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
(Case No. 21-cv-00574-SPL)
(District Judge Steven P. Logan)

MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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October 7, 2021

DISCLOSURE STATEMENT

Washington Legal Foundation has no parent company, issues no stock, and no publicly held company owns a ten percent or greater interest in it.

Washington Legal Foundation moves for leave to file a brief as *amicus curiae* supporting Appellees. Appellants object to granting this motion; Appellees consent to granting this motion.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in important arbitration cases. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015). This is an important case because it presents a question of about whether a whole class of parties are exempt from the Federal Arbitration Act.

WLF's proposed *amicus* brief makes two arguments. First, it argues that the arbitrator must decide whether the parties' arbitration agreement is enforceable. Second, the brief argues that the Recovery Act does not displace the FAA.

"Members of the court might find" WLF's arguments "helpful to deciding this appeal." *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020) (Scudder, J., in chambers) (granting WLF's motion for leave to file an *amicus* brief). The proposed brief provides additional discussion and citations not found in

the parties' briefs. These arguments and citations help explain why the District Court properly compelled arbitration here. *Cf. Lefebure v. D'Aquilla*, 2021 WL 4552965, *4 (5th Cir. Oct. 5, 2021) (Ho, J., in chambers) ("courts should welcome *amicus* briefs for one simple reason: '[I]t is for the honour of a court of justice to avoid error in their judgments" (quoting *Protector v. Geering*, 145 Eng. Rep. 394 (K.B. 1686) (alteration in original))).

WLF therefore moves for leave to file the attached *amicus* brief supporting Appellees and such other relief as the Court deems proper and just.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limits of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 293 words excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it uses 14-point Century Schoolbook font.

/s/ John M. Masslon II
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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in important arbitration cases. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015).

INTRODUCTION

With very few exceptions, the Federal Arbitration Act applies to any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Congress used very broad language in the FAA precisely because it wanted to include as many contracts as possible in its scope. Of course, the right to arbitrate under the FAA means nothing if one must litigate over a delegation clause in an arbitration agreement before proceeding to arbitration. The benefits of arbitration disappear if the parties must undertake a full trial on who decides an issue under the arbitration clause. Rather than the quick, efficient resolution of disputes, such

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

practices lead to increased costs that are eventually passed on to consumers.

But the Chickasaw Nation asks this Court to ignore well-settled precedent about delegation clauses and hold that it may litigate its claims in federal court before going to an arbitrator. This, of course, contravenes the parties' delegation agreement. In short, the Chickasaw Nation asks this Court to create a special rule that applies only to it.

The rule about delegation clauses isn't the only general rule the Chickasaw Nation asks this Court to ignore. It also wants the Court to undermine the FAA's purpose by holding that the FAA does not apply to many contracts. In the Chickasaw Nation's view, the thousands of contracts for medical care involving Indian tribes are shielded from arbitration. Such a rule lacks any basis in law or logic. The District Court saw through this ruse and granted Caremark's request to compel arbitration. This Court should also decline to create special arbitration rules for the Chickasaw Nation and hold that an arbitrator must determine whether the parties' dispute falls within the contract's arbitration provision.

STATEMENT

The Chickasaw Nation owns and operates several pharmacies. 1-ER-4 (citation omitted). In 2003, the Chickasaw Nation and Caremark voluntarily signed a provider agreement. 2-ER-13. As part of the agreement, the Chickasaw Nation agreed to fill prescriptions for participants in certain prescription-drug plans. *See* 2-ER-31. In return, Caremark agreed to reimburse the Chickasaw Nation under the contract's fee schedule. *Id.*

The agreement incorporates by reference Caremark's provider manual's terms. *See* 2-ER-30-31. The provider manual also says that it is part of the parties' contract. Since 2003, the Chickasaw Nation has signed network enrollment forms—including just last year. *See* 2-ER-31, 104. Together, the agreement, manual, and forms comprise the parties' contract.

The contract includes an arbitration clause. It provides that "all disputes" between the parties "arising out of, or relating in any way to" the contract "will be exclusively settled by arbitration." 2-ER-33. The arbitration clause also includes a delegation clause, which states that "[t]he arbitrator(s) shall have exclusive authority to resolve any dispute

relating to the interpretation, applicability, enforceability or formation of the agreement to arbitrate, including but not limited to, any claim that all or part of the agreement to arbitrate is void or voidable for any reason." *Id.*

But the Chickasaw Nation didn't abide by its contractual obligations. When a dispute arose under the parties' contract, it ignored the contract's requirements for starting arbitration proceedings. Rather, it sued Caremark in Oklahoma. 2-ER-34. Caremark responded by suing in the District of Arizona—the proper venue for arbitrations under the contract. Caremark sought an order compelling the Chickasaw Nation to comply with the contract and arbitrate the dispute.

The Chickasaw Nation insisted it didn't have to comply with the FAA. In its view, it could escape the FAA's plain language because Congress hid an elephant in the mousehole of the Recovery Act. And ignoring the Supreme Court's and this Court's well-settled precedent, it argued that the arbitration clause was invalid. The District of Arizona saw through those arguments and compelled arbitration. A two-judge motions panel stayed that decision pending disposition of this expedited appeal.

ARGUMENT

The FAA empowers a party to enforce an (otherwise valid) arbitration clause in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Congress enacted the FAA to thwart the "great variety of devices and formulas" that judges "hostil[e] towards arbitration" had used to "declar[e] arbitration against public policy." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (cleaned up). And it used broad terms ("evidencing" a transaction "involving" commerce) because it wanted the FAA to extend as far as the federal legislative power under the Commerce Clause can go. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995).

In short, Congress wanted the FAA to govern most arbitration clauses. This includes arbitration clauses that contain delegation provisions and those entered into by Indian tribes. This Court should reject the Chickasaw Nation's contrary arguments.

I. THE ARBITRATOR MUST DETERMINE WHETHER THE PARTIES' ARBITRATION AGREEMENT IS ENFORCEABLE.

A. This Court's And The Supreme Court's Precedent Mandate Affirmance.

The contract provides "that any claim that all or part of the agreement to arbitrate is void or voidable for any reason" must be decided by the arbitrator. 2-ER-33.

Normally, "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy" must be made by a court—not an arbitrator. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality) (citations omitted). But "parties are free to authorize arbitrators to resolve such questions." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019) (citation omitted).

Parties use delegation clauses to authorize arbitrators to decide these gateway issues. "A delegation clause is merely a specialized type of arbitration agreement, and the [FAA] operates on this additional arbitration agreement just as it does on any other." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (cleaned up). "[I]f the clause appears in a written provision in a contract evidencing a transaction involving

commerce" then courts must compel arbitration on gateway issues if a party satisfied the FAA's other requirements. *Id.* (cleaned up). In other words, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019). That is what happened here. The parties, by agreeing to a delegation clause, empowered the arbitrator to make these gateway determinations.

True, Caremark must show "clear and unmistakable evidence" that the parties agreed to have the arbitrator decide these gateway issues. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (cleaned up). But it's difficult to conceive of clearer evidence of that than the parties' delegation clause here. It declares that the arbitrator—not a court—decides these gateway issues. As Caremark made the necessary showing, the District Court correctly compelled arbitration.

The Chickasaw Nation tries to distract from this on-point case law by citing *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287 (2010). *See* Chickasaw Nation's Br. 25. What goes unmentioned, however, is that *Granite Rock* involved a contract lacking a delegation clause. *See*

id. at 297. So it simply did not address whether an arbitrator should decide gateway issues. *See id.* at 299 n.5.

The Court's decision in *Rent-A-Ctr W., Inc. v. Jackson*, 561 U.S. 63 (2010), shows why the Chickasaw Nation's opening brief misses the mark. There, the Court explained that a delegation provision is severable from the arbitration clause. *Id.* at 70-71 (citation omitted). So just because a party challenges the arbitration provision, it does not follow that it has also challenged the delegation provision.

The Chickasaw Nation argues that, as a sovereign, it could not have agreed to arbitrate here because only the provider manual used the word "arbitration." Chickasaw Nation's Br. 29-42. This is not an attack on the delegation clause; it's a challenge to the arbitration provision. Because the delegation clause is severable from the arbitration provision, the District Court correctly held that the delegation clause is enforceable. The arbitrator can decide whether the Chickasaw Nation agreed to arbitrate.

Although the Chickasaw Nation argues (at 55) that it cannot prospectively waive its Recovery Act rights, that argument lacks merit. Under the prospective-waiver doctrine, a delegation provision that

waives a party's "right to pursue [federal] statutory remedies" is unenforceable. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (cleaned up). The delegation clause here, however, does not bar the Chickasaw Nation from pursuing its Recovery Act claims. It just channels those claims to arbitration rather than to a district court.

As the delegation clause does not prospectively waive the Chickasaw Nation's Recovery Act rights, this case is controlled by this Court's decision in *Brice v. Haynes Invs., LLC*, 2021 WL 4203337 (9th Cir. Sept. 16, 2021). There, this Court held that "[w]here a delegation provision exists, courts first must focus on the enforceability of that specific provision, not the enforceability of the arbitration agreement as a whole." *Id.* at *4 (citations omitted). A contrary holding "would render the delegation provision a nullity." *Id.*

Because the parties' contract includes a delegation provision, the only question this Court should ask is whether that provision is valid. *See Brice*, 2021 WL 4203337 at *4 (citing *Brennan v. Opus Bank*, 796 F.3d 1125, 1133 (9th Cir. 2015)). Again, the Chickasaw Nation focuses its attack on the arbitration agreement as a whole—not the delegation provision. Under *Brice*, this Court cannot decide the issue that the

Chickasaw Nation asks it to decide. Rather, it is limited to deciding whether the delegation provision is enforceable. Because the Chickasaw Nation does not challenge the delegation provision separately from the arbitration agreement, the Court should apply *Brice* and affirm.

It can't be that if a party emphatically denies that it agreed to arbitrate, it can essentially nullify the parties' delegation clause. Yet that is the position the Chickasaw Nation advances. *See Brice*, 2021 WL 4203337 at *4. Despite its arguments only going to the enforceability of the arbitration agreement, the Chickasaw Nation thinks it can avoid the delegation clause simply by saying that it never agreed to arbitration—no matter how frivolous that claim is. Contracts are legally enforceable; that enforceability doesn't disappear because one party gets cold feet.

The Chickasaw Nation is having second thoughts about its decision because it wants the dispute resolved by an Oklahoma judge. But it can't escape its contractual obligations based on buyer's remorse. Rather, it must comply with its contractual obligations, including the arbitration clause's delegation provision. This Court should give the parties what they bargained for and affirm the District Court's order. Like all parties

to a contract with a delegation clause, the Chickasaw Nation must raise its objections before the arbitrator—not a federal court.

B. A Contrary Ruling Would Practically Make Delegation Clauses Virtually Unenforceable.

If the Court were to adopt the Chickasaw Nation's position, delegation clauses would become unenforceable. *See Brice*, 2021 WL 4203337 at *4. The point of a delegation clause is to help avoid litigation costs. This case proves the point. Caremark made some concessions to the Chickasaw Nation in return for it's agreeing to arbitrate any disputes arising out of the agreement. But the Chickasaw Nation failed to abide by that agreement.

This is now the third Court that Caremark has expended resources in before an arbitrator can decide the issues in the case. Besides this Court, Caremark had to defend against the Chickasaw Nation's suit in Oklahoma and file its own lawsuit in Arizona. That is not cheap. As this Court explained, arbitration "ensur[es] speedy, cost-effective, and informal" dispute resolution. *Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 829 (9th Cir. 2019) (citing *Concepcion*, 563 U.S. at 348-49).

But that's not all. If Caremark prevails in this litigation, which it should, it must then arbitrate the claims. After arbitration, if Caremark

prevails it might have to defend against a federal suit seeking to vacate or modify the arbitration award. That consumes more time and more money. In short, it wastes more resources.

That is why many parties want to enter into arbitration agreements containing delegation clauses. Rather than have to litigate in federal court about the scope of an arbitration clause, this and other questions are left to the arbitrator. Fighting battles before the arbitrator is cheaper and quicker than doing so in federal court.

What is the point of a delegation clause if parties must litigate the issues in federal court before going to arbitration? There is none. It doesn't save anyone money. Nor does it save time. Rather, it puts the parties back in the same place they were without a delegation clause—after expending significant resources. Although a valid arbitration provision exists, the scope of that provision must be litigated in federal court—not before an arbitrator. This essentially makes the delegation provision unenforceable.

Yet that is the rule the Chickasaw Nation proposes. All that the party opposing arbitration must do is offer some argument why the arbitrator should not decide the arbitration clause's scope and a full-

blown federal case ensues. But making delegation clauses unenforceable will have disastrous effects on our economy.

A free-market economy works because parties are willing to exchange consideration in a way that benefits both parties. If a company values a widget at $2 and a consumer values it at $4, both parties gain $1 if the company sells it for $3. In the contracting world, a company may value a delegation clause at $1 million while the other party might value not having the clause at $500,000. If the companies cannot agree to an enforceable delegation clause, the result is $500,000 in dead-weight loss. In other words, GDP goes down by $500,000 with no chance to recoup it. Summed across the entire economy, the effect of adopting the Chickasaw Nation's rule is substantial.

So there are compelling reasons why this Court should enforce the parties' delegation clause. Both the Supreme Court and this Court's precedent require such a result. It also ensures that parties can agree to mutually beneficial contracts. The Court should thus reject the Chickasaw Nation's argument that the arbitrator cannot decide these gateway questions.

II. THE RECOVERY ACT DOES NOT DISPLACE THE FAA.

The Chickasaw Nation argues that it is not bound by the FAA because it is an Indian tribe. In short, it argues that federal law does not apply to it. This Court should reject that argument because it ignores how the FAA interacts with other federal laws.

A. The Chickasaw Nation's Argument Would Eliminate The Ability To Compel Arbitration For Most Claims Arising Under Federal Law.

The Recovery Act provides that an Indian tribe may file a civil action to recover certain medical expenses. *See* 25 U.S.C. §§ 1621e(a) and (e)(1)(B). Under the Chickasaw Nation's theory, any statute that supplies a cause of action in federal court displaces the FAA for claims under that statute. The Chickasaw Nation argues that compelling arbitration for claims brought under the federal statute would defeat Congress's purpose in providing a cause of action. This argument defies logic. It would essentially extinguish parties' right to agree to arbitrate such claims. Decisions from the Supreme Court show why this argument is wrong.

The Supreme Court rejected an almost identical argument in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012). There, the

plaintiffs argued that the Credit Repair Organization Act displaced the FAA. That statute allows for aggrieved consumers to file an "action" in "court." 15 U.S.C. § 1679g(a)(2)(A). The consumers made the same arguments that the Chickasaw Nation makes here: "They cite[d] the provision's repeated use of the terms 'action,' 'class action,' and 'court'—terms that they sa[id] call to mind a judicial proceeding." *CompuCredit*, 565 U.S. at 100.

The Court soundly rejected that argument. It explained that the statute's "references [could not] do the heavy lifting [the consumers] assign[ed] them. It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit." *CompuCredit*, 565 U.S. at 100. There must be a clear "congressional command" to displace the FAA. *Id.* at 100-01 (quoting *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

The Recovery Act lacks any clear congressional command to displace the FAA. Rather, like the CROA, the Recovery Act just borrows words from a litigation context for brevity. The Chickasaw Nation does not even attempt to distinguish *CompuCredit*. *See* Chickasaw Nation's

Br. 54. That is because it realizes *CompuCredit* is indistinguishable. And *CompuCredit* disposes of the Chickasaw Nation's specious argument that the Recovery Act displaces the FAA.

Other cases did not directly address the issue. For good reason; the Chickasaw Nation's argument lacks merit. But these other decisions also show the flaws in the Chickasaw Nation's reasoning. For instance, the Fair Labor Standards Act provides that aggrieved employees may bring "[a]n action" in "any Federal or State court" to vindicate their rights. 29 U.S.C. § 216(b). Yet in *Epic Systems*, the Court held that employees who agree to arbitration clauses must arbitrate their FLSA claims. 138 S. Ct. at 1621-32. This ruling is impossible under the Chickasaw Nation's theory of how the Recovery Act and the FAA interact. Under that theory, the FLSA's provision allowing employees to maintain an action in a federal or state court would displace the FAA. The Court, however, did not ignore the FAA's plain language just because the FLSA provides for a federal suit.

The Age Discrimination in Employment Act also allows aggrieved individuals to file an "action" in a "court." 29 U.S.C. § 626(b). Even so, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that the ADEA

does not displace the FAA. 500 U.S. 20, 26-33 (1991). If the Chickasaw Nation's displacement argument were correct, the Court would have reached a different conclusion. There are dozens, if not more, of federal statutes that use language like the CROA's, ADEA's, and the Recovery Act's language. Yet under the Chickasaw Nation's argument, parties cannot agree to arbitrate claims under those statutes. The absurdity of the argument is self-evident.

B. Tools Of Statutory Interpretation Show That The Recovery Act Does Not Displace The FAA.

1. This Court should apply general rules of statutory construction when deciding this case.

The Chickasaw Nation relies on *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), to argue that typical tools of statutory construction are inapplicable in cases involving Indian law. Chickasaw Nation's Br. 44. This argument misses the mark for two reasons. First, the Chickasaw Nation relies on thirty-six-year-old precedent because more recent Supreme Court decisions have abandoned this approach to statutory interpretation. In more recent times, the Court has applied the traditional tools of statutory interpretation when considering Indian law

cases. Second, even if the Court agreed with the Chickasaw Nation's view of how to interpret Indian laws, the FAA is not an Indian law.

The Court's decision this year in *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434 (2021), proves the point. There, the Court considered whether Alaska Native regional and village corporations were tribal governments under the Indian Self-Determination and Education Assistance Act. The Court first looked at the statute's plain-meaning. *Id.* at 2441-43. This, of course, is the first step of ordinary statutory construction. *Orozco-Lopez v. Garland*, 11 F.4th 764, 775 (9th Cir. 2021) (citing *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009)). In other words, the Court did not deviate from the normal process because it was a case involving Indian law.

The rest of the opinion is even more telling. The Court did not once invoke the canon of construction that the Chickasaw Nation relies on. Rather, the Court focused on traditional tools of statutory interpretation. The first tool it employed was the canon of construction that the "Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption." *Confederated*

Tribes, 141 S. Ct. at 2445 (citing *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019)).

Next, the Court turned to another familiar tool of statutory construction—statutory history. *Confederated Tribes*, 141 S. Ct. at 2446. After discussing why the statutory history supported its holding, the Court next turned to the general rule that "the series-qualifier canon gives way when it would yield a 'contextually implausible outcome.'" *Id.* at 2448 (quoting *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1171 (2021)). And rather than citing any source the Chickasaw Nation relies on, the Court cited Bryan Garner's *Modern English Usage*—the quintessential general book. *See id.*

Finally, the Court used the presumption-of-consistent-usage and related-statutes canons of construction. *See Confederated Tribes*, 141 S. Ct. at 2451. These are general canons of statutory interpretation. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170-73, 252-55 (2012). So every statutory tool the Court used in *Confederated Tribes* was one that courts use in everyday statutory-interpretation cases. Despite undertaking complex issues of Indian law, the Court never suggested that it would use different statutory-

interpretation tools. This Court should follow suit and apply general tools of statutory construction when deciding whether the Recovery Act displaces the FAA.

Confederated Tribes was not the first time the Court used normal statutory-interpretation tools in an Indian law case. Last year, the Supreme Court rejected an argument like the Chickasaw Nation's argument here. In *McGirt v. Oklahoma*, the Court held that "[w]hen interpreting Congress's work in [Indian law], no less than any other, [its] charge is usually to ascertain and follow the original meaning of the law before [it]."140 S. Ct. 2452, 2468 (2020) (citing *New Prime*, 139 S. Ct. at 538-39). As in *Confederated Tribes*, the Court reiterated that "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear." *Id.* at 2469. Again, this is the usual practice in statutory interpretation cases.

The Court went further by extolling "the perils of substituting stories for statutes." *McGirt*, 140 S. Ct. at 2470. Allowing such stories to triumph over statutes would make statutory violations acceptable. *See id.* at 2470-71. Here, the Chickasaw Nation tries to sell this Court a story about why it is exempt from the FAA. Yet this story does not match the

FAA's language. Following the story leads to the dangerous conclusion that an Indian tribe could ignore a bargained-for agreement to arbitrate for no other reason than because it is a tribe. This is the antithesis of law; it is chaos.

But the Chickasaw Nation does not cite *Confederated Tribes* or explain why the Court used normal statutory-construction canons in *McGirt*. The silence is deafening. There is no way to explain away the Court's actions without admitting that this Court should apply normal tools of statutory interpretation when deciding this case. And this the Chickasaw Nation cannot do. Because when the Court applies these normal rules, the Chickasaw Nation knows it will lose.

Second, even if the Court applied different rules when interpreting statutes about Indian law, the FAA is not a statute about Indian law. Rather, it is a law of general applicability. It applies to any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The Commerce Clause allows Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8 cl. 2. So Congress can regulate three areas of commerce. The FAA covers all three areas. *See Allied-Bruce Terminix Cos.*, 513 U.S.

at 277. The FAA is therefore not a law regulating only Indian affairs. Rather, it is a law of general applicability that applies to all commerce in our nation.

So for two reasons this Court should use normal statutory-interpretation techniques when deciding this case. First, the Supreme Court has done so in both Indian law cases it decided the past two years. Second, the FAA is not an Indian law. The Chickasaw Nation's contrary arguments lack merit and the Court should reject them.

2. General tools of statutory construction show that the FAA governs the parties' contract.

Having explained why the Court should use general tools of statutory interpretation here, the next step is applying those canons to decide whether the Recovery Act displaces the FAA. Using those canons of construction shows that the FAA applies to cases in which an Indian tribe has a cause of action under the Recovery Act.

When a statute's language is unambiguous, the Court must apply that language as written. *In re Transwest Resort Props., Inc.*, 881 F.3d 724, 729 (9th Cir. 2018) (citing *King v. Burwell*, 576 U.S. 473, 485 (2015)). Here, the language of the FAA is clear and unambiguous.

The FAA applies only to "[a] written" contract. 9 U.S.C. § 2. As described above, the parties' contract consists of three writings that refer to and incorporate each other. Because the contract is in writing, the FAA governs if it "evidenc[es] a transaction involving commerce" that agrees "to settle by arbitration a controversy thereafter arising out of such contract." *Id.* Here, the parties' written contract involves commerce—the provision of pharmaceutical services. And the contract includes an arbitration clause. So it is covered by the FAA.

Because the FAA governs the parties' contract, the District Court had to compel arbitration if there was no dispute that the parties agreed to the written contract including an arbitration clause. *See* 9 U.S.C. § 4. The Chickasaw Nation concedes the parties have a contract. It just disputes the particulars of that contract. As described in § I *supra*, the arbitrator must decide all issues about the arbitration clause's validity.

The Chickasaw Nation tries to escape this straightforward application of the FAA by arguing that the Recovery Act displaces the FAA. As described in § II.A. *supra*, this argument conflicts with many Supreme Court FAA decisions. But there is another reason that the Court should reject this strained argument; normal canons of construction for

construing multiple statutes show that the Recovery Act does not displace the FAA.

The Recovery Act allows tribes to file a "civil action, including a civil action for injunctive relief and other relief and including, with respect to a political subdivision or local governmental entity of a State, such an action against an official thereof" to recover "the highest amount the third party would pay for care and services furnished by providers other than governmental entities, to any individual to the same extent that such individual . . . would be eligible to receive damages, reimbursement, or indemnification for such charges or expense." 25 U.S.C. §§ 1621e(a) and (e)(1)(B). Notably absent from the Recovery Act's text is the word "arbitration."

Under the omitted-case canon, courts cannot add language to a statute to advance its purpose. Scalia & Garner, *supra* at 93-100; *see Connell v. Lima Corp.*, 988 F.3d 1089, 1107-08 (9th Cir. 2021) (citation omitted). This canon of interpretation "is so obvious that it seems absurd to recite it." Scalia & Garner, *supra* at 93. Yet it is necessary to recite because parties like the Chickasaw Nation routinely ask courts to enact "judicial legislation." *Ebert v. Poston*, 266 U.S. 548, 554 (1925).

If Congress wanted to exempt Recovery Act suits from the FAA it could have included a provision barring arbitration of Indian tribes' claims to recover from third parties like Caremark. Or it could have just said that "notwithstanding the FAA," Indian tribes could sue in federal court. It did neither. Rather, it just provided a cause of action for Indian tribes to recover for medical expenses.

The Chickasaw Nation, however, doesn't like the Recovery Act's language. It is having second thoughts about agreeing to arbitrate its disputes with Caremark. So it now turns to this Court asking for a judicial amendment to the Recovery Act by adding an exemption from the FAA. This violates the omitted-case canon. But that is not the only canon of construction that the Chickasaw Nation asks the Court to ignore.

Under the mandatory/permissive canon, mandatory words impose a duty while permissive words grant discretion. Scalia & Garner, *supra* at 112-15. The Recovery Act's enforcement section uses permissive language. It says that Indian tribes "*may* enforce the right of recovery" by filing a civil action. 25 U.S.C. § 1621e(e)(1) (emphasis added). It does not foreclose Indian tribes from recovering using alternative dispute-resolution mechanisms, including arbitration.

The FAA, however, uses mandatory language. It provides that arbitration provisions "*shall* be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis added). And the FAA instructs courts that they "shall" order arbitration if a party establishes that the parties' contract provides for arbitration. *Id.* § 4. There is no wiggle room for courts.

The Recovery Act's use of permissive language when describing the right to file a civil action to recover damages and the FAA's use of mandatory language when discussing what disputes must be arbitrated show that Congress wanted the FAA to govern in these cases. Rather than make both permissive or both mandatory, it made only the FAA mandatory. So the Recovery Act does not displace the FAA.

The Chickasaw Nation wants to avoid applying the normal tools of statutory interpretation here because they point to a result it doesn't like; the Recovery Act does not displace the FAA. The District Court correctly held that the parties must arbitrate their dispute, including whether the arbitration clause is enforceable. This Court should affirm and hold the parties to the plain terms of their contract.

3. The result is the same using the Chickasaw Nation's approach to statutory interpretation.

Even if this Court uses the Chickasaw Nation's approach to statutory interpretation, the result is the same. It argues that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Chickasaw Nation's Br. 44 (quoting *Blackfeet Tribe*, 471 U.S. at 766). But there is nothing about interpreting the Recovery Act and the FAA to require arbitration that hurts Indian tribes. Rather, allowing the parties to consent to arbitration helps Indian tribes.

Litigation is expensive. It's expensive for businesses, which must pay lawyers to argue and employees to miss work to testify. It's expensive for consumers and workers, who cover businesses' costs through higher prices and lower wages.

Arbitration is cheaper than litigation. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (*en banc*) (citing Int'l Ct. of Arb., *Introduction to Arbitration*, available at http://www.iccwbo.org/court/english/arbitration/introduction.asp (visited June 30, 2003); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Renot. L. Rev. 171, 171 (2003); *Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). So arbitration helps Indian tribes by saving them money when they bring Recovery Act claims. It also allows them to negotiate better contracts with pharmacy-benefit managers. In exchange for an arbitration clause, the other side can make other concessions. In short, interpreting the FAA and Recovery Act to allow for arbitration of Recovery Act claims helps, not hurts, tribes.

Indian tribes' recent positions before this Court prove the point. *Brice* addressed arbitration clauses with delegation provisions that the Chippewa Cree Tribe and the Otoe-Missouria Tribe drafted. *See* 2021 WL 4203337 at *2. The tribes viewed these arbitration agreements as beneficial. Otherwise, they would have not included the clauses in the contracts. Because construing statutes to allow arbitration helps—not hurts—Indian tribes, even using the Chickasaw Nation's interpretive method leads to the Recovery Act not displacing the FAA.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,325 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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