No. 22-15543

In the United States Court of Appeals for the Ninth Circuit

Caremark LLC, et al.,
Petitioners-Appellees,

v.

Choctaw Nation, et al.,
Respondents-Appellants.

On Appeal from the United States District Court
for the District of Arizona
No. 21-cv-01554-SMB
Hon. Susan M. Brnovich

BRIEF OF APPELLEES

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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

This appeal is nearly identical to one this Court just decided against another set of tribal pharmacies represented by the same counsel. In *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir. 2022), this Court upheld the same arbitration agreement at issue here and concluded that arbitrators, not courts, must resolve all threshold challenges to that arbitration agreement. This Court thus rejected the Chickasaw Nation's contention that tribal sovereign immunity blocked arbitrators from resolving threshold challenges to the enforceability of their arbitration agreement with Caremark and other defendant-appellees, who manage "prescription drug benefits for health insurers, Medicare Part D drug plans, large employers, and other healthcare payers." *Id.* at 1025. Rather, this Court held, "courts need not resolve the sovereign-immunity implications (if any) before deciding whether an agreement to arbitrate exists at all." *Id.* at 1032.

Chickasaw likewise rejected the Nation's argument that the Recovery Act, 25 U.S.C. § 1621e, precludes arbitrators from deciding in the first instance whether Recovery Act claims are subject to arbitration. As this Court explained, arguing that "claims are not arbitrable because the procedural rules in arbitration 'prevent or hinder'" appellants' rights under the Recovery

Act "raises exactly the type of threshold arbitrability issue that the parties have delegated to the arbitrator." *Chickasaw*, 43 F.4th at 1034.

Now, represented by the same counsel as in *Chickasaw*, appellants—the Choctaw Nation and its various pharmacies—attempt a brazen end-run around *Chickasaw*. Appellants have acknowledged that *Chickasaw* involved "virtually identical legal and factual issues," including the same arbitration agreement, materially identical challenges to the arbitration agreement, the same defendants, and identically situated tribal entities.[1] Appellants even previously represented that "the issues that the Ninth Circuit will resolve in the Chickasaw Appeal significantly bear upon—and, in fact, will necessarily ***control***—the resolution of the exact same issues present here." 10/7/21 Stay Mot. 2-3 (emphasis in original).

Yet appellants' opening brief largely pretends that this Court never decided *Chickasaw*. Appellants reiterate the same sovereign-immunity and Recovery Act challenges to arbitration as in *Chickasaw*. Indeed, appellants

[1] Appellants' Unopposed Motion to Hold Appeal in Abeyance and to Suspend Briefing Schedule 2, 4, Dkt. 16, *Caremark, LLC v. Choctaw Nation*, No. 22-15543 (9th Cir. May 26, 2022) (5/26/22 Abeyance Mot.); Respondents' Motion to Stay This Action Pending Resolution of Ninth Circuit Appeal Significantly Bearing Upon This Action 2-3, Dkt. 16, *Caremark, LLC v. Choctaw Nation*, No. 21-cv-01554 (D. Ariz. Oct. 7, 2021) (10/7/21 Stay Mot.).

apparently lifted portions of the *Chickasaw* briefs verbatim. *Compare, e.g.*, Br. 32-46, *with* Appellants' Opening Br. 43-58, Dkt. 27-1, *Caremark, LLC v. Chickasaw Nation*, No. 21-16209 (9th Cir. Sept. 1, 2021) (*Chickasaw* Appellants' Br.). When appellants do acknowledge *Chickasaw*, they (at 7-8) "respectfully disagree[]" with its sovereign-immunity holding. But "it is well settled that" this Court is "bound by [its] prior decisions." *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014). Appellants were correct before: *Chickasaw* "necessarily control[s] … the resolution of the exact same issues present here," and forecloses appellants' rehashed arguments. 10/7/21 Stay Mot. 2-3 (emphasis omitted).

Appellants raise only one novel argument: that the federal district court in Arizona purportedly lacked jurisdiction to compel arbitration because of appellants' tribal immunity. In appellants' telling, they can enlist federal courts' jurisdiction by filing a complaint against appellees in federal district court in Oklahoma. Yet appellants supposedly can still wield immunity to thwart enforcement of their agreement to arbitrate in federal court in Arizona, the federal court with venue to compel arbitration under the Federal Arbitration Act (FAA). Appellants tellingly cite no authority endorsing their theory that they can waive immunity in some federal courts but not others to

forum-shop their way around arbitration. This Court should reject that abusive contention and affirm.

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. On March 14, 2022, 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 of Arizona had jurisdiction to compel arbitration where appellants consented to the jurisdiction of the Eastern District of Oklahoma.
2. Whether *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir. 2022)—which upheld the same delegation clause at issue here and required arbitrators to resolve the same threshold challenges that appellants present here—requires affirmance of the district court's order compelling arbitration.

STATEMENT OF THE CASE

A. *Caremark, LLC v. Chickasaw Nation*

As appellants previously acknowledged, this case is "identical" to an earlier suit this Court just resolved. *See* 10/7/21 Stay Mot. 6. On December 29, 2020, the Chickasaw Nation and its pharmacies, represented by the same counsel here, sued appellees in the Eastern District of Oklahoma. *See* Complaint, Dkt. 2, *Chickasaw Nation v. CVS Caremark, LLC*, No. 20-00488 (E.D. Okla. Dec. 29, 2020). The Chickasaw Nation alleged that appellees violated the Recovery Act, which generally "enable[s] tribal healthcare providers to recover the cost of healthcare services from third-party insurers." *Chickasaw*, 43 F.4th at 1027. The Nation claimed, for example, that appellees had improperly denied the Nation's claims for reimbursement. *Id.*

Appellees moved to stay that lawsuit in federal district court in Oklahoma and petitioned to compel arbitration in federal district court in Arizona—the venue designated in the parties' arbitration agreement. *See* Petition for Order to Compel Arbitration, Dkt. 1, *Caremark, LLC v. Chickasaw Nation*, No. 21-cv-00574 (D. Ariz. Apr. 2, 2021). That arbitration agreement is located in the Provider Manual, a detailed document that "governs a pharmacy's relationship with Caremark." *Chickasaw*, 43 F.4th at

1025-26. That arbitration agreement was "'incorporated … as if fully set forth'" in the Provider Agreement, which pharmacies sign and which "set[s] forth the general terms of the relationship." *Id.* at 1025.

Further, that arbitration agreement "includes a 'delegation clause'—a clause requiring the arbitrator, rather than courts, to resolve threshold issues about the scope and enforceability of the arbitration provision." *Id.* at 1026. Finally, the arbitration agreement provides that any arbitration "'must be conducted in Scottsdale, Arizona and Provider agrees to such jurisdiction, unless otherwise agreed to by the parties in writing.'" *Id.* at 1027.

In July 2021, the Arizona district court granted appellees' petition and ordered arbitration. In August 2022, this Court affirmed, holding that the parties had delegated "threshold arbitrability issue[s] … to the arbitrator." *Chickasaw*, 43 F.4th at 1034. This Court held that by signing the Provider Agreements, the Chickasaw Nation agreed that an arbitrator would decide any issues relating to the enforceability of the arbitration provision in "'[a]ny and all disputes between'" its pharmacies and Caremark. *Id.* at 1026, 1031.

This Court "reject[ed]" the Chickasaw Nation's "argument that, because it did not clearly and unequivocally waive its tribal immunity, it cannot have agreed to the arbitration provisions (or the delegation clauses) in the Provider

Manuals." *Id.* at 1033. The Court held that the Chickasaw Nation could not "plausibly deny that it formed contracts with Caremark." *Id.* at 1031. The Court therefore did not need to "resolve the sovereign-immunity implications (if any)" of the arbitration provision as applied to the "particular claims for which arbitration [was] sought." *Id.* at 1032-33. Instead, the Court left it to the arbitrator to determine "the enforceability of the underlying arbitration provision . . . in the first instance." *Id.* at 1034.

The Court also rejected the Chickasaw Nation's contention that "its Recovery Act claims [were] not arbitrable" because "the Recovery Act itself precludes the enforcement of any agreement to arbitrate." *Id.* at 1028. The Court explained that the Nation's Recovery Act arguments—including that "the procedural rules in arbitration 'prevent or hinder' the Nation's right of recovery"—were directed to "the enforceability of the arbitration provisions as a whole" and thus for the arbitrator to decide. *Id.* at 1033-34.

B. Procedural History

Four months after filing the Chickasaw Nation complaint, the same counsel filed a complaint in the same federal district court in Oklahoma on behalf of the Choctaw Nation against appellees and other defendants. Complaint, Dkt. 2, *Choctaw Nation v. Caremark PHC, LLC*, No. 21-cv-00128

(E.D. Okla. Apr. 26, 2021). That complaint is materially identical to the *Chickasaw* complaint and involves the same pharmacy agreements as in *Chickasaw*—including the same delegation clauses and arbitration agreements. *Compare Chickasaw*, 43 F.4th at 1025-27, *with* 3-ER-167–69; 3-ER-198. As appellants later put it, this suit and the *Chickasaw* litigation "involve (1) the same purported arbitration agreement at issue here; (ii) the same Petitioners present here; (iii) the same underlying claims at issue here; and (iv) the same type of respondent present here, *i.e.*, a Federally recognized tribal nation." 10/7/21 Stay Mot. 2.

Like in the *Chickasaw* suit, appellees petitioned to compel arbitration in the District of Arizona—the designated venue for arbitration under the arbitration agreement—and asked the Eastern District of Oklahoma to stay proceedings pending arbitration. Motion to Stay Proceedings Pending Arbitration in the District of Arizona, Dkt. 34, *Choctaw Nation v. Caremark PHC, LLC*, No. 21-cv-00128 (E.D. Okla. Sept. 13, 2021). The Eastern District of Oklahoma granted appellees' motion to stay under the Federal Arbitration Act "[f]or the same reasons" that court stayed proceedings pending arbitration in the *Chickasaw* suit. Order 1, 3, Dkt. 64, *Choctaw Nation v. Caremark PHC, LLC*, No. 21-cv-00128 (E.D. Okla. Sept. 30, 2022) (*Choctaw*

Stay Order). The district court "agree[d] with the Ninth Circuit's reasoning" in *Chickasaw* that, "because of the delegation clause in the Provider Manual, the threshold question of arbitrability was one for the arbitrator, not the court." *Chickasaw Nation v. Caremark PHC, LLC*, 2022 WL 4624694, at *3 (E.D. Okla. Sept. 30, 2022); *Choctaw* Stay Order 3 (referencing reasoning in *Chickasaw* order). The Eastern District of Oklahoma thus stayed and closed the action "pending the outcome of any arbitration proceedings" in Arizona. *Choctaw* Stay Order 3.

Like in the *Chickasaw* suit, appellants' main objections to arbitration in the District of Arizona were that (1) the Choctaw Nation purportedly never "signed a contract containing an arbitration clause" and so could not have waived its sovereign immunity and (2) "the Recovery Act displaces any such arbitration agreement." Special Appearance for Respondents' Response in Opposition to Petitioners' Petition to Compel Arbitration 1, Dkt. 28, *Caremark, LLC v. Choctaw Nation*, No. 21-cv-01554 (D. Ariz. Nov. 18, 2021).

On March 14, 2022, the District of Arizona granted appellees' petition to compel arbitration. 1-ER-004–014. Relying on the District of Arizona's decision to compel arbitration in *Chickasaw*, the district court deemed the delegation clause "clear and unmistakable; an arbitrator—not [the] Court—

should decide the threshold question of arbitrability." 1-ER-011. The district court further held that appellants had clearly signed arbitration agreements because "the Provider Manuals were properly incorporated by reference into the Provider Agreements." 1-ER-009. The court also held that "the Choctaw Nation pharmacies clearly and unequivocally waived sovereign immunity when they signed contracts with an express arbitration provision." 1-ER-012. Finally, the court concluded that "whether the Recovery Act displaces the arbitration provision is a question for the arbitrator." 1-ER-013.

On May 24, 2022, this Court granted appellants' motion to stay the district court order compelling arbitration. Order, Dkt. 15, *Caremark, LLC v. Choctaw Nation*, No. 22-15543 (9th Cir. May 24, 2022). On May 26, 2022, appellants filed an unopposed motion to hold the appeal in abeyance until this Court decided *Chickasaw*, which appellants reiterated involved "virtually identical legal and factual issues," namely "whether the Chickasaw Nation clearly and unequivocally agreed to (a) arbitrate or delegate its federal claims and (b) waive its sovereign immunity" and "whether the Recovery Act displaces any purported arbitration agreement." 5/26/22 Abeyance Mot. 2, 4.

On August 9, 2022, this Court decided *Chickasaw* and resolved those issues in appellees' favor. 43 F.4th 1021. The Chickasaw Nation declined to

petition for panel or en banc rehearing. Despite previously representing that *Chickasaw* would "necessarily ***control***" the "resolution of the exact same issues present" in this case, 10/7/21 Stay Mot. 3, appellants nonetheless proceeded with this appeal.

SUMMARY OF ARGUMENT

I. The district court had jurisdiction to compel arbitration. Appellants waived immunity in federal court as to this dispute several times over. First, they waived federal-court immunity by filing a complaint in the Eastern District of Oklahoma. Second, appellants agreed to an arbitration provision that requires arbitration in Scottsdale, Arizona and authorizes enforcement of awards "in any court having jurisdiction thereof," which includes the District of Arizona. 3-ER-198. Because the District of Arizona has jurisdiction to enforce any arbitration award, that federal court has incidental authority to effectuate that jurisdiction by compelling arbitration. Third, appellants agreed to arbitration under the FAA, which means they agreed to federal jurisdiction to enforce that arbitration agreement.

II. *Chickasaw* forecloses appellants' arguments that sovereign immunity and the Recovery Act bar enforcement of the delegation clause.

A. The parties' delegation clause requires arbitrators, not courts, to decide all threshold arbitrability issues. In *Chickasaw*, this Court held that appellants' sovereign immunity challenges are the kind of threshold challenges to arbitration that the parties' delegation clause reserves to arbitrators. So too here.

B. Appellants alternatively contend that the Recovery Act displaces the parties' arbitration agreement. But as *Chickasaw* held, that is also a question for the arbitrator because it is a challenge to arbitration writ large, not the delegation clause specifically. Appellants are also incorrect that they would be unable to effectively vindicate their federal rights under the Recovery Act if an arbitrator resolved their threshold challenges. Supreme Court and Ninth Circuit precedent strongly favors enforcing the delegation clause here.

III. Even if this Court resolves appellants' challenges to arbitration, it should affirm.

A. Appellants cannot plausibly deny they agreed to arbitration, or that they are bound by the terms of the Provider Agreement and Provider Manual. As this Court explained in *Chickasaw*, because appellants concede that all "pharmacies signed Provider Agreements with Caremark," which incorporate the Provider Manual, and appellants have submitted "hundreds of thousands

of claims . . . to Caremark over the last several years," appellants are bound by the terms of the Provider Agreement and Provider Manual. *Chickasaw*, 43 F.4th at 1031. Those documents include unambiguous agreements to arbitrate and to delegate all disputes over arbitrability to the arbitrators.

Appellants' arguments that the tribe's sovereign immunity bars arbitration are meritless. The Choctaw Nation waived immunity by signing an agreement with a clear arbitration provision. *See C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 414 (2001). Appellants protest that no one from the tribe ever signed a document containing an arbitration provision, but *Chickasaw* recognized that the Provider Agreement properly incorporated the Provider Manual's arbitration provision. And the Choctaw Nation signatories plainly had authority to contractually bind the tribe; appellants identify no provision of Choctaw law that restricts who can waive immunity.

B. The Recovery Act, 25 U.S.C. § 1621e, does not bar arbitration either. Appellants argue that the Recovery Act supersedes the FAA, but the Supreme Court has rejected every effort to find conflicts between the FAA and other federal statutes. Appellants alternatively say that the arbitration agreement is unenforceable because the arbitration procedures would hinder their

Recovery Act claims. But the challenged procedures come nowhere close to the line the Supreme Court has drawn in upholding far more onerous procedural rules. This Court should affirm.

ARGUMENT

I. The District of Arizona Had Jurisdiction to Compel Arbitration

Appellants (at 1 n.2, 8-9, 21-22, 29) raise just one argument that the *Chickasaw* appellants did not: that the District of Arizona purportedly lacked jurisdiction to compel arbitration. Appellants (at 17, 29-30) say they consented to federal jurisdiction in the Eastern District of Oklahoma—where they filed suit—but withheld consent to federal jurisdiction in the District of Arizona, *i.e.*, the federal court empowered to compel arbitration under the FAA. *See* 9 U.S.C. § 4. This Court should reject that selective theory of waiver, which would invite forum-shopping and let appellants evade enforcement of an arbitration agreement they unquestionably agreed to honor.

1. Appellants waived any objection to federal-court jurisdiction. To start, waivers of immunity apply to all courts of a particular sovereign—like federal or state courts—not specific venues. *Cf. Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944) (waivers of immunity in state courts do not waive immunity in federal courts). Sovereign immunity protects a sovereign against being haled into other sovereigns' courts or other adjudicatory forums without

consent because one sovereign cannot sit in judgment of another. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1496-97 (2019); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-89 (2014). But federal courts are undifferentiated subsidiaries of the same sovereign: the federal government. By invoking federal jurisdiction in the federal district court in Oklahoma, appellants necessarily waived immunity in other federal courts.

Appellants' cited authorities (at 29-30) do not hold otherwise. Most either reiterate the uncontroversial proposition that waivers in one forum (*e.g.*, an administrative proceeding or tribal court) do not carry over to another (*e.g.*, federal court) or are otherwise inapposite.[2] Others hold that a tribe that files suit and thereby opens itself to judgment on some claims does not automatically waive immunity as to counterclaims.[3] But here, appellees'

[2] *See West v. Gibson*, 527 U.S. 212, 226 (1999) (Kennedy, J., dissenting) ("a waiver of sovereign immunity in one forum does not effect a waiver in other forums"); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984) (noting "problems of federalism inherent in making one sovereign appear against its will in the courts of the other" (quotation omitted)); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (tribe's intervention in "administrative proceedings" did not waive federal-court immunity); *Attorney's Process & Investigation Servs., Inc. v. Sac and Fox Tribe*, 609 F.3d 927, 946 (8th Cir. 2010) (holding tribal court had jurisdiction over claims and rejecting petition for an order compelling arbitration); *Big Horn Cnty. Elec. Coop. Inc. v. Adams*, 219 F.3d 944, 955 (9th Cir. 2000) (immunity waivers in tribal court do not waive federal-court immunity).

[3] *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509-10 (1991); *Ute Indian Tribe of the Uintah and Ouray Rsrv. v. Utah*, 790 F.3d 1000, 1011 (10th Cir. 2015); *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1017 (9th Cir. 2016).

petition to compel arbitration inextricably involves the exact same claims that appellants want federal courts to resolve—not counterclaims. Indeed, FAA § 4 itself acknowledges the special linkage between underlying claims and petitions to compel arbitration of those claims. *See* 9 U.S.C. § 4 (party may petition to compel arbitration in "any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties"); *Vaden v. Discover Bank*, 556 U.S. 49, 66 (2009). By bringing their claims in federal court, appellants necessarily put in play whether federal courts are the proper forum for such claims.

Appellants' theory would transform tribal immunity from a limited defense into an invitation to forum-shop and evade an agreed-upon arbitration. Tribes could purport to limit waivers of immunity in a given forum to proceedings before a particular, favorable judge. Taken to its logical extreme, tribes could even thwart judicial review by purporting to waive federal-court immunity only in district court, not on appeal. This Court should reject appellants' attempt to rewrite the rules of immunity.

2. Appellants independently assented to federal jurisdiction under the Supreme Court's decision in *C&L Enterprises, Inc. v. Citizen Band*

Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001). *C&L* held that a tribe that clearly agreed to arbitration had also plainly "waived its immunity from suit in state court" to enforce that arbitration agreement. *Id.* at 414. Like appellants here, the tribe in *C&L* agreed to an arbitration provision that invoked American Arbitration Association (AAA) rules and provided that judgment could be entered "in any court having jurisdiction," which the Court interpreted to mean "any federal or state court having jurisdiction thereof." *Id.* at 415, 419 (quotations omitted). The Court thus concluded that the tribe had consented both to arbitration and to enforcement of any arbitral award in Oklahoma state court. *Id.* at 423.

So too here, by agreeing to the Provider Manual's arbitration provision, appellants clearly consented to federal-court jurisdiction to effectuate arbitration. *See id.* As noted, *supra* p. 6, the arbitration provision mandates "arbitration must be conducted in Scottsdale, Arizona and Provider agrees to such jurisdiction," and elaborates that "judgment … may be entered in any court having jurisdiction thereof." 3-ER-198. The arbitration provision also incorporates AAA rules, 3-ER-198, which, as *C&L* noted, provide that parties to arbitration under the rules "'shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state

court having jurisdiction thereof," 532 U.S. at 415 (quoting AAA, Construction Industry Dispute Resolution Procedures R-48(c) (Sept. 1, 2000)). Moving to compel arbitration is incident to the ultimate enforcement of any arbitral award. *See Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 275-76 (1932) (explaining where court had authority "to make an order for arbitration, the court also ha[d] authority to confirm the award or to set it aside").

Appellants' agreement to arbitrate under the FAA, 3-ER-199, reinforces their assent to federal jurisdiction in the District of Arizona. FAA § 4 authorizes motions to compel arbitration in federal courts in the district where arbitration would be held—here, Arizona. *See Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1219-20 (10th Cir. 2005). As the Second Circuit has held, "[w]hen a party agrees to arbitrate in a state, where the [FAA] makes such agreements specifically enforceable, that party must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in that state." *Dr.'s Assocs., Inc. v. Stuart*, 85 F.3d 975, 979 (2d Cir. 1996) (alterations adopted and quotation omitted). "To hold otherwise would be to render the arbitration clause a nullity." *Id.* (quotation omitted); *accord Allied Pros. Ins. Co. v. Anglesey*, 2018 WL 6219926, at *6 (C.D. Cal. Aug. 10, 2018) ("[S]election of a forum for arbitration would be

rendered meaningless if it did not also embody consent to enforce the arbitration agreement in that jurisdiction's courts.").

Appellants' contrary position would nullify their agreement to arbitrate and lead to the untenable result that *no* federal court might have jurisdiction to require appellants to honor their agreement to arbitrate. Unsurprisingly, the Eastern District of Oklahoma—whose jurisdiction appellants invoked to adjudicate their claims—implicitly rejected that argument by staying proceedings under FAA § 3 so as to defer to the District of Arizona's order compelling arbitration. *See Chickasaw Nation*, 2022 WL 4624694, at *1, *3; *Choctaw* Stay Order 3 (referencing *Chickasaw* stay order).

Ultimately, appellants' jurisdictional argument proves too much. If, as appellants contend, the District of Arizona lacked jurisdiction, this Court would also lack jurisdiction to resolve the many challenges that appellants (at 26-46) mount against the arbitration agreement. This Court should reject appellants' attempt to dodge federal enforcement of an arbitration agreement they plainly signed, while appellants opportunistically urge federal courts to invalidate that agreement and adjudicate their claims on the merits.

II. *Chickasaw* Forecloses Appellants' Other Arguments

Appellants' remaining arguments are that sovereign immunity and the Recovery Act preclude enforcement of the delegation clause, which (as noted) expressly provides that arbitrators, not courts, will resolve all threshold challenges to the enforcement of the arbitration agreement. *Supra* p. 6; 3-ER-198. *Chickasaw* rejected those same arguments and governs here. *See Gomez*, 768 F.3d at 875; *United States v. Walker*, 953 F.3d 577, 579-80 (9th Cir. 2020). Again, appellants already conceded as much, representing before *Chickasaw* issued that this case involves "virtually identical legal and factual issues," 5/26/22 Abeyance Mot. 2, and "the same" arbitration agreement, 10/7/21 Stay Mot. 2. Appellants cannot circumvent *Chickasaw* now by relitigating the same arguments—often copied and pasted from the *Chickasaw* briefs—as if *Chickasaw* never happened.

A. Under *Chickasaw,* Arbitrators Must Decide Appellants' Sovereign-Immunity Challenges

Appellants agreed to "the same" arbitration agreement as the one this Court considered in *Chickasaw*. 10/7/21 Stay Mot. 2; *compare* 3-ER-198, *with Chickasaw*, 43 F.4th at 1026-27. Like in *Chickasaw*, appellants here agree (at 15-16) that they signed Provider Agreements, *see* 3-ER-167–84, that

incorporated the Provider Manual, its arbitration agreement, and the delegation clause in the arbitration agreement, *see* 3-ER-198–99.

This Court in *Chickasaw* already upheld that same delegation clause, *i.e.*, the separate mini-contract requiring arbitrators to resolve all threshold challenges to arbitration aside from "whether an arbitration agreement was formed." 43 F.4th at 1030; *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010). As in *Chickasaw*, then, arbitrators must decide all threshold challenges to the enforceability of the arbitration agreement in the first instance. Appellants press the same challenges that the *Chickasaw* appellants did and that this Court already reserved for arbitrators.

To start, appellants (at 25-26, 28) copy and paste portions of the *Chickasaw* appellants' opening brief to contend that courts must apply some heightened standard to whether tribes formed an arbitration agreement at all. *See Chickasaw* Appellants' Br. 30-31. Appellants (at 26, 28) thus say this Court cannot send even threshold issues to the arbitrators unless this Court holds that the Choctaw Nation "'clearly' and 'unequivocally' agreed to waive its sovereign immunity." *Chickasaw* held the opposite: There is no "special, heightened showing" required to determine that a tribe "entered into an arbitration agreement." 43 F.4th at 1031-32. Appellants' notion that a tribe

could not "have agreed to . . . arbitration provisions" because it "did not take the clear and unequivocal steps necessary to waive immunity" is thus incorrect. *Id.* at 1030.

Appellants (at 18, 31) also deny that anyone from the Choctaw Nation signed a document containing an arbitration agreement. The *Chickasaw* appellants made this argument too. *See Chickasaw* Appellants' Br. 1, 13, 17, 20, 32. And again, this Court in *Chickasaw* rejected that argument. All appellant pharmacies signed a Provider Agreement with Caremark, and that agreement expressly incorporates the Provider Manual—including the Manual's arbitration agreement. 3-ER-168. As *Chickasaw* explained, appellants cannot disclaim agreeing to arbitration simply because the document they signed incorporated the arbitration agreement by reference. 43 F.4th at 1031. Nor can appellants ask the court "to 'excise' the arbitration provisions while leaving the remainder of the parties' agreements intact." *Id.*

Finally, while appellants (at 15-16) do not dispute that Choctaw Nation representatives signed the Provider Agreements and their accompanying arbitration provisions, appellants (at 31) contest whether these signatories had authority to waive immunity. Yet again, the *Chickasaw* appellants argued the same thing. *Chickasaw* Appellants' Br. 13, 16, 32. And yet again, this Court

in *Chickasaw* disagreed, holding that the *Chickasaw* appellants could not "seriously dispute that [they] have contractual relationships with Caremark that are governed by the terms of the Provider Manual," including the delegation clause. *Chickasaw*, 43 F.4th at 1030-31. As in *Chickasaw*, "considering the hundreds of thousands of claims the [Choctaw] Nation has submitted to Caremark over the last several years—the Nation cannot plausibly deny that it formed contracts with Caremark." *Id.* at 1031; 2-ER-112.

B. Under *Chickasaw*, Arbitrators Must Decide Appellants' Recovery Act Challenges

Appellants (at 40-46) alternatively claim that the Recovery Act bars arbitration of threshold issues. Appellants (at 41-43) say that, notwithstanding delegation clauses, courts must decide whether the Recovery Act prevents arbitration of claims arising under that statute. Similarly, appellants (at 43-45) argue that even allowing arbitrators to resolve appellants' claim that the Recovery Act bars arbitration would purportedly undermine appellants' rights under the Recovery Act. Here too, appellants copied these arguments and accompanying authorities mostly verbatim from the *Chickasaw* appellants' brief. *See Chickasaw* Appellants' Br. 52-57. And, here too, these arguments do not survive *Chickasaw*.

For starters, *Chickasaw* held that appellants' "theory that the Recovery Act displaces the arbitration provisions in the Provider Manuals does not impugn the validity of the delegation clauses specifically" but is instead "a challenge to the enforceability of the arbitration provisions as a whole." *Chickasaw*, 43 F.4th at 1033. And "any challenge to the validity of the arbitration agreement as a whole"—as opposed to the delegation clause in particular—is one "for the arbitrator." *Id.* (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010)). *Chickasaw* even expressly rejected some of the same authorities that appellants (at 41-42) reassert. 43 F.4th at 1033-34 (distinguishing *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537-38 (2019)). As *Chickasaw* explained, those cases do not show that courts must always "determin[e] whether a statute precludes arbitration." *Id.* at 1033; *New Prime*, 139 S. Ct. at 537-38.

Similarly, *Chickasaw* undercuts appellants' contention (at 43-45) that letting arbitrators resolve threshold issues would purportedly compromise appellants' rights under the Recovery Act. Under this "'effective vindication' exception," an arbitration agreement is invalid if it operates "as a prospective waiver of a party's *right to pursue* statutory remedies." *Am. Express Co. v. Italian Colors*, 570 U.S. 228, 235 (2013) (quotation omitted). Though

Chickasaw reserved whether the arbitration agreement was an "invalid prospective waiver," 43 F.4th at 1033 n.12, *Chickasaw*'s reasoning also refutes appellants' asserted impediments to vindicating their Recovery Act rights.

When parties agree to a delegation provision, the relevant question is whether the delegation clause itself prevents the party from pursuing federal remedies because, as *Chickasaw* observed, courts treat "delegation clauses within arbitration provisions the same way [they] treat arbitration provisions within broader contracts." *Id.* at 1029; *see Brennan v. Opus Bank Corp.*, 796 F.3d 1125, 1132 (9th Cir. 2015). So long as parties can present to the arbitrator the threshold argument that arbitrating the dispute would prevent them from pursing federal claims, courts must honor the delegation clause.

Insofar as appellants' non-binding authorities (at 43-44) suggest otherwise, those decisions conflict with the Supreme Court's and this Court's direction by not focusing on the antecedent question whether the delegation clause itself, "the precise agreement to arbitrate at issue," is an invalid prospective waiver. *Rent-A-Center*, 561 U.S. at 71; *see Chickasaw*, 43 F.4th at 1029; *Brennan*, 796 F.3d at 1132.[4] Appellants (at 45) invoke *CompuCredit v.*

[4] Several cases held delegation clauses unenforceable only by analyzing the arbitration agreement *as a whole* and concluding it was unenforceable on prospective-waiver grounds. *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 243 (3d Cir. 2020); *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 294 (4th Cir. 2020); *Hayes v. Delbert Servs.*

Greenwood, 565 U.S. 95, 97-98 (2012), but that decision does not help them because the parties there did not raise the delegation provision.

Here, allowing arbitrators to decide whether arbitration would thwart effective vindication of appellants' claims does not compromise their Recovery Act claims. Appellants vaguely assert (at 45) that "arbitrating threshold issues" would inflict "substantial costs" and involve "a significant time commitment." But appellants do not suggest that an arbitrator could not hear their effective-vindication challenge. Regardless, appellants are sophisticated entities and can recover the required deposit (plus attorney's fees) if they succeed. Appellants' arguments about time are misplaced too; the defining features of arbitration are "simplicity, informality, and expedition," which benefit all parties involved. *Mitsubishi Motors Corp. v. Soler Chrysler-*

Corp., 811 F.3d 666, 675 (4th Cir. 2016). Those cases short-circuited consideration of the delegation clause's enforceability and also involved challenges to agreements that purportedly refused to apply federal law at any stage. Meanwhile, *Brayman v. KeyPoint Government Solutions, Inc.*, 2019 WL 3714773, at *6 (D. Colo. Aug. 7, 2019), addressed an arbitration agreement's class-action waiver, which explicitly required courts to handle disputes over the waiver's validity or enforceability. The court did not analyze the delegation clause in detail and erroneously suggested that courts have "inherent[]" power to strike provisions of arbitration agreements "regardless of" a delegation clause. *Id.* In *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 374 (10th Cir. 2016), the delegation clause was not at issue. Finally, *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955 (N.D. Cal. 2019) is not good law. *See Brice v. Haynes Invs., LLC*, 13 F.4th 823, 826 (9th Cir. 2021) (reversing and remanding), *reh'g en banc granted, opinion vacated sub nom. Brice v. Plain Green, LLC*, 35 F.4th 1219 (9th Cir. 2022).

Plymouth, Inc., 473 U.S. 614, 628 (1985). Thus, none of these features of arbitrating threshold questions compromises their federal rights or impugn the delegation clause.

Appellants (at 45) suggest that other "arbitration provisions" impair their ability to raise their threshold effective-vindication theory—apparently referring to the arbitration procedures they challenge elsewhere. Br. 35-40. Again, *Chickasaw* casts doubt on that claim, which the *Chickasaw* appellants likewise raised. *See* Chickasaw Br. 55-56 (arguing the arbitration clause's "sizable deposit," "limitations on discovery," and "the one-sided confidentiality provisions" hinder the "ability to litigate . . . the question of whether the arbitration provision effectively precludes it from vindicating its statutory rights"). Most of the challenged procedures "do not implicate . . . [appellants'] ability to arbitrate the delegated gateway issues." *Chickasaw*, 43 F.4th at 1034 n.13. The permissibility of a shorter limitations period or damages limits are "immaterial at this stage." *Id.* Appellants never address why they "would need discovery to arbitrate the legal question" of arbitrability. *Id.* Nor have appellants "explained how the confidentiality provisions would hamper [their] ability to arbitrate" threshold issues. *Id.*

III. Regardless, the District Court Correctly Compelled Arbitration

Even if this Court resolved appellants' challenges to arbitration rather than honoring the delegation clause, appellants' arguments are meritless.

A. Appellants' Sovereign-Immunity Objections Are Incorrect

Appellants (at 31) suggest they are not bound by the arbitration provision because "the only documents signed by anyone at the Nation (the Provider Agreements) did not contain any arbitration provisions." Instead, those arbitration provisions were incorporated by reference, which appellants (at 25, 31) apparently deem insufficient. As discussed, *Chickasaw* rejected that argument by upholding the delegation clause, which was equally incorporated by reference. 43 F.4th at 1031; *supra* p. 21. Likewise, the Supreme Court in *C&L* held that incorporating AAA rules by reference sufficed to make those rules part of the contract despite not appearing within the "four corners of the contract." 532 U.S. at 419 n.1. Whether drafters include an arbitration provision in the signed document or incorporate it by reference, the result is the same: clear arbitration provisions waive immunity.

Appellants (at 26-28) argue that "a valid and clear waiver of tribal sovereign immunity may only be accomplished through *authorized* tribal actions" and claim that no authorized tribal representative waived immunity here. But, as in *Chickasaw*, the signatories to the Provider Agreements signed

as "authorized agent[s]." 3-ER-146, 149, 152, 155, 158, 161, 165, 169. Those signatories—Reece W. Sherrill, CEO of Choctaw Nation Health Care and Todd Hallmark, COO of Choctaw Nation Health Services Authority—undisputedly had authority to contractually bind the tribe, unlike cases appellants (at 27 n.12, 28) cite where signatories arguably lacked the power to bind the tribe in any way.[5] Indeed, appellants have reaped the benefits of these contracts for years, to the tune of obtaining $90,500,000 in reimbursements. 2-ER-112; *see also Chickasaw*, 43 F.4th at 1031.

Appellants (at 28) insist, based on a single declaration, that under Choctaw Nation law, only the Tribal Council can waive immunity. 2-ER-024 (Danker Decl. ¶ 5). But, as in *Chickasaw*, neither appellants' brief nor the declaration identifies any provision of Choctaw law actually restricting waivers of immunity this way. And the Choctaw Constitution contains no such restriction. *See* Constitution of the Choctaw Nation of Oklahoma, https://tinyurl.com/ywh7rtye. Appellants' failure to back their assertion with

[5] *See Stillaguamish Tribe of Indians v. Pilchuck Grp. II, LLC*, 2011 WL 4001088, at *6 (W.D. Wash. Sept. 7, 2011) (declining to find waiver where some terms in an agreement "directly contradict[ed]" terms discussed with the tribal board); *Attorney's Process & Investigation Servs., Inc. v. Sac and Fox Tribe*, 401 F. Supp. 2d 952, 955-56, 961-62 (N.D. Iowa 2005) (tribe's signatory had been ousted from tribe's elected council by other members of tribe); *Hydrothermal Energy Corp. v. Fort Bidwell Indian Cmty. Council*, 170 Cal. App. 3d 489, 496 (Cal. Ct. App. 1985) (signatory signed on behalf of tribal council for only "limited bookkeeping purpose").

any provision of Choctaw law distinguishes this case from appellants' authorities (at 26-27 & n.12), which involved tribal laws that expressly required certain procedures or signoff by specified tribal officials to waive immunity.[6]

B. The Recovery Act Does Not Bar Arbitration

Appellants (at 32, 34) alternatively argue that (1) the Recovery Act precludes arbitration, or (2) arbitrating their Recovery Act claims would prevent effective vindication of their statutory rights. Both arguments fail.

1. The Recovery Act does not foreclose arbitration of Recovery Act claims. Under the FAA, courts must "rigorously . . . enforce arbitration agreements according to their terms." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). A party suggesting that a later-enacted statute (like the Recovery Act) overrides the FAA "bears the heavy burden of showing 'a clearly expressed congressional intention'" to do so. *Id.* at 1624 (quotation omitted). Thus far, the Supreme Court "has rejected *every* . . . effort" to

[6] *See Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108, 110 (S.D. 1998) (tribal constitution required particular officials to approve any agreements); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1288 (11th Cir. 2001) (tribal law expressly provided that only designated tribal officials had authority to waive immunity); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d. 271, 272 (N.D.N.Y. 2000) (same); *Dilliner v. Seneca-Cayuga Tribe*, 258 P.3d 516, 520 (Okla. 2011) (same); *Chance v. Coquille Indian Tribe*, 963 P.2d 638, 640-41 (Or. 1998) (same); *see also Cosentino v. Pechango Band of Luiseno Mission Indians*, 637 F. App'x 381, 382 (9th Cir. 2016) (per curiam) (tribe adopted ordinance waiving certain claims of immunity but not with respect to the specific claim at issue).

"conjure conflicts between the Arbitration Act and other federal statutes." *Id.* at 1627 (collecting cases).

Appellants cannot satisfy this demanding standard. The Recovery Act says nothing about arbitration—"an important and telling clue that Congress has not displaced the Arbitration Act." *Id.* Appellants nonetheless assert that the Recovery Act should be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Br. 32 (quoting *Montana v. Blackfleet Tribe of Indians*, 471 U.S. 759, 766 (1985)). But that canon does not apply when it conflicts with the overriding rule disfavoring implied repeals. *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

Appellants (at 32) also gesture at the Recovery Act's "separate civil action" that authorizes tribes to "enforce the right of recovery." 25 U.S.C. § 1621e(e)(1)(B). But the Supreme Court has repeatedly held that statutes with private actions do not supplant the FAA. *See Epic Sys.*, 138 S. Ct. at 1627 (citing cases). Further, that a tribe "*may* enforce the right of recovery" by filing civil actions, 25 U.S.C. § 1621e(e)(1)(B) (emphasis added), does not mean that tribes *must* choose that route and cannot arbitrate.

Appellants (at 34-35) suggest the Recovery Act at least bars enforcement of the particular arbitration agreements here. They cite (at 34)

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." 25 U.S.C. § 1621e(c). According to appellants (at 35), the arbitration agreement "hinder[s]" appellants' "right of recovery" by prescribing procedures that undercut appellants' "procedural rights" under the Recovery Act.

Not so. The "right of recovery" in § 1621e(a) 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." Procedures outside § 1621e(a) are not part of the statute's "right of recovery." And the arbitration agreement does not "prevent or hinder" appellants from claiming recovery under the Act. *See id.* § 1621e(a). Arbitrators are equally capable of resolving federal statutory claims, including Recovery Act claims. *See Mitsubishi Motors*, 473 U.S. at 628.

2. Appellants (at 35-40) alternatively argue that procedural rules in arbitration indirectly hamper their chances to prevail on their Recovery Act claims. Appellants rely on the word "hinder" in the Recovery Act and the effective-vindication doctrine, which holds that arbitration agreements cannot

require parties to prospectively waive their "*right to pursue* statutory remedies." *Italian Colors*, 570 U.S. at 236 (quotation omitted).

But the fact that an agreement might make it more difficult to "*prov[e]* a statutory remedy" does not mean that the agreement eliminates "the *right to pursue* that 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 "make access to [arbitration] impracticable." *Id.*; *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (upholding discovery limitations); *Italian Colors*, 570 U.S. at 235-36 (upholding hefty fees to initiate arbitration); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 532-36 (1995) (upholding waivers of class-litigation rights and forum-selection clauses requiring international arbitration).

The arbitration rules here come nowhere close to making arbitration "impracticable." Even if a particular provision did, the rest of the agreement would remain enforceable because the contracts have severability provisions. *E.g.*, 3-ER-168 (Provider Agreement); 3-ER-198 (Provider Manual).

Statute of Limitations. Appellants (at 35-36) argue that the arbitration provision's six-month filing deadline prevents them from effectively vindicating their rights because the Recovery Act supplies a longer, six-year

limitations period. *See* 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 a 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). Appellants do not explain why six months is "unreasonably short" or makes arbitration of Recovery Act claims impracticable.

Appellants cite (at 36) *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *as amended* (Mar. 13, 1995), but that case concerned a shorter, 90-day limitations period and was decided before the Supreme Court's *Heimeshoff* decision. Appellants also (at 36) cite *Anderson v. Comcast Corp.*, 500 F.3d 66, 76-77 (1st Cir. 2007), which invalidated an arbitration provision for conflicting with a *state*-law statute of limitations. That case is inapt here because 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) (quotation omitted).

Fees and Costs. Under the arbitration agreement, the losing party covers all arbitration costs and the other side's "reasonable attorney's fees."

3-ER-198. The party initiating arbitration puts at least $50,000 in escrow to cover any loss, 3-ER-199, and pays an administrative filing fee.[7] Appellants (at 36) say that these requirements "[s]upersed[e] the Recovery Act's fee and cost provisions," which reward only prevailing plaintiffs.

But these fee-and-cost provisions hardly thwart arbitration. 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; *Vimar*, 515 U.S. at 532, 536. It strains credulity that these standard administrative costs would deter appellants from pursuing claims totaling millions. Appellants (at 37) decry fee-shifting provisions as unconscionable, but appellants are sophisticated players that pay out millions in claims annually. And, unlike in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178 (9th Cir. 2003) (cited at Br. 48), appellants bear no costs at all if they win.

Discovery. Appellants criticize the arbitration agreement's limits on discovery, *see* 3-ER-198, but concede "the Supreme Court has held limitations on discovery do not necessarily render an arbitration provision invalid." Br.

[7] *See, e.g.*, AAA, Commercial Arbitration Rules and Mediation Procedures: Administrative Fee Schedules (amended and effective May 1, 2018), https://www.adr.org/sites/default/files/Commercial_Arbitration_Fee_Schedule_1.pdf.

38 (citing *Gilmer*, 500 U.S. at 31). That is an understatement: as the First Circuit 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). That "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 say how the discovery procedures "eliminate . . . the *right to pursue*" a Recovery Act claim. Arbitrators can order discovery of documents that are necessary for appellants to prove their claim, and order additional depositions in "exceptional circumstances." 3-ER-198. Appellants' authorities (at 38) void discovery limitations as unconscionable, *e.g.*, *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 614 (D.S.C. 1998), *not* because limitations prevented vindication of federal rights. And some cases involve more serious limits. *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 for expert depositions).

Damages. Appellants (at 38-39) incorrectly assert that the arbitration agreement would prevent them from recovering the "highest amount" a third party would pay for services under 25 U.S.C. § 1621e(a). 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-198 (emphasis added).

Appellants (at 39) object that the arbitration agreement bars punitive damages, but never explain why those damages are essential to vindicate Recovery Act rights—especially when the "right of recovery" never mentions them. *See* 25 U.S.C. § 1621e(a). Appellants' authorities (at 39) are inapposite; they pertain to federal statutes that expressly provide for punitive damages.[8]

Confidentiality Provisions. Appellants (at 40) object that the agreement's confidentiality provisions hamper appellants' chances. But confidentiality is a hallmark of most arbitration rules. Were this a valid basis for refusing to honor arbitration agreements, no agreement would be safe.

Appellants' district-court authorities (at 40) do not support their 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, reasoning that the plaintiff could not "show that her rights will be

[8] *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).

substantially impaired by the confidentiality rules." *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 effective-vindication claims but instead held confidentiality provisions that lopsidedly benefited employers unconscionable under state law.

CONCLUSION

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

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DATED: March 10, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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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 March 10, 2023. 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.

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Respectfully submitted,

By: /s/ *Sarah M. Harris*
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