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. CV-21-01554-SMB
Hon. Susan M. Brnovich

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This case presents the question whether a sovereign Native American tribe asserting federal statutory rights in a federal court action in the Eastern District of Oklahoma may be sued and compelled to arbitration proceedings in the District of Arizona, even though (1) the tribe never authorized a waiver of its sovereign immunity to subject it to suit in Arizona, much less "clearly" and "unequivocally" agreed to arbitration and waive its sovereign immunity in a forum to which it did not consent, as required by governing Supreme Court precedent, *see* *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001),[1] and (2) the federal statute under which the tribe has sued in Oklahoma authorizes a federal claim in federal court and bars enforcement of any contractual provision that would "prevent or hinder the right of recovery," 25 U.S.C. § 1621e(c), as arbitration would do here. The district court in this case erred by compelling arbitration. By Order of May 24, 2022, this Court granted a stay of the district court's judgment. This Court should now reverse.[2]

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[1]As discussed more fully herein, the Nation's initiation of litigation in the Eastern District of Oklahoma did not waive its sovereign immunity in any other forum. *See West v. Gibson*, 527 U.S. 212, 226 (1999) ("It is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums.").

[2] In *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir. 2022), this Court resolved similar issues in connection with a dispute between Caremark and the Chickasaw Nation. However, unlike in *Caremark, LLC v. Chickasaw Nation*, the Choctaw Nation here directly and expressly challenges (1) the subject matter

The Choctaw Nation (the "Nation") is a sovereign and federally recognized Native American tribal nation headquartered in Oklahoma. 2-ER-56. The Nation owns and operates health care facilities, including pharmacies, serving its members and seeking reimbursement from the members' private insurers pursuant to the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, *et seq*. ("IHCIA"). *Id*. The IHCIA contains a financial recoupment mechanism codified in 25 U.S.C. § 1621e (known as the "Recovery Act") authorizing Indian tribes to recover the cost of healthcare services from private insurers.

The Nation has brought suit in the Eastern District of Oklahoma pursuant to the Recovery Act against the Caremark Appellees[3] (collectively, "Caremark") alleging improper denial of claims for reimbursement.[4] The complaint alleges that Caremark violated the Nation's statutory rights under the Recovery Act, forcing the Nation's pharmacies to operate at a loss and threatening their ability to provide

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jurisdiction of the district court; and (2) the enforceability and validity of Caremark's delegation provisions. *See* Statement of the Case, below, wherein the Nation discusses *Caremark, LLC v. Chickasaw Nation* in greater detail.

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

[4] *Choctaw Nation v. Caremark LLC, et al.*, No. 6:21-CV-00128-PRW (E.D. Okla.). 2-ER-49.

healthcare services to the Nation's members. The Recovery Act authorizes a federal cause of action in court to vindicate statutory rights. 25 U.S.C. § 1621e(a); *id.* at § 1621e(e)(1)(B). Caremark countered by filing suit against the Nation in the District of Arizona to compel arbitration, insisting that the Nation had agreed to arbitrate its statutory claims. The Nation enjoys sovereign immunity and cannot be sued in another forum and forced to arbitrate without a clear and unequivocal agreement to waive its sovereign immunity, which can only be validly accomplished through the Choctaw Nation Tribal Council. Yet Caremark did not produce any agreement signed by anyone authorized to waive the Nation's sovereign immunity to subject it to suit and arbitration in Arizona.

Despite the Nation's argument that no "clear" and "unequivocal" agreement to arbitrate had been formed between the parties, the district court granted Caremark's petition to force arbitration.

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

district court to ignore that argument and delegate the Recovery Act issue to the arbitrator as well.

JURISDICTIONAL STATEMENT

Caremark invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on March 14, 2022, and the Nation filed a timely notice of appeal on April 12, 2022.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The Federal Arbitration Act provides that "[a]n appeal may be taken from . . . a final decision with respect to an arbitration." 9 U.S.C. § 16(a)(3). Section 16(a)(3) authorizes appeal of a final decision "regardless of whether the decision is favorable or hostile to arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000).

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

motion to compel arbitration in a given case is the only claim before the district court, a decision to compel arbitration is deemed to dispose of the entire case, and permit appellate review under 9 U.S.C. § 16(a)(3)." *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994) (citations omitted).

The district court's March 14, 2022 order is final under section 16. The court resolved the only issue presented to it: whether the Nation must be compelled to arbitrate its claims. That issue was independent, and there were no other claims in the case. Moreover, the Court not only granted the petition to compel arbitration, it directed that "this case is now closed." 1-ER-3. That falls squarely within the definition of a "final decision" in *Green Tree*.

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

ISSUES PRESENTED

1. Whether the district court did not have subject matter jurisdiction over this dispute, where the Nation never clearly and unequivocally waived its sovereign immunity to consent to Caremark's suit against it in Arizona.

2. Whether the district court erred in ordering that claims brought by the Nation in its Eastern District of Oklahoma lawsuit seeking to enforce its statutory right to reimbursement for pharmacy expenses must be submitted to arbitration, where Caremark filed suit against the Nation in the District of Arizona to compel arbitration and where the district court refused to consider the Nation's argument that it never authorized anyone to waive its sovereign immunity to subject it to suit in Arizona.

3. Whether the Nation did not "clearly" and "unequivocally" waive its sovereign immunity and consent to suit in the District of Arizona where no representative of the Nation was authorized to waive the Nation's sovereign immunity, and whether the district court erred in concluding the Nation waived its sovereign immunity.

4. Whether the Recovery Act, which creates a federal court cause of action and prohibits any contractual provision that hinders a tribe's statutory right of recovery, supersedes any agreement to arbitrate claims for recovery under the

statute, and whether the district court erred in delegating this question to the arbitrator for decision.

STATEMENT OF THE CASE

A. *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir. 2022).

Prior to the instant dispute between the Choctaw Nation and Caremark, a separate but factually similar dispute arose between the Chickasaw Nation and Caremark. Specifically, the Chickasaw Nation filed suit against Caremark and other defendants in Oklahoma federal court under the Recovery Act arising from Caremark's unlawful pharmacy claim denials. *See Chickasaw Nation v. CVS Caremark, LLC, et al.*, No. 20-CV-488-PRW (E.D. Okla.). Caremark then obtained an order compelling the Chickasaw Nation to arbitration in Arizona (just as Caremark did here). *See Caremark LLC, et al., v. Chickasaw Nation, et al.*, No. 2:21-CV-574-SPL (D. Ariz.). The Chickasaw Nation appealed, and this Court issued its opinion in that matter on August 9, 2022. *See Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir. 2022).

1. Sovereign Immunity.

In *Caremark, LLC v. Chickasaw Nation*, regarding the Chickasaw Nation's sovereign immunity, this Court held that "[a]n arbitration agreement may or may not have implications for a tribe's sovereign immunity, and courts need not resolve the sovereign-immunity implications (if any) before deciding whether an agreement to

arbitrate exists at all." *Id.* at 1032. However, the Choctaw Nation respectfully disagrees due to the jurisdictional nature of sovereign immunity and, unlike in *Caremark, LLC v. Chickasaw Nation*, the Choctaw Nation here directly and expressly challenges the district court's jurisdiction to compel it to arbitration.

"[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc*., 523 U.S. 751, 754 (1998). Moreover, "[i]mmunity encompasses not merely *whether* [a sovereign] may be sued, but *where* it may be sued." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis in original). Further, "when a defendant timely and successfully invokes tribal sovereign immunity, [courts] ***lack subject matter jurisdiction***." *Acres Bonusing, Inc v. Marston*, 17 F.4th 901, 908 (9th Cir. 2021), *cert. denied sub nom. Acres Bonusing, Inc. v. Martson*, 213 L. Ed. 2d 1065, 142 S. Ct. 2836 (2022) (collecting cases) (emphasis added).

Here, the district court (erroneously) concluded the Nation entered into arbitration agreements with Caremark—a conclusion the district court reached *after* Caremark filed suit against the Nation in Arizona. However, as discussed herein, the Nation never waived its sovereign immunity to authorize suit against it in Arizona.[5] Therefore, the district court never had jurisdiction over the Nation in Arizona—and

[5] And in any event, the Nation disputes that it entered in any arbitration agreement for the reasons discussed herein.

courts should, therefore, address the sovereign immunity question first due to the jurisdictional nature of sovereign immunity. *See Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) ("[i]f they [tribal defendants] were entitled to tribal immunity from suit, the district court would lack jurisdiction over the claims against them and would be required to dismiss them from the litigation").

Further, this Court in *Caremark, LLC v. Chickasaw Nation* did not consider whether the Chickasaw Nation's sovereign immunity barred Caremark from initiating the proceeding against the Chickasaw Nation in the Arizona district court to compel arbitration. 43 F.4th at 1033 n. 11. As discussed more fully herein, the Choctaw Nation here expressly argues its sovereign immunity protected it from suit and arbitration in Arizona.

2. The Recovery Act.

With respect to the Recovery Act, this Court in *Caremark, LLC v. Chickasaw Nation* concluded "[t]he Nation's theory that the Recovery Act displaces the arbitration provisions in the Provider Manuals does not impugn the validity of the delegation clauses specifically." 43 F.4th at 1033. Therefore, this Court delegated the question of "whether the Recovery Act precludes arbitration of the merits of the Nation's claims" to arbitration. *Id.* at 1034. However, unlike in *Caremark, LLC v. Chickasaw Nation*, the Choctaw Nation here specifically challenges the validity and enforceability of the delegation clause because, as discussed more fully herein, even

arbitrating threshold issues pursuant to the delegation clause would involve significant costs and time that the Nation would not have to incur in federal court. Thus, the delegation clause itself is unenforceable under the Recovery Act, and the Court—not an arbitrator—should conclude the Recovery Act displaces Caremark's arbitration provisions, as they prevent or hinder the Nation's right of recovery under the Recovery Act.

B. Background: The Right to Financial Recoupment Under the Indian Health Care Improvement Act.

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

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

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

Shortly thereafter, Congress became aware that some insurance companies were refusing to reimburse healthcare expenses paid by tribes on the ground the Recovery Act was limited to claims made to insurers by the federal government.[6]

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

Accordingly, Congress amended the Recovery Act in 1992 to make clear "an Indian tribe, or tribal organization" has the same right of recovery as the federal government. Pub. L. No. 102–573, Title II, § 209, 106 Stat. 4526 (1992); H.R. REP. NO. 102–643, pt. 1, at 75 (1992) (explaining "the Act is amended by this section to allow Indian tribes and tribal organizations the same rights as the Secretary to recover reasonable expenses incurred for the provision of health services to any individual through third party reimbursement").[7]

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

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

This recovery mechanism is essential to the ability of tribal governments to protect the health of Native Americans. Members of any Native American nation who visit the Nation's ITU Pharmacies pay no co-pay or other fee for their prescription medications and medical devices. 2-ER-53.

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

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

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

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

C. The Choctaw Nation’s Health Care System.

The Nation “has invested significant resources in the development and expansion of its Tribal health care system infrastructure.” 2-ER-25. The Nation serves “not only Choctaw citizens but—pursuant to our self-governance compacts with the Indian Health Services—Native persons throughout our region.” *Id*. The Nation operates a robust and sophisticated network of health clinics and “ITU” Pharmacies,[8] including Respondents the Choctaw Nation Health Care – Talihina, OK; Choctaw Nation Health Clinic Rubin White – Poteau, OK; Choctaw Nation Health Clinic – McAlester, OK; Choctaw Nation Health Clinic – Idabel, OK; Choctaw Nation Health Clinic – Stigler, OK; Choctaw Nation Health Clinic – Hugo, OK; Choctaw Nation Health Clinic – Atoka, OK; and Choctaw Nation Health Center Durant Pharmacy – Durant, OK. 2-ER-53, 72. The Choctaw Nation Department of Health operates the Choctaw Nation Online Pharmacy Refill Center. *Id.* The Choctaw Nation’s ITU Pharmacies provide services to members of federally

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

recognized Native American nations ("Members"), including many citizens of Oklahoma. 2-ER-53.

Many members of the Nation maintain health insurance policies (typically through their employers) issued by Aetna or UnitedHealth Group or one of their affiliates. 2-ER-73. These insurers will not reimburse the Nation for any qualifying expense unless the Nation submits claims through the insurer's pharmacy benefit manager ("PBM"). 2-ER-29. The Nation therefore effectively has no choice but to enter into a contract with each insurer's PBM. *Id*.

As a result, the Nation and its pharmacies signed various provider agreements to facilitate reimbursement of expenses. In August 2005, the Choctaw Nation Health Care Center (Talihina, Oklahoma),[9] the Choctaw Nation Health Clinic (Poteau, Oklahoma), the Choctaw Nation Health Clinic (McAlester, Oklahoma), the Choctaw Nation Health Clinic (Idabel, Oklahoma), the Choctaw Nation Health Clinic (Stigler, Oklahoma) and the Choctaw Nation Health Clinic (Hugo, Oklahoma) signed Provider Agreements with Caremark Inc. and CaremarkPCS.[10] 3-ER-145-162. And in December 2008, the Choctaw Nation Health Clinic (Atoka, Oklahoma) signed a

[9] In September 2009, the Choctaw Nation Health Care Center (Talihina, Oklahoma) signed another Provider Agreement with CaremarkPCS, L.L.C. and Caremark, L.L.C. 3-ER-167-172. Neither Caremark Inc. nor Caremark PCS are named defendants in the Nation's underlying Complaint. 2-ER-49.

[10] Neither Caremark Inc. nor Caremark PCS are named defendants in the Nation's underlying Complaint. 2-ER-49.

Provider Agreement with Caremark, L.L.C. and CaremarkPCS, L.L.C.[11] 3-ER-163-166. Lastly, in June 2010, the above-referenced seven pharmacies signed a new Provider Agreement with Caremark, L.L.C. and CaremarkPCS, L.L.C. 3-ER-173-179.

However, none of the signatories to those agreements were authorized to waive the Nation's sovereign immunity to subject the Nation to suit in Arizona. And none of the Provider Agreements actually signed by the Nation's representatives contained arbitration provisions.

The Nation guards its sovereign immunity carefully. Choctaw Nation law provides that only the Choctaw Nation Tribal Council may waive its sovereign immunity. 2-ER-24. However, no such waiver occurred here to subject the Nation to Caremark's suit in the District of Arizona. 2-ER-24. As a matter of policy, "the Choctaw Nation does not sign arbitration agreements, outside of exceptional circumstances," (*id.*) which are not present here. When the Nation does agree to waive its sovereign immunity for dispute resolution purposes, it selects a forum convenient to the Nation, such as its own tribal courts or another Oklahoma-based forum. *Id*.

[11] Caremark PCS, L.L.C. is not a named Defendant in the Nation's underlying Complaint. 2-ER-49.

As the Nation's Executive Director of Legal Operations made clear, "[t]he Choctaw Nation Tribal Council has not waived the Choctaw Nation's sovereign immunity relative to any Petitioner named in the above-referenced matter [referring to Caremark], nor has the Choctaw Nation Tribal Council signed any agreement with any Petitioner named in the above-referenced matter that contained any waiver of the Choctaw Nation's sovereign immunity." 2-ER-24. Moreover, "[t]he Choctaw Nation Tribal Council has not authorized any person to sign any agreement with any Petitioner named in the above-referenced matter that contained any waiver of the Choctaw Nation's sovereign immunity." *Id*.

D. The Nation's Oklahoma Complaint and Caremark's Lawsuit Against the Nation in The District of Arizona Seeking To Compel Arbitration.

On April 26, 2021, the Nation filed a complaint in the Eastern District of Oklahoma against 11 defendants, including the Caremark Petitioners. 2-ER-49. The complaint sought to vindicate the Nation's rights under the Recovery Act. The Nation's complaint alleged the defendants violated its rights under the Recovery Act by improperly denying claims for reimbursement and by wrongfully applying insurance discounts that force tribal pharmacies to operate at a loss. The Oklahoma complaint states "[t]he Nation consents to this Court's exercise of jurisdiction over it for the purposes of this suit," but the complaint contains no other waiver of sovereign immunity. 2-ER-62.

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

Caremark responded to the Nation's Oklahoma lawsuit by moving to stay the Oklahoma litigation pending arbitration, asserting the same arguments it has made in this case. The Oklahoma district court in that action granted Caremark's request.

Shortly after the Nation filed its Oklahoma lawsuit, Caremark filed suit against the Nation in the District of Arizona to compel arbitration, insisting the Nation agreed to arbitrate the claims asserted in the Eastern District of Oklahoma. 2-ER-30. Caremark pointed to arbitration clauses in Provider Manuals (not expressly included in any of the signed Provider Agreements) to which the Nation never manifested clear and unequivocal consent, or signed. Caremark did not submit any contract or document actually signed by the Nation that even contained the word "arbitration." And, importantly, Caremark did not provide any evidence that the

Choctaw Nation Tribal Council had waived the Nation's well-recognized sovereign immunity to permit Caremark's suit against it in Arizona. To be certain, no such waiver ever occurred.

The Nation responded to the petition to compel arbitration by showing it had not signed or agreed to arbitration provisions surreptitiously slipped into the Provider Manuals. It also pointed out the Caremark Petitioners could not show a clear and unequivocal waiver of sovereign immunity as required by well-established precedent. *E.g.*, *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (a tribe's waiver of immunity must be "clear" and "unequivocal"). Relatedly, the Nation also submitted an uncontested declaration establishing that no one at the Nation was authorized to waive the Nation's sovereign immunity to subject it to suit in the District of Arizona. Finally, the Nation argued the Recovery Act expressly precludes the application of any contractual provision (including the arbitration and delegation provisions cited by Caremark) that hinders or prevents the Nation's ability to recover under the statute, as Caremark's arbitration clause unquestionably does.

E. The District Court's Decision Compelling Arbitration.

The district court entered judgment for the Caremark Petitioners, holding "the Nation has waived its sovereign immunity for claims brought related to the Provider Agreement" and "the Court must step aside and allow the arbitrator to decide

whether the claims in this case are subject to arbitration." 1-ER-11, 13. The district court then granted the Petition to Compel Arbitration, entered judgment for the Caremark Petitioners, and ordered the case closed. 1-ER-3. The district court subsequently denied the Nation's motion for a stay pending appeal.

On May 24, 2022, this Court granted the Nation's motion for stay pending appeal.

SUMMARY OF THE ARGUMENT

The district court erroneously determined the Nation waived its sovereign immunity even though the Nation never authorized the waiver of its sovereign immunity to subject it to suit and arbitration in Arizona. The district court also erroneously delegated to an arbitrator a threshold question that must be resolved by a court: whether Congress, in the Recovery Act, displaced any arbitration obligation here. *See* 25 U.S.C. § 1621e(c) ("no provision of any contract … shall prevent or hinder the right of recovery").

First, the district court failed to consider the Nation's argument that it never authorized anyone to waive its sovereign immunity to subject it to Caremark's suit and arbitration in the District of Arizona. "[A]n Indian tribe is subject to suit only where [1.] Congress has authorized the suit or [2.] the tribe has waived its immunity." *Kiowa Tribe of Okla.*, 523 U.S. at 754. A waiver of tribal sovereign immunity must be "clear" and "unequivocal." *E.g.*, *Gold Country Casino*, 464 F.3d

at 1047 (a tribe's waiver of immunity must be "clear" and "unequivocal"). Further, a valid waiver of the Nation's sovereign immunity can only be accomplished through formal action by the Choctaw Nation Tribal Council. 2-ER-24; *see also generally Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1135 (9th Cir. 1995) ("As the governing body of the Navajo Nation, the Navajo Tribal Council is similar in function to the Congress of the United States."). Moreover, "[i]mmunity encompasses not merely *whether* [a sovereign] may be sued, but *where* it may be sued." *Halderman*, 465 U.S. at 99 (emphasis in original).

In this case, Caremark filed suit against the Nation in Arizona to compel the Nation to arbitration. However, the Choctaw Nation Tribal Council never authorized Caremark's suit against the Nation in the District of Arizona, and the district court erred by failing to consider the Nation's uncontested declaration setting out these dispositive and uncontested facts. *See Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe*, 401 F. Supp. 2d 952, 963 (N.D. Iowa 2005) (arbitration clause does not waive immunity where "the very validity of the Agreement is in dispute" because authority of tribal official to waive immunity was disputed). Because the Nation never authorized suit against it in Arizona, the district court never had jurisdiction over the Nation. *See Pistor*, 791 F.3d at 1111 ("[i]f they [tribal defendants] were entitled to tribal immunity from suit, the district court would lack jurisdiction over the claims against them and would be required to dismiss them from

the litigation"); *see also Acres Bonusing*, 17 F.4th at 908 ("when a defendant timely and successfully invokes tribal sovereign immunity, we lack subject matter jurisdiction") (collecting cases).

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

Even if an arbitration agreement existed in this case (and it does not), it would be displaced by the Recovery Act. The district court—not an arbitrator—should make this determination, as the Nation expressly challenged the enforceability of Caremark's delegation clause (which the Recovery Act renders unenforceable). *See* 25 U.S.C. § 1621e(c) ("no provision of any contract … shall prevent or hinder the right of recovery"). And because the delegation clause is unenforceable under the Recovery Act, the district court should have reached the question of whether Caremark's arbitration provisions are unenforceable under the Recovery Act (they are). *Id.*

Congress created the right of tribes to institute a federal civil action and provided a special one-way fee- and cost-shifting provision for plaintiffs, a six-year statute of limitation, damages rules, and fulsome discovery rights for the benefit of

tribes. The statutory guarantee of these procedural rights would be lost in arbitration. The loss of these rights – by itself – means arbitration would "prevent or hinder the right of recovery," 25 U.S.C. § 1621e(c), because the procedural rights are, themselves, part of "the right of recovery" Congress sought to protect from contractual interference. Moreover, the loss of these rights would also "hinder" the Nation's ability to pursue the substance of its claims by substantially raising the cost of litigation (*e.g.*, substantial filing fees and costs for arbitrators' time) and hampering the Nation's ability to prove its case. Further, even delegating threshold issues to arbitration hinders the Nation's rights under the Recovery Act because any time spent in arbitration involves significant delays and costs the Nation would not have incurred in federal court (where the Recovery Act guarantees the Nation a federal cause of action without the associated fees and costs of arbitrators and arbitration).

Arbitration policy is weakened, not promoted, when important safeguards – like the duty of courts to ensure the existence of an arbitration agreement and to protect statutory rights – are not observed. As the drafters of the Revised Uniform Arbitration Act ("RUAA") commented, "[w]ithout these safeguards, arbitration loses credibility as an appropriate alternative to litigation." Uniform Arbitration Act § 6 (revised 2000), 7 U.L.A. 26 (2000). To compel arbitration in this case "would undermine, not advance, the federal policy favoring alternative dispute resolution."

*Hooters of Am., Inc. v. Phillip*s, 173 F.3d 933, 941 (4th Cir. 1999) (Wilkinson, C.J.).

This Court has already granted a stay of the district court's judgment pending appeal. This Court should now reverse the district court's judgment and hold that arbitration is impermissible here because there is no "clear" and "unequivocal" showing of agreement to subject the Nation to suit and arbitration in Arizona, the district court never had jurisdiction over the Nation, and in any event, any arbitration obligation is displaced by the Recovery Act.

ARGUMENT

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

A. The Nation is Not Bound to Arbitrate Absent a Showing that the Nation "Clearly" And "Unequivocally" Agreed to Waive its Sovereign Immunity to Subject it to Suit and Arbitration in Arizona.

Federally recognized tribal nations (such as the Choctaw Nation) exercise "sovereign functions," *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2466 (2020), and are entitled to "inherent sovereign immunity." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla*., 498 U.S. 505, 509 (1991). "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla.*, 523 U.S. at 754. Moreover, "[i]mmunity encompasses not merely *whether* [a sovereign] may be sued, but *where* it may be sued." *Halderman*, 465 U.S. at 99 (emphasis in original) . Caremark (as the party seeking arbitration) bore the burden of proving the existence of a valid arbitration

agreement, *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005 (9th Cir. 2010), and of demonstrating clear and unequivocal waiver of immunity.

In this case, Caremark does not contend Congress abrogated the Nation's tribal immunity. Instead, Caremark argued to the district court that the Nation waived sovereign immunity to subject it to suit in Arizona by agreeing to the arbitration provision contained in its Provider Manual, which was purportedly incorporated by reference into the Provider Agreement previously signed by the Nation *even though the Choctaw Nation Tribal Council never authorized suit against the Nation in Arizona*. This argument disregards the heightened standards governing waivers of tribal sovereign immunity and should be rejected.

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

also Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006) ("[W]aivers of tribal sovereign immunity may not be implied"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (waiver must be "'must be unequivocally expressed'") (citation omitted); *Potawatomi*, 498 U.S. at 509 ("Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe.") (citation omitted); *see also Puyallup Tribe, Inc. v. Dept. of Game of State of Wash.*, 433 U.S. 165, 172–73 (1977); *United States v. U. S. Fidelity & Guar. Co*., 309 U.S. 506, 512–13 (1940).

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

The record in this case clearly establishes the Nation never "clearly" and "unequivocally" agreed to waive its sovereign immunity to subject it to suit and arbitration in Arizona. *See Cosentino v. Pechanga Band of Luiseno Mission Indians*, 637 F. App'x 381, 382 (9th Cir. 2016) (affirming dismissal of petition to compel arbitration because "[a] tribe's waiver of immunity must be 'clear'") (citation omitted).

It is well-settled law that a valid and clear waiver of tribal sovereign immunity may only be accomplished through *authorized* tribal actions. *See, e.g.*, *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1288 (11th Cir. 2001) ("Extending authority to waive sovereign immunity to a single individual, at least in this context, would be directly contrary to the Supreme Court's clear statement that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal

quotations omitted); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 275 (N.D.N.Y. 2000) ("The Tribal Council did not authorize Walter Horn to waive sovereign immunity, nor did the Tribal Council expressly waive the Tribe's sovereign immunity. Thus, the Tribe's sovereign immunity was not waived, and it is immune from suit."); *Calvello v. Yankton Sioux Tribe*, 1998 S.D. 107, ¶ 12, 584 N.W.2d 108, 112-13 ("Without a clear expression of waiver by the Tribe's General Council either before or after the arbitration proceeding, the involvement or purported acquiescence of certain tribal officials cannot waive the Tribe's sovereign immunity. […] A waiver must be clear and unequivocal and must issue from a tribe's governing body, not from unapproved acts of tribal officials.").[12]

[12] *See also Hydrothermal Energy Corp. v. Fort Bidwell Indian Cmty. Council*, 170 Cal. App. 3d 489, 496, 216 Cal. Rptr. 59 (Ct. App. 1985) ("Ms. Lame Bull could not waive the tribe's immunity, unless the Tribe had expressly delegated that duty to her. Nothing in the Tribe's constitution and bylaws gave her such authority. […] The arbitrator's decision that the American Arbitration Association had jurisdiction was based on an erroneous finding of waiver by execution of the contract."); *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶¶ 17, 19, 258 P.3d 516, 520 (even express waivers in contracts were not effective where tribal council authorized Chief to execute contracts, but not waive immunity); *Chance v. Coquille Indian Tribe*, 327 Or. 318, 322-26, 963 P.2d 638, 640-42 (1998) (holding that, even if contract's language waiving immunity was express, contract not valid where signing official lacked authority under tribal law to waive immunity); *MM&A Prods., LLC v. Yavapai-Apache Nation*, 234 Ariz. 60, 65, 316 P.3d 1248, 1253 (Ct. App. 2014) ("Express authorization and express language are two distinct but related issues, and requiring an express delegation of a tribe's authority to waive its immunity is a logical and consistent application of the overarching principle encompassing both issues: that the tribe itself must expressly consent to a waiver of its immunity.").

Moreover, if a tribe's assent is uncertain, there is no clear agreement. *See, e.g., Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.*, 2011 WL 4001088, *5 (W.D. Wash. Sept. 7, 2011) (no waiver of tribal immunity, even where the "waiver has the requisite clarity," because "the dispute is over whether the Tribe actually agreed to the waiver"); *Sac & Fox Tribe*, 401 F. Supp. at 963 (arbitration clause does not waive immunity where "the very validity of the Agreement is in dispute" because authority of tribal official to waive immunity was disputed) ; *see also United States v. U. S. Fidelity & Guar. Co*., 309 U.S. 506, 513 (1940). ("immunity cannot be waived by [tribal] officials.").

In this case, an uncontested declaration (that the district court erroneously failed to consider) clearly establishes that:

> As a matter of Choctaw Nation law, only the Choctaw Nation Tribal Council may waive the Choctaw Nation's sovereign immunity. The Choctaw Nation Tribal Council has not waived the Choctaw Nation's sovereign immunity relative to any Petitioner named in the above-referenced matter [including Caremark], nor has the Choctaw Nation Tribal Council signed any agreement with any Petitioner named in the above-referenced matter that contained any waiver of the Choctaw Nation's sovereign immunity. The Choctaw Nation Tribal Council has not authorized any person to sign any agreement with any Petitioner named in the above-referenced matter that contained any waiver of the Choctaw Nation's sovereign immunity.

2-ER-23-26. The district court erred by refusing to consider these uncontested facts and by concluding the Nation waived its sovereign immunity.

Because the Nation never authorized suit against it in Arizona, the district court never had jurisdiction over the Nation. *See Pistor*, 791 F.3d at 1111 ("[i]f they [tribal defendants] were entitled to tribal immunity from suit, the district court would lack jurisdiction over the claims against them and would be required to dismiss them from the litigation") ; *see also Acres Bonusing*, 17 F.4th at 908 ("when a defendant timely and successfully invokes tribal sovereign immunity, we lack subject matter jurisdiction") (collecting cases). This Court should reverse the district court's decision.

Further, the Nation bringing suit in Oklahoma did not waive the Nation's immunity to subject it to suit and arbitration in Arizona. As the Tenth Circuit (per then-Judge Gorsuch) has explained in upholding the assertion of tribal immunity, "sovereign immunity is 'a personal privilege which [a sovereign] may waive at [its] pleasure,'" and waivers "'of sovereign immunity are strictly construed.'" *Ute Indian Tribe*, 790 F.3d at 1009 (citations omitted). "[I]mmunity encompasses not merely *whether* [a sovereign] may be sued, but *where* it may be sued." *Halderman*, 465 U.S. at 99 (emphasis in original) ; *see also West*, 527 U.S. at 226 ("It is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums."). Immunity even extends to counterclaims within the same action in the same court: "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a

counterclaim to an action [in federal court] filed by the tribe." *Okla. Tax Comm'n*, 498 U.S. at 509.); *Ute Indian Tribe*, 790 F.3d at 1011 ("[A] tribe's decision to go to court doesn't automatically open it up to counterclaims—even compulsory ones") (Gorsuch, J.); *see also Bodi*, 832 F.3d at 1017 (by filing suit, "a tribe does not automatically waive its immunity as to claims that could be asserted against it, even as to 'related matters . . . aris[ing] from the same set of underlying facts'") (citation omitted); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (tribe's participation in administrative proceedings does not waive immunity in subsequent court action reviewing agency proceedings); *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of The Mississippi in Iowa*, 609 F.3d 927, 945-46 (8th Cir. 2010) (tribe's tort suit in one forum (tribal court) did not waive immunity from separate arbitration proceeding); *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 955 (9th Cir. 2000) (tribe's filing suit as plaintiff in tribal court "was insufficient to waive sovereign immunity in federal court").

This case stands in stark contrast to *C&L Enterprises,* where the issue of tribal authority to waive immunity was not addressed and where the Supreme Court held a tribe's waiver of its sovereign immunity was "clear" in part because the *Tribe itself* had prepared the contract containing the arbitration provision. 532 U.S at 420, 423. That provision expressly provided that all claims or disputes would be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the

American Arbitration Association ("AAA") and that an award could be enforced in any state or federal court having jurisdiction. *Id*. at 419. In concluding the contract's language "clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court," *id*. at 423, the Court observed the tribe did not "find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; *C&L* foisted no form on a quiescent Tribe." *Id.*

In contrast to *C&L*, the only documents signed by anyone at the Nation (the Provider Agreements) did not contain any arbitration provisions, and in any event, the Nation's representatives that signed Caremark's Provider Agreements did not have authority to waive the Nation's sovereign immunity to subject it to suit and arbitration in Arizona. Caremark drafted the agreements and never obtained authorization from the Choctaw Nation Tribal Council to subject the Nation to suit and arbitration in Arizona. *See Danka Funding Co., LLC v. Sky City Casino*, 329 N.J. Super. 357, 366, 747 A.2d 837, 842 (Law. Div. 1999) ("Danka Business Services knew it was dealing with an Indian tribe and is charged with knowledge that the tribe possessed sovereign immunity.").

Accordingly, Caremark cannot show the Nation "clearly" and "unequivocally" agreed to waive its immunity to consent to suit and arbitration in Arizona, and the district court never had jurisdiction over the Nation to compel it to arbitration in the first instance.

II. THE RECOVERY ACT DISPLACES ANY AGREEMENT TO ARBITRATE.

Even if the Nation had clearly and validly agreed to waive its sovereign immunity to subject it to suit and arbitration in Arizona (it did not),[13] the Recovery Act prevents such arbitration here. Congress made clear that a tribe "may enforce the right of recovery" by "instituting a separate civil action, including a civil action for injunctive relief and other relief." 25 U.S.C. § 1621e(e)(1)(B). Thus, the Act gives the Nation the remedy of an action in federal court, not arbitration. In addition, the Recovery Act expressly states "no provision of any contract . . . shall prevent or hinder the right of recovery of the United States, an Indian tribe, or tribal organization" under the Recovery Act. 25 U.S.C. § 1621e(c).

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

[13] And even if the district court had jurisdiction to compel the Nation to arbitration in the first instance (it did not).

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

Second, Congress intended to give the Nation recovery rights identical to those of the United States. "The 1992 amendments are meant to assure Indian tribes and tribal organizations the *same right of recovery* established by Congress in 1988." *Yukon-Kuskokwim*, 884 F. Supp. at 1367 (emphasis added); *see also* H.R. Rep. No. 102–643, pt. 1, at 75 (1992) ("[T]he Act is amended by this section to allow Indian tribes and tribal organizations the *same rights* as the Secretary to recover reasonable expenses incurred for the provision of health services to any individual through third party reimbursement") (emphasis added). Courts interpreting the Recovery Act should therefore bear in mind that the provision was designed to foster the right of recovery of sovereign authorities and not merely commercial actors.

By its plain terms, the statute is not limited to overriding contractual provisions that *preclude* recovery, but rather also displaces provisions that "prevent *or hinder*" recovery. 25 U.S.C. § 1621e(c) (emphasis added). Because statutory construction must give effect to every word of the statute, *Loughrin v. United States*, 573 U.S. 351, 358 (2014), courts should interpret "hinder" as involving less interference than action that "prevents" recovery. Indeed "hinder" implies a much more modest degree of burden than "prevent." *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 283 n.15 (1993) ("hindering" can include "imped[ing]" short of "overwhelm[ing]" or "supplant[ing]"); *United States v. Gwyther*, 431 F.2d 1142, 1144 n.2 (9th Cir. 1970) ("'hinder' means to obstruct, hamper, block") (citation omitted).

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

In this case, the roadblocks placed by arbitration and the delegation clause meet both the "prevent or hinder" and the "effective vindication" standards, so that the Recovery Act precludes arbitration *and* the delegation of any threshold issues to arbitration.[14]

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

The Recovery Act provides tribes with important statutory rights not guaranteed in arbitration. The loss of the guarantee of these rights – by itself – means arbitration would "prevent or hinder the right of recovery," 25 U.S.C. § 1621e(c), because the procedural rights are themselves part of "the right of recovery" Congress sought to protect from contractual interference. Moreover, the loss of these rights would also "hinder" the Nation's ability to pursue the substance of its claims by substantially raising the cost of litigation and hampering the Nation's ability to prove its case.

(1) *The Statute of Limitations*. The Recovery Act permits actions to be brought within "six years and ninety days" after a cause of action accrues. *See* 25 U.S.C. § 1621e(j) (incorporating the limitations period of 28 U.S.C. § 2415). Yet

[14] Moreover, Caremark's arbitration provisions expressly incorporate federal law, which includes the Recovery Act. *See, e.g.*, 3-ER-139 ("Any such arbitration must be conducted in Scottsdale, Arizona, and Provider agrees to such jurisdiction, *unless otherwise* agreed to by the parties in writing or *mandated by Law*.") (emphasis added).

Caremark's arbitration provision would impose a limitations period of 6 months. *See* 3-ER-199. Thus, for any claim arising more than six months prior to the Nation's Oklahoma lawsuit, the arbitration not only hinders but impermissibly *precludes* recovery. Such a result meets both the "prevent or hinder" standard and the "effective vindication" standard. *See, e.g., Graham Oil Co. v. ARCO Prods. Co., a Div. of Atl. Richfield Co.*, 43 F.3d 1244, 1247–48 (9th Cir. 1994), *as amended* (Mar. 13, 1995) ("the arbitration clause expressly forfeits Graham Oil's statutorily-mandated right to a one-year statute of limitations on its claims against ARCO. The clause reduces the time in which a claim can be brought from one year to 90 days, or in some cases six months"); *Anderson v. Comcast Corp.*, 500 F.3d 66, 77 (1st Cir. 2007).

(2) *Superseding the Recovery Act's fee and cost provisions.* The Recovery Act permits a prevailing plaintiff to recover attorneys' fees and costs. 25 U.S.C. § 1621e(g). But Caremark's purported arbitration clause adds up-front costs and risks that go beyond the Recovery Act and deter potential claimants from filing suit. Caremark eliminates the Recovery Act's one-way fee provision by providing that the defendant in the arbitration receives fees if it prevails. And Caremark may also require any litigant to place funds in escrow up front to cover estimated arbitration costs and Caremark's potential attorneys' fees (with a minimum deposit of $50,000). 3-ER-199. Additionally, the Choctaw would likely face a non-refundable filing fee

with the American Arbitration Association upwards of $50,000.00. This Court has recognized that provisions such as these improperly discourage lawsuits in instances where Congress intended plaintiffs to gain access to a judicial forum. *See, e.g., Ingle v. Cir. City Stores, Inc*., 328 F.3d 1165, 1178 (9th Cir. 2003) ("By itself, the fact that an employee could be held liable for Circuit City's share of the arbitration costs should she fail to vindicate employment-related claims renders this provision substantively unconscionable."); *see also Blair v. Scott Specialty Gases*, 283 F.3d 595, 605–06 (3d Cir. 2002). Those cases apply with equal force here, where Congress intended to provide a forum to tribal Nations to vindicate their right to recovery.

(3) *Restricting the Nation's access to discovery*. While the Nation in a Recovery Act suit could use the robust discovery permitted by the Federal Rules of Civil Procedure, Caremark would severely restrict the Nation's access to discovery, creating a process even more restrictive than the AAA Commercial Dispute Procedures. For instance, Caremark's arbitration clause requires a showing of "direct, substantial, and demonstrable need" to receive any documents, and absent a showing of "exceptional circumstances" limits depositions to one corporate representative deposition per party, limited to four hours. 3-ER-198. Provisions such as these disproportionately disadvantage plaintiffs (such as the Nation) who need discovery to prove their cases.

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

(4) *Limiting the Nation's damages*. Caremark's arbitration provision also hinders the Nation's right to recover damages under the statute. The Recovery Act permits the Nation to recover either "the reasonable charges billed by . . . an Indian tribe, or tribal organization in providing health services" "or, if higher, the highest amount the third party would pay for care and services furnished by providers other

than governmental entities." 25 U.S.C. § 1621e(a). Caremark's arbitration clause does not permit recovery of the "highest amount" a third party would pay, and explicitly precludes recovery of punitive damages (which the Nation seeks in its Oklahoma lawsuit). 3-ER-198.

Courts have held damage limitations such as these prevent effective vindication of statutory rights. *See, e.g., Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478-79 n.14 (5th Cir. 2003) (arbitration provision's "ban on punitive and exemplary damages" violated effective vindication doctrine in Title VII case); *Kristian v. Comcast Corp.*, 446 F.3d 25, 47–48 (1st Cir. 2006) (same for treble damages in Clayton Act case); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2018 WL 4677830, at *7–8 (E.D. Va. Sept. 6, 2018) (finding that arbitration provision providing that arbitrator is "not empowered to award damages in excess of compensatory damages" was invalid where antitrust statute provided for treble damages); *Gorman v. S/W Tax Loans, Inc.,* No. 1:14-CV-00089-GBW-KK, 2015 WL 12751710, at *5 (D.N.M. Mar. 17, 2015) (arbitration agreement violated "effective vindication" doctrine where it limited damages that arbitrator could award to "actual compensatory, economic damages" and Truth in Lending Act allowed plaintiff to recover actual damages and "twice the amount of any finance charge in connection" with loan) (citations omitted). Because the arbitration provision would limit the Nation's damages, it hinders the Nation's rights under the Recovery Act.

(5) *Subjecting the Nation to a confidentiality provision favoring Caremark.* Caremark's arbitration provision requires confidentiality of "the existence, content or results of any dispute or arbitration hereunder" except as required by law. 3-ER-198. This restriction precludes the Nation from learning the results of other proceedings involving similar claims and contracts. And it favors Caremark because, as repeat players, they know the results of all prior decisions, while tribes and tribal organizations are kept in the dark. The provision therefore hinders the Nation's recovery rights and runs afoul of the "effective vindication" standard. *Longnecker v. Am. Exp. Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014) (deeming confidentiality provision unconscionable because it would have one-sided effect by permitting defendant, who was repeat player, information on prior arbitrations, but denying that information to plaintiffs); *Anderson v. Regis Corp.*, No. 05-CV-646-TCK-SAJ, 2006 WL 8457208, at *6 (N.D. Okla. Apr. 26, 2006); *DeGraff v. Perkins Coie LLP*, No. C 12-02256 JSW, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

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

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

The district court ignored the Nation's argument that arbitration (and the delegation of any threshold issues to arbitration) is precluded by the Recovery Act, apparently concluding the parties agreed to submit the question of arbitrability to the

arbitrator. 1-ER-11. That was error. First, as discussed above, the court overlooked the key point that the Nation never agreed to waive its immunity to subject it to suit (and, therefore, arbitration) in Arizona. Thus, the district court did not have jurisdiction to compel the Nation to arbitration in the first instance.

Second, the existence of a delegation clause does not override the will of Congress in expressly precluding any contractual provision that hinders a tribal government's rights under the Recovery Act. As this Court has observed, "private contracting parties cannot, through the insertion of a delegation clause, confer authority [to order arbitration] upon a district court that Congress chose to withhold." *In re Van Dusen*, 654 F.3d 838, 844 (9th Cir. 2011); *Van Dusen v. Swift Transp. Co., Inc.*, 544 F. App'x 724 (9th Cir. 2013) (reaffirming *In re Van Dusen* as the "law of the circuit"); *see Oliveira v. New Prime, Inc.*, 857 F.3d 7, 15 (1st Cir. 2017), *aff'd*, 139 S. Ct. 532 (2019) (quoting same language from *In re Van Dusen*); *see also Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("Like any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command."); *In re McZeal*, No. 14-15947, 2017 WL 2372375, at *9 (N.D. Ohio May 31, 2017) ("Even though [the parties] validly delegated gateway questions of arbitrability to arbitration, the Court must still determine whether Congress intended any of the trustee's claims to be nonarbitrable.") (citation omitted).

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

It is therefore not surprising that where, as here, Congress has expressly precluded any contractual provision that hinders the right of recovery under the Recovery Act, the delegation provision is a nullity. Accordingly, the Supreme Court has repeatedly decided for itself questions about whether courts have authority to compel arbitration of particular claims under the FAA—even where the contract at

issue contained a "delegation" clause purporting to vest authority to resolve all disputes in the arbitrator. For example, in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 101-02 (2012), which involved a delegation clause, the Supreme Court decided for itself whether the Credit Repair Organization Act contained "a 'congressional command' that the FAA shall not apply." *Id.*; Pets. Br., *CompuCredit Corp. v. Greenwood*, No. 10-948, 2011 WL 2533009, at *7-*8 (U.S. June 23, 2011) (quoting arbitration provision, including delegation clause); *see also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (reversing order compelling arbitration because "nothing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement"); *id.* at 282 n.1 (reprinting arbitration). Here, too, the Court should decide in the first instance whether the Recovery Act precludes arbitration.

In addition, a delegation clause does not preclude the court from determining whether an arbitration provision effectively precludes the vindication of statutory rights. "Regardless of whether a delegation provision is clear and unmistakable on its own terms, it will not be enforced if it results in enforcing an arbitration agreement that prospectively waives plaintiffs' statutory rights and remedies." *Brice v. Plain Green, LLC*, 372 F. Supp. 3d 955, 969 (N.D. Cal. 2019); *see id.* at 973 ("I do not reach whether there is a clear and unmistakable delegation clause because that would not change the fact that the arbitration agreement is unenforceable as an

unambiguous prospective waiver."); *see Williams v. Medley Opportunity Fund II, LP.*, 965 F.3d 229, 243 (3d Cir. 2020) ("The prospective waiver of statutory rights renders the entire arbitration agreement (delegation clause included) unenforceable because the prohibited waiver here is not severable."); *Brayman v. KeyPoint Gov't Sols., Inc.*, No. 18-CV-0550-WJM-NRN, 2019 WL 3714773, (D. Colo. Aug. 7, 2019) ("A federal court's power to strike a portion of an arbitration clause that prevents 'effective vindication' of rights (such as certain cost-shifting provisions) is a power the federal courts inherently possess, regardless of a clause delegating all disputes to the arbitrator.") (citing *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 378 (10th Cir. 2016)). Where the party opposing arbitration challenges the delegation clause in addition to the arbitration clause as a whole, the court must address the statutory waiver issue. *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 291–92 (4th Cir. 2020); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 671 (4th Cir. 2016).

Here, *both* the delegation clause and the arbitration clause hinder the right of recovery. And the Nation specifically challenges the enforceability and validity of the delegation provision under the Recovery Act. Invoking the delegation clause to force the Nation to raise its statutory construction arguments in arbitration rather than in an Article III tribunal would itself override the congressional command of the Recovery Act, which authorizes a federal claim in federal court to enforce a tribe's rights – thereby ensuring that a federal judge, not an arbitrator, decides a

tribe's statutory rights. Moreover, even arbitrating threshold issues pursuant to the delegation clause would involve significant time and expenses that the Nation would not have to incur in federal court. For example, arbitrating threshold issues alone would saddle the Nation with substantial costs (such as excessive arbitration filing fees, administrative fees, and the significant costs associated with compensating any arbitrators for reviewing briefing, attending hearings, writing opinions, etc.). Additionally, arbitrating threshold issues would also require a significant time commitment by the Nation just to establish its Recovery Act claims belong in Oklahoma federal court, not arbitration. The Nation would *not* have to incur these burdens and costs in federal court. Thus, the delegation clause itself is unenforceable under the Recovery Act because it prevents and hinders the Nation's right of recovery under the Recovery Act.

Caremark's arbitration provisions hinder the Nation's ability to litigate not only its substantive claims, but also the question of whether the arbitration provision effectively precludes it from vindicating its statutory rights. Because the delegation clause itself hinders the Nation's ability to protect its rights, the court and not the arbitrator must decide that issue.

As noted above, in *CompuCredit Corp.*, courts – not arbitrators – decided whether a federal statute rendered arbitration agreements unenforceable, even though the arbitration agreement included a delegation clause.

In any event, Caremark is wrong that the Recovery Act is insufficiently specific (as it argued at the district court level). The statute expressly overrides "*any* contract" that hinders the right of recovery – without exception. 25 U.S.C. § 1621e(c) (emphasis added). An arbitration provision that hinders recovery plainly fails within that provision. And if there were any doubt, it must be resolved in the Nation's favor under the familiar principle of statutory interpretation that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at 766.

Arbitration (and the delegation of any threshold issues to an arbitrator) would "hinder the right of recovery" under section 1621e(c) by denying the Nation the guarantees of the statutory rights provided by the Recovery Act.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,090 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

Dated: January 9, 2023

s/ Michael Burrage

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/ Michael Burrage

STATUTORY ADDENDUM

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

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

(a) Right of recovery

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

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

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

(b) Limitations on recoveries from States

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

(1) workers' compensation laws; or

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

(c) Nonapplicability of other laws

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

(d) No effect on private rights of action

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

(e) Enforcement

(1) In general

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

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

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

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

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

(2) Notice

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

(3) Recovery from tortfeasors

(A) In general

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

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

(B) Treatment

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

(f) Limitation

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

(g) Costs and attorney's fees

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

(h) Nonapplicability of claims filing requirements

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

(i) Application to urban Indian organizations

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

(j) Statute of limitations

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

(k) Savings

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