agreement. "[A] waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed . . . in 'clear' and unmistakable terms." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016) (citations omitted); *see also Maxwell v. County of San Diego*, 708 F.3d 1075, 1087 (9th Cir. 2013) (actions of tribal fire department under mutual aid agreements did not waive immunity, which must be "explicit and unequivocal").

(b) Caremark contends the Nation did "assent, by receiving revised Manuals, then submitting claims." Appellees' Br. 23. But even if a sovereign receives "unambiguous[]" "notice" that it "will be subject to suit if it engages in certain specified conduct," it cannot be "deemed to have constructively waived its sovereign immunity" by "voluntarily" engaging in such conduct. *College Sav. Bank v. Florida*

Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 679-80 (1999). "[T]here is 'no place' for the doctrine of constructive waiver in our sovereign-immunity jurisprudence," and a court can "'find waiver only where stated by the most express language.'" *Id.* at 678 (citation omitted); *see also Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1288-89 (11th Cir. 2001) (acceptance of federal funds did not waive tribal immunity); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 584 (8th Cir. 1998) (same). The same "assent" argument Caremark makes here could have been raised in any constructive waiver case.[3]

(c) Caremark asserts (with no citation) that "Appellants never appear to have objected or requested changes upon receipt of revised Manuals." Appellees' Br. 15. In fact, the record does not reveal whether Appellants did or did not object. Regardless, the Nation was under no affirmative duty to register an objection to preserve its immunity. There must be a "clear declaration" of waiver by the sovereign. *College Savings Bank*, 527 U.S. at 680 (citation omitted). Caremark

[3] The Nation's conduct falls far short of that necessary to waive immunity. In *Pistor*, 791 F.3d at 1111 (cited Appellees' Br. 44), this Court cited *In re Bliemeister*, 296 F.3d 858 (9th Cir. 2002), where a state, named as a creditor in a bankruptcy proceeding, affirmatively invited an adversary proceeding against it, answered the complaint, and subsequently moved for summary judgment – without raising an immunity defense. Caremark cites *Oglala Sioux Tribe v. C&W Enters., Inc.*, 542 F.3d 224 (8th Cir. 2008), where the tribe "not only raised no objection [to arbitration], it responded, raising its own arbitral counterclaims under the same contract." 542 F.3d at 231. The tribe filed a document in the arbitration stating it did "not object[] to" arbitration of the claim. *Id.* Here, the Nation has vociferously objected to arbitration.

lacks the power to tell a sovereign that it will be deemed to consent to an arbitral forum unless it expressly objects.

2. Caremark is wrong in suggesting that the language of the arbitration agreement provides the sole test for whether a tribe "clearly" and "unequivocally" agreed to arbitration. Appellees' Br. 42-43. If a tribe's assent is uncertain, there is no clear agreement. *E.g., Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.*, 2011 WL 4001088, *5 (W.D. Wash. Sept. 7, 2011) (no waiver of tribal immunity, even where the "waiver has the requisite clarity," because "the dispute is over whether the Tribe actually agreed to the waiver"); *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe*, 401 F. Supp. 2d 952, 963 (N.D. Iowa 2005) (arbitration clause does not waive immunity where "the very validity of the Agreement is in dispute" because authority of tribal official to waive immunity was disputed).

Caremark argues *C&L Enterprises* looked to the language of the contract. Appellees' Br. 42-43. That simply reinforces our argument: in *C&L Enterprises*, *the tribe itself* drafted the arbitration provision, and so consulting the provision's language was the way of ascertaining the scope of the tribe's assent. 532 U.S. at 423. This case is the opposite: here, the Nation did not even *sign* a contract containing an arbitration provision. Moreover, the Provider Manual was not drafted with Native American tribes in mind; as Caremark admits, it is a form contract

intended for wide use governing the "[t]ens of thousands of pharmacies" within the network. Appellees' Br. 1. This case is more like the examples distinguished in *C&L Enterprises*, 532 U.S. at 423 (an "adhesion contract" or a "form contract, designed principally for private parties who have no immunity to waive"), especially since the Nation is effectively forced to enter into contracts with pharmacy benefit managers or forgo insurance reimbursement. 2-ER-24.

3. Caremark argues that the Provider Agreements signed by the Nation's pharmacies "expressly incorporate the Provider Manual in effect at the time." Appellees' Br. 39. This argument fails.

(a) Caremark's argument applies to only two of the Nation's pharmacies –the Chickasaw Nation Medical Center ("CNMC") and the Purcell Indian Health Clinic ("Purcell"). Those are the only two pharmacies whose Provider Agreements are in the record. *See* Appellees' Br. 7-9, citing 3-ER-146-47, 3-ER-152. Caremark has no proof that the AdvancePCS Provider Agreements signed in 2003 by Ardmore Health Clinic Pharmacy ("Ardmore"), the Chickasaw Nation Online Pharmacy Refill Center ("Online Refill Center"), and Tishomingo Health Clinic ("Tishomingo") contained any language incorporating the AdvancePCS Provider Manual.

Caremark admits that those 2003 Provider Agreements are not in the record. Appellees' Br. 13 n.1. Rather, it relies on unsupported and self-serving speculation

from Caremark declarant Stephanie Harris that the 2003 AdvancePCS Provider Agreements "would have contained the same language" as later Caremark Provider Agreements. 2-ER-104. But this bald assertion cannot suffice to establish a "clear" and "unequivocal" agreement to waive immunity. Further, Ms. Harris nowhere establishes personal knowledge as to the contents of an agreement signed in 2003 not in Caremark's files – particularly when AdvancePCS, not Caremark, was party to that agreement (Caremark did not acquire AdvancePCS until 2004, Appellees' Br. 13). Ms. Harris has been in the PBM industry only since 2006 and has held her current position with Caremark only since 2015. 2-ER-99-100. The events in question predate her personal knowledge.

Caremark also asserts that appellants "presumably" have the 2003 AdvancePCS Agreements and would have "every incentive" to produce them if they were favorable. Appellees' Br. 51. But the party seeking arbitration bears the burden of proving the existence of a valid arbitration agreement, *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005 (9th Cir. 2010), and of demonstrating clear and unequivocal waiver of immunity. Caremark cannot meet that burden through innuendo and surmise.

(b) Even as applied to CNMC and Purcell, Caremark's "incorporation-by-reference" argument falls short of establishing "clear" and "unequivocal" agreement to arbitration. *See Allison Steel Mfg. Co. v. Superior Court*, 523 P.2d 803, 806 (Ariz.

App. 1974) (where one party had drafted an agreement, incorporation by reference could not provide "clear and unequivocal" showing of opposing party's consent to an indemnification provision).

Further, as Caremark admits, the 2005 and 2010 Provider Agreements incorporated only the "Provider Manual in effect at the time." Appellees' Br. 39. The Agreements used the present tense ("are incorporated") (3-ER-147, 3-ER-152), not the future tense, and hence did not encompass future manuals. The Provider Agreements signed in 2005 and 2010 did not say the Nation automatically agreed in advance to whatever terms Caremark might unilaterally insert in a future manual in 2014. Thus, even under Caremark's argument, Purcell is bound only to the arbitration provision in the 2004 Provider Manual, which does not cover this case because it is limited to disputes "in connection with or arising out of the Provider Agreement," 3-ER-138, rather than to disputes arising out of the Recovery Act. The same is true of CNMC; the arbitration provision in the 2009 Provider Manual contains the same limited language and further would allow the Nation to seek injunctive relief in court. 3-ER-142; *see* Appellants' Opening Br. 32-34.

(c) The CNMC and Purcell Provider Agreements, as well as all the Network Enrollment Forms in the record, provide for a separate procedure for adding terms to the parties' agreement: amendments *initialed by both parties.* Appellants' Opening Br. 34-35. This process was never followed. Caremark proposes to

"harmonize sensibly" the initialization procedure with the Provider Manual amendment process (Appellees' Br. 48) by allowing it to add unilaterally whatever terms it wishes in the Provider Manual, while never invoking the initialization process. Such a proposal is not in "harmony"; it would render the initialization process a nullity, even though that is the very mechanism established by the only agreements the parties actually signed. Clearly, the parties intended that a change as significant as addition of an arbitration provision – which implicates a tribe's immunity – would be subject to the initialization process, not unilaterally slipped in by Caremark.

(d) Caremark has no proof of delivery of Provider Manuals to the Nation's pharmacies until 2014. Caremark points to language in the Purcell 2005 Provider Agreement (3-ER-152) and CNMC 2010 Provider Agreement (3-ER-148) "acknowledg[ing] receipt" of Provider Manuals. Appellees' Br. 14 (Notably, Caremark cannot identify any such language in the AdvancePCS Provider Agreements signed in 2003 by Ardmore, the Online Refill Center, and Tishomingo, which are not in the record.)

But the boilerplate language in the Purcell and CNMC Agreements to which Caremark points does not amount to a clear and unequivocal showing that the pharmacies actually agreed to their terms. Caremark insists that, "[w]ithout reviewing the Provider Manual, pharmacies would have no idea how to implement

key elements," such as how "to certify compliance with various laws." Appellees' Br. 9. But Caremark's argument is pure speculation. It never developed any evidence in the district court on this subject, nor did the court make any findings. Moreover, Caremark's argument is beside the point. It is irrelevant whether the Nation's pharmacies reviewed the Provider Manual to understand the nuts-and-bolts of how to certify legal compliance, process claims, and receive payments. None of that amounts to "clear" and "unequivocal" agreement to an arbitration provision (even if the pharmacies had noticed that provision in their review). Caremark's argument is merely another version of its "constructive waiver" contention – that by receiving the Provider Manuals and operating within the Caremark network, the pharmacies impliedly agreed to arbitration. That argument is a non-starter in the context of sovereign immunity waivers.[4]

5. Caremark contends the Provider Manual is updated every few years because details regarding reimbursement claims "change in response to legal or industry developments." Appellees' Br. 9. But this case does not involve any such

[4] Caremark contends "even if appellants did not receive revised Manuals before 2014, appellants' claims only date to 2014." Appellees' Br. 47. But the timeframe of the Nation's claims is not the issue. The point is that Caremark cannot bind the Nation's pharmacies to an arbitration provision unilaterally inserted in the Provider Manual sent in 2014, long after they signed their Provider Agreements.

change. It involves Caremark's adding arbitration provisions to which the Nation did not agree.

B. Caremark Cannot Establish that Signers to the Contracts Had the Authority to Agree to Arbitration.

Caremark's position suffers from a further fatal defect: it has failed to show that the persons who signed contracts with Caremark possessed the authority to waive immunity and bind the Nation to arbitration. An uncontested declaration establishes that, as a matter of tribal law, only the Chickasaw Nation Governor or Tribal Legislature can waive immunity, and neither did so here. Nor did they authorize any person to sign any relevant agreement waiving immunity. 2-ER-19.

Caremark insists a tribe may assert a lack-of-authority defense only if it has enacted tribal laws in advance expressly so providing. Appellees' Br. 45. But the Nation has enacted such a law.[5] Regardless, Caremark's argument has no legal basis. A tribe (just like any State or the United States) can proceed by common law and constitutional principles as well as by statute. The Supreme Court has opined (without citing to a tribal statute) that "immunity cannot be waived by [tribal] officials." *United States v. U.S. Fidelity & Guar. Co*., 309 U.S. 506, 513 (1940); *see Missouri River Services, Inc. v. Omaha Tribe*, 267 F.3d 848, 852 (8th Cir. 2001)

[5] The Chickasaw Code provides: "Any such Limited Waiver of Sovereign Immunity must be included in a document that had been authorized by the Tribal Legislature as to form prior to the execution of such document." Section 18-401.1(B), available at https://code.chickasaw.net/Title-18.aspx.

("the Tribe's attorney could not expand the scope of the Tribe's waiver") (citation omitted). No court has imposed the precondition sought by Caremark. *See Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 687 (8th Cir. 2011) (no waiver of immunity even in the absence of a formal tribal resolution so providing). The case cited by Caremark, *Sanderlin*, 243 F.3d at 1288, did not hold that advance enactment of a tribal statute restricting waiver authority was a requirement for asserting immunity; it merely noted the presence of such a statute.

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

Our opening brief explained (at 36-41) that Caremark has failed to establish the existence of arbitration agreements between the Nation's pharmacies and the relevant entities seeking to compel arbitration. For example, Caremark did not even acquire two of the parties seeking to compel arbitration (Aetna, Inc. and Aetna Health, Inc.) until 2018 (2-ER 47), making it impossible for the Nation's pharmacies to have "clearly" and "equivocally" agreed to arbitration with those entities when they signed Provider Agreements in 2003, 2005, and 2010. In fact, only one Caremark entity seeking to compel arbitration (Caremark LLC) is a signatory to any document signed by the Nation.

Caremark points to language in Provider Manuals "from 2014 on" broadening the scope of the arbitration provision to include "parents, subsidiaries, affiliates, agents, and assigns." Appellees' Br. 49. But this language did not exist in the

Provider Manuals in effect when the Nation's pharmacies signed Provider Agreements. 3-ER-133 (2003 AdvancePCS manual); 3-ER-138 (2004 Caremark manual); 3-ER-142 (2009 Caremark manual). We have already shown that Caremark's implied or constructive waiver theory may not be used to bind the Nation to the arbitration provision in the 2014 manual. *See* pp. 13-14, *supra*. A sovereign cannot be said to "clearly" and "unequivocally" consent to arbitration with a hypothetical, future subsidiary or affiliate whose identity cannot be ascertained – particularly since immunity can be waived selectively.

Caremark next offers an equitable estoppel theory, Appellees' Br. 49, but equitable estoppel does not lie against a sovereign as it does against private litigants. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419 (1990). Even if estoppel were applicable in theory, Caremark cannot meet its requirements. This Court has "never previously allowed a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff," *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1169 (9th Cir. 2021) (citation omitted), and this case should not be the first.

A prerequisite to compelling arbitration under equitable estoppel is that the plaintiff's claims must be "intertwined with the contract providing for arbitration." *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) (internal quotation marks and citation omitted). Caremark's own authority explains the claims must be "founded in and inextricably bound up with the obligations imposed

by the agreement containing the arbitration clause." *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp*., 748 F.3d 249, 261 (5th Cir. 2014) (internal quotation marks and citation omitted).

Here, the Nation has asserted purely statutory claims that can be resolved without reference to the Provider Agreement and Provider Manuals. Because these "statutory claims 'd[o] not arise out of or relate to the contract that contained the arbitration agreement,' [the non-signatories] may not compel [the Nation] to arbitrate [it]s claims on the basis of equitable estoppel." *Rajagopalan*, 718 F.3d at 848 (internal quotation marks and citation omitted).

Caremark suggests that "[i]f the Provider Agreements and Provider Manuals never applied to the Aetna entities," the Nation would have no basis for submitting claims. Appellees' Br. 50. Caremark misstates our argument. The point is that the heightened standard of *C&L Enterprises* applies specifically to the *arbitration provision* in particular, because it would subject the sovereign Nation to a forum for resolution of its rights without its consent. Holding that the Nation did not agree to the slipped-in arbitration provision does not require invalidation of the entire contract. As Caremark admits, Appellees' Br. 60, the Provider Agreement's severability clause ensures the remaining provisions remain in effect.

III. THE RECOVERY ACT DISPLACES ANY AGREEMENT TO ARBITRATE.

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

Even if the Nation had entered into a valid arbitration agreement, the Recovery Act prevents its implementation here. The Recovery Act 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.

Caremark ignores the statutory text and attempts to repackage the standard as "effective vindication" or "unconscionab[ility]," which it insists is "sky-high." Appellees' Br. 37-38. But it simply overlooks the showing in our opening brief (at 45-46) that the term "hinder" implies a much more modest degree of interference than the "effective vindication" standard, which according to Caremark requires a showing that a procedural barrier would make access to arbitration "impracticable." Appellees' Br. 59 (citation omitted).

In contrast, "[t]he word 'hinder' means 'to hamper' or 'to impede or delay the progress of,' and thus does not signify a conclusive impediment." *Purkey v. Green*, 28 F. App'x 736, 747 (10th Cir. 2001) (Henry, J., concurring and dissenting) (citation omitted). *See also* Webster's Dictionary, *available at* https://www.merriam-webster.com/dictionary/hinder (defining "hinder" as "to make slow or difficult the progress of: HAMPER. Their journey was *hindered* by snow

and high winds. [E]conomic growth *hindered* by sanctions[.]") (emphasis in original).

The term "hinder" must also be interpreted "liberally in favor of the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Caremark misconstrues our argument as "implied repeal." Appellees' Br. 56. Rather, the Indian canon applies to the interpretation of "federal statutes that are 'passed for the benefit of . . . Indian tribes.'" *Gila River Indian Community v. U.S. Dep't of Veterans Affairs*, 899 F.3d 1076, 1081 (9th Cir. 2018) (citation omitted; ellipses in original). Congress proclaimed precisely that purpose and codified extensive findings and declarations of policy in the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601-1602 of which the Recovery Act is an important part. Congress established the official policy of the United States "to ensure the highest possible health status for Indians and urban Indians and *to provide all resources necessary to effect that policy*." *Id.* at § 1602(1) (emphasis added); *see also* Appellants' Opening Br. 8-10. "Congress has expressed its desire to provide all assistance necessary to enable Indians to take advantage of non-federal sources of health assistance." *McNabb v. Bowen*, 829 F.2d 787, 793 (9th Cir. 1987).

Because Caremark applies the wrong legal standard – impracticability rather than hindrance – its Recovery Act arguments largely miss the mark. Caremark says the Nation must show "de facto bars to proceeding in arbitration at all" and cannot

prevail merely by showing that the arbitration procedures would "make it more difficult to prove a statutory remedy." Appellees' Br. 59, 60 (citation and emphasis omitted). But "making something more difficult" is exactly what "hinder" means. Caremark's reliance on cases upholding restrictive arbitration provisions outside the context of the Recovery Act are therefore inapposite.

The comparison between the Nation's procedural rights under the Recovery Act and its procedural rights under arbitration is damning. Caremark does not deny that the Nation's suit under the Recovery Act would enjoy a special one-way fee- and cost-shifting provision for plaintiffs, a six-year statute of limitation, favorable damages rules, and fulsome discovery rights for the Nation's benefit. It admits in arbitration the Nation would face "limits on available damages and discovery, six-month filing deadlines, awarding fees and costs to the winner, and confidentiality." Appellees' Br. 5. We have already shown (Appellants' Opening Br. 46-52) that the loss of the Recovery Act procedural rights would "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. The procedural roadblocks created by the Caremark arbitration provision "hinder" the Nation's ability to achieve full recovery under the Act and are therefore displaced.

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

This Court has held that "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); *see New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019).

Caremark dismisses these cases because they involve whether other sections of the FAA preclude arbitration. Appellees' Br. 35. But Caremark does not explain why these cases should be treated differently from a Recovery Act proceeding, which involves a clear and unambiguous statute that precludes *any* contractual provision hindering the right of recovery. Under Caremark's theory, the outcome of this case would apparently depend on whether the Recovery Act was codified in Title 9 of the U.S. Code, as opposed to Title 25.

Caremark cannot cite a single case vesting an arbitrator with authority to decide whether the Recovery Act (or any comparable statute) displaces an agreement to arbitrate. Instead, Caremark cites numerous decisions in which *courts* – not arbitrators – resolved such question. Appellees' Br. 36. This proves our point. Both *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), and *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 282 n.1 (2002), involved delegation clauses. *See* Appellants' Br. 44-45. Under Caremark's argument, the Supreme Court should have refrained from deciding whether statutes displaced arbitration agreements and instead sent that issue to an arbitrator. Caremark tries to brush aside the point on the

ground the parties did not raise such an argument. Appellees' Br. 36. But that omission is telling. If the parties, amici, and the Justices all declined to raise the argument that Caremark now believes is fundamental, the merit of Caremark's argument is suspect, to say the least.

Caremark relies heavily on this Court's recent 2-1 decision in *Brice v. Haynes Investments, LLC*, __ F.4th __, No. 19-15707, 2021 WL 4203337 (9th Cir. Sept. 16, 2021), but that case is inapposite. *Brice* expressly disagreed with the decisions of three other circuits and held that a delegation clause operated to preclude judicial review of an "effective vindication" objection. But this is not an effective vindication case. That is, the Nation is not arguing that arbitration would "foreclose" its ability to vindicate its rights under a generally applicable statute. *See id*. at *7 ("[o]ur focus is on whether the contractual language forecloses, i.e., *renders impossible*, Borrowers' pursuit of their federal remedies") (emphasis in original). The Nation points to a specific statute that renders null and void any contractual provision that "prevents or hinders" the right of recovery. The existence of that explicit statutory command distinguishes *Brice*.

There is a further distinction between this case and *Brice*: here, the delegation clause is specifically displaced because it hinders the right of recovery under the Recovery Act. (And Caremark is wrong in suggesting that our Recovery Act arguments are not directly specific to the delegation clause.) As we noted in our

opening brief (at 56-57), the delegation clause would itself override the congressional command of the Recovery Act, which authorizes an Article III federal court to decide a tribe's rights. In addition, the arbitral provisions hindering the right of recovery become effective at the moment of delegation and hamstring the Nation's ability to arbitrate the threshold issues themselves. Thus, Caremark does not dispute that the Nation (but not Caremark) will have to deposit a minimum of $50,000 (and possibly more) at delegation. While Caremark belittles the significance of this requirement, it offers no substantive defense of it. The limitations on discovery and the one-sided confidentiality provisions also take effect immediately. These provisions operate to hamper the Nation's ability to litigate the very "gateway" issues the arbitrator will decide—including whether arbitration will hinder the Nation's right of recovery.

CONCLUSION

This Court should reverse the district court's judgment and, at minimum, direct that it resolve the threshold questions it mistakenly delegated to an arbitrator.

October 22, 2021

Respectfully submitted,

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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 6,949 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.

Dated: October 22, 2021

/s/ Michael Burrage

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 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.

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