Nos. 23-250 and 23-253

In the Supreme Court of the United States

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

NORTHERN ARAPAHO TRIBE

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH AND TENTH CIRCUITS

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. 5301 *et seq.*, permits eligible Indian tribes to contract with the federal government to assume responsibility for federal health care programs administered for the benefit of Indians. Upon entering into the contract, a tribe is entitled to the appropriated funds that the Indian Health Service (IHS) would have otherwise allocated to the federal program. 25 U.S.C. 5325(a)(1). The Act also requires IHS to pay "contract support costs"—funds "added to" that appropriated amount to cover the costs of activities the tribes must undertake to operate the transferred program, but which either "normally are not carried on" by IHS when acting as program operator, or which IHS would have "provided * * * from resources other than" the appropriated funds transferred under the contract. 25 U.S.C. 5325(a)(2). Separately, contracting tribes are permitted to collect payment from third-party payors—like Medicare, Medicaid, and private insurers—when they provide health care services to covered individuals. The question presented is as follows:

Whether IHS must pay "contract support costs" not only to support IHS-funded activities, but also to support the tribe's expenditure of income collected from third-party health care payors.

PARTIES TO THE PROCEEDING

In *San Carlos Apache*, petitioners (defendants-appellees below) are Xavier Becerra, Secretary of Health and Human Services; Roselyn Tso, Director of the Indian Health Service; and the United States. Respondent (plaintiff-appellant below) is the San Carlos Apache Tribe.

In *Northern Arapaho*, petitioners (defendants-appellees below) are Xavier Becerra, Secretary of Health and Human Services; Roselyn Tso, Director of the Indian Health Service; and the United States. Respondent (plaintiff-appellant below) is the Northern Arapaho Tribe.*

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* All individual defendants were sued in their official capacities, and Director Tso has been automatically substituted for her predecessors under Rule 35.3 of the Rules of this Court.

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OPINIONS BELOW

In *San Carlos Apache*, the opinion of the court of appeals (*SCA* Pet. App. 1a-15a) is reported at 53 F.4th 1236. The opinion of the district court (*SCA* Pet. App. 19a-35a) is reported at 482 F. Supp. 3d 932.

In *Northern Arapaho*, the opinion of the court of appeals (*NA* Pet. App. 1a-39a) is reported at 61 F.4th 810. The order of the district court (*NA* Pet. App. 40a-56a) is reported at 548 F. Supp. 3d 1134.

JURISDICTION

In *San Carlos Apache*, the Ninth Circuit entered its judgment on November 21, 2022. A petition for rehearing was denied on May 16, 2023 (*SCA* Pet. App. 36a). On August 4, 2023, Justice Kagan extended the time within

which to file a petition for a writ of certiorari to and including September 13, 2023, and the petition was filed on that date.

In *Northern Arapaho*, the Tenth Circuit entered its judgment on March 6, 2023. A petition for rehearing was denied on June 2, 2023 (*NA* Pet. App. 57a-58a). On August 21, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including September 20, 2023, and the petition was filed on September 15, 2023.

On November 20, 2023, the Court granted the petitions for writs of certiorari. In each case, the Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

A. Legal Background

1. Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 5301 *et seq.*, in 1975 to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal programs and services for Indians. 25 U.S.C. 5302(b).[1] The Act allows eligible Indian tribes to assume responsibility for operating federal programs that would otherwise be administered by the Secretary of the Interior or the Secretary of Health and Human Services for the benefit of tribal members.

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[1] References in this brief to provisions of the United States Code are to the current version unless otherwise noted. Until 2016, ISDA's provisions were classified at 25 U.S.C. 450 *et seq.*; this brief refers to the provisions' current location when describing their predecessors.

25 U.S.C. 5321; see *Menominee Indian Tribe of Wisconsin* v. *United States*, 577 U.S. 250, 252 (2016). Tribes may assume such responsibility by entering into a "self-determination contract" with the respective agency in which the tribe agrees to undertake the federal program or programs previously administered by the agency on the tribe's behalf. 25 U.S.C. 5321; see 25 U.S.C. 5304(j). Certain tribes may also enter into "self-governance compacts," which function like self-determination contracts but generally offer those tribes greater operational flexibility. See 25 U.S.C. 5381-5399.

This case involves self-determination contracts between the Indian Health Service (IHS), to which the Secretary of Health and Human Services has delegated his ISDA contracting authority, and two tribes—respondents San Carlos Apache Tribe and Northern Arapaho Tribe. IHS has traditionally operated health care programs serving eligible American Indians and Alaska Natives, primarily under the authority of the Snyder Act, 25 U.S.C. 13, and the Indian Health Care Improvement Act, 25 U.S.C. 1601 *et seq.* See 1 *Cohen's Handbook of Federal Indian Law* § 22.04 (Nell Jessup Newton ed., 2023). IHS has entered into ISDA contracts or compacts with the majority of federally recognized tribes for the tribes to assume all or a portion of IHS's programs; for the remaining programs, IHS continues to provide services directly. U.S. Dep't of Health & Human Servs., *Fiscal Year 2024, Indian Health Service: Justification for Estimates for Appropriations Committees* CJ-300 (2023) (FY2024 IHS Budget Justification), https://perma.cc/2YYB-ZXF8.

2. Upon entering into an ISDA contract, a tribe receives funding from IHS to operate the transferred program or programs. That contract funding has two main

components, which are set forth in 25 U.S.C. 5325(a). Section 5325(a)(1) provides that the tribe shall receive the amount of appropriated funds that the "Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. 5325(a)(1). This is commonly known as the "Secretarial amount." See *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 186 (2012).

Section 5325(a)(2) requires IHS to provide an additional amount in contract funding for "contract support costs." It states:

> There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. 5325(a)(2). Congress added this obligation to pay contract support costs in 1988, see Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, Tit. II, § 205, 102 Stat. 2292, after finding that tribes entering into ISDA contracts routinely incurred costs necessary to carry out transferred programs that the transferring agency had not previously paid out of its appropriated funding when operating the program—a systematic shortfall that could result in tribes reducing program services.

See S. Rep. No. 274, 100th Cong., 1st Sess. 9 (1987) (1987 Senate Report) (noting that "[i]n practice," tribes had less program funding vis-à-vis agencies because of additional compliance costs); see also S. Rep. No. 374, 103d Cong., 2d Sess. 9 (1994) (1994 Senate Report) (referring to the problem of "diminution in program resources when [federal] programs[] * * * are transferred to tribal operation"). As the text of Section 5325(a)(2) indicates, Congress determined that the relevant concern arises—and therefore that contract support costs should be available—in two circumstances. First, it arises when the agency would not "normally" have "carried on" the relevant compliance activity under the program—such as making contributions to state workers compensation programs for employees, which the federal government is not obligated to do. 25 U.S.C. 5325(a)(2)(A). Second, it arises when the agency would have covered a necessary cost using "resources other than" its appropriated funding for the program—such as the cost of auditing infrastructure or legal services. 25 U.S.C. 5325(a)(2)(B).

In 1994 amendments to ISDA, Congress added another paragraph to Section 5325(a) to specify that contract support costs can "include both funds required for administrative and other overhead expenses and 'direct' type expenses of program operation." 1994 Senate Report 8-9; see Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, Tit. I, § 102(14)(C), 108 Stat. 4257. In the new paragraph (3) of Section 5325(a), Congress explained that agencies must fund both kinds of contract support costs, so long as the underlying activities are not already funded by the Secretarial amount:

> (3) (A) The contract support costs that are eligible costs for the purposes of receiving funding under this chapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—
>
> (i) direct program expenses for the operation of the Federal program that is the subject of the contract; and
>
> (ii) any additional administrative or other expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,
>
> except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

25 U.S.C. 5325(a)(3)(A). Section 5325(a)(3)(A)(i) describes what are typically called "direct contract support costs," which might include expenses like the workers compensation payments described above. See *Cherokee Nation of Okla.* v. *Leavitt*, 543 U.S. 631, 635 (2005). Section 5325(a)(3)(A)(ii) describes what are typically called "indirect contract support costs," which might include the ISDA program's share of the tribe's pooled overhead or administrative costs (again, so long as the underlying activities are not already funded by the Secretarial amount). See *ibid.*

ISDA does not specify a formula for calculating direct and indirect contract support costs. See 25 U.S.C. 5325(a)(3)(C) (indicating that such amounts may be determined pursuant to negotiation). But IHS has

published a chapter in its Indian Health Manual that specifies a methodology, which is often incorporated into ISDA contracts. IHS, U.S. Dep't of Health & Human Servs., *Indian Health Manual, Pt. 6, Ch. 3 - Contract Support Costs* (Aug. 6, 2019) (Manual), https://perma.cc/V4Y4-7J5J; see J.A. 78, 146. The Manual provides for the negotiation of direct contract support costs based on the tribe's identification of its eligible costs. See Manual § 6-3.2B and D. Although indirect contract support costs may also be negotiated on a cost-by-cost basis, IHS and contracting tribes most often agree to calculate that amount by applying a separately negotiated rate to a "direct cost base." Manual § 6-3.2E(1) and (2); see *Cherokee Nation*, 543 U.S. at 635. Generally speaking, and as applicable to the negotiations underlying the contracts here, the "direct cost base" is calculated by adding the Secretarial amount and the direct contract-support-cost amount and subtracting applicable pass-throughs and exclusions. Manual § 6-3.2E(1)a and b; see Manual Exhibit 6-3-F (template for calculating and negotiating indirect contract support costs).

3. In 1998, Congress enacted express limits on agencies' obligation to pay contract support costs. See Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e), 112 Stat. 2681-280. The provision relevant here, titled "Indian Health Service: availability of funds for Indian self-determination or self-governance contract or grant support costs," provides:

> Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance

> contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act [25 U.S.C. 5321 et seq.] and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

25 U.S.C. 5326 (brackets in original); see 25 U.S.C. 5327 (similar provision for the Department of the Interior).

Sections 5326 and 5327 were enacted the year after the decision in *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997), which held that the Department of the Interior was required to pay contract support costs to support tribal programs funded by grants from another federal department. *Id.* at 1458-1459, 1461-1463. The *Ramah* court had reasoned that the tribe's fixed indirect costs—which benefitted both those programs and the tribe's ISDA programs—could not be underfunded. *Id.* at 1463. In the House Report accompanying the 1998 legislation, the Committee on Appropriations characterized *Ramah* as "erroneous," H.R. Rep. No. 609, 105th Cong., 2d Sess. 57 (1998), and recommended statutory language "specifying that IHS funding may not be used to pay for non-IHS contract support costs," *id.* at 108; see *id.* at 110; the bill reported out of that committee included the language of Section 5326, see H.R. 4193, § 114, 105th Cong., 2d Sess. (as reported July 8, 1998).

4. In addition to the funds they receive under ISDA contracts, tribal contractors may receive income

pursuant to the Indian Health Care Improvement Act (IHCIA), Pub. L. No. 94-437, 90 Stat. 1400. As amended, IHCIA authorizes both IHS and tribal contractors to collect payment for services from private insurers, tortfeasors, and workers compensation programs. See 25 U.S.C. 1621e. IHCIA also amended the Social Security Act to authorize IHS and tribal contractors to participate in and collect payment from the Medicare and Medicaid programs, so long as they meet those programs' conditions and requirements. See 42 U.S.C. 1395qq, 1396j; see also 25 U.S.C. 1641. In addition, IHCIA regulates IHS's and tribal contractors' subsequent use of the income they receive from those third-party payors. See 25 U.S.C. 1621f(a), 1641(c)(1)(B) and (d)(2)(A).

Congress also addressed third-party income, referred to as "program income," in ISDA. In the 1994 ISDA amendments in which Congress enacted Section 5325(a)(3)(A), Congress also added Section 5325(m), which states that "[t]he program income earned by a tribal organization in the course of carrying out a self-determination contract" "shall be used by the tribal organization to further the general purposes of the contract," and "shall not be a basis for reducing the amount of funds otherwise obligated to the contract." 25 U.S.C. 5325(m)(1) and (2). Congress added a similar provision in Title V of ISDA in 2000 when it provided permanent authorization for eligible tribes to enter into self-governance compacts with IHS. That provision, 25 U.S.C. 5388(j), instructs that "program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement," and "[s]uch funds shall not result in any offset or reduction in the

amount of funds the Indian tribe is authorized to receive under its funding agreement." *Ibid.*

5. Finally, as of 2020, a provision of ISDA instructs that the Act should "be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe." 25 U.S.C. 5321(g). Similar (though not identical) language is present in the text of the model ISDA agreement that Congress enacted in 1994. See 25 U.S.C. 5329(c) (providing that "[e]ach provision of the Indian Self-Determination and Education Assistance Act * * * and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs"); J.A. 51, 124; see also *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (describing the interpretive canon related to the construction of laws affecting Indian tribes).

B. Proceedings Below

1. San Carlos Apache Tribe

a. In 2011, the San Carlos Apache Tribe entered into a three-year self-determination contract to operate specific IHS programs under ISDA, including an emergency medical services program and an alcohol and substance abuse program. J.A. 50-53. The Tribe contracted with IHS to receive roughly $2.7 million in Secretarial amount funding and $559,000 in contract support costs for 2011 (though those amounts were altered through subsequent contract modifications over the next two years). J.A. 77-79; see J.A. 4-5.

In 2019, the Tribe filed suit against the government under the Contract Disputes Act of 1978, see 25 U.S.C. 5331(a), arguing that it was entitled to additional

contract support costs for fiscal years 2011 to 2013. J.A. 16-17. The Tribe contended that IHS was statutorily required to pay indirect contract support costs to support the Tribe's expenditures of income received from third parties during those years; specifically, it argued that the "direct cost base" used to calculate indirect contract support costs should have included not only the funds the Tribe received from IHS, but also the payments the Tribe received as reimbursement from third parties. J.A. 10-11, 17. The Tribe sought nearly $3 million in additional contract support costs for that three-year period, J.A. 17, as well as damages exceeding $5.2 million to make up for the "lost third-party revenues" the Tribe claimed it would have earned if IHS had paid those contract support costs, *ibid.*; see J.A. 12-13.

b. The government filed a motion to dismiss the Tribe's claim, adhering to IHS's longstanding position that costs associated with activities funded by third-party income are not eligible contract support costs under ISDA. The district court agreed and dismissed the claim. *SCA* Pet. App. 19a-35a. The court primarily based its conclusion on the text of Section 5325(a), observing that the statute's contract-support-cost provisions do not refer to third-party revenue. *Id.* at 21a-23a. The court also observed that ISDA's separate treatment of "program income" in Section 5325(m) bolstered the conclusion that such income did not give rise to a contract-support-cost obligation under Section 5325(a). *Id.* at 23a; see *id.* at 24a-25a. And the court reasoned that Section 5326 further "doom[ed]" the Tribe's position, *id.* at 25a, because the costs the Tribe incurs in spending income received from non-IHS parties are not "*directly* attributable" to the Tribe's ISDA contract with IHS, *id.* at 27a; see *id.* at 27a-31a.

The parties resolved an unrelated claim, and the district court entered final judgment. *SCA* Pet. App. 16a-18a.

c. The Ninth Circuit reversed the dismissal of the Tribe's claim and remanded for further proceedings. *SCA* Pet. App. 1a-15a.

The Ninth Circuit concluded that the definition of contract support costs in Section 5325(a)(2) "appears to apply" to the Tribe's costs of spending third-party income. *SCA* Pet. App. 9a; see *id.* at 8a-9a. Observing that the Tribe's ISDA contract "incorporate[s]" the provisions of ISDA by reference, J.A. 51, and citing the statutory conditions applicable to the Tribe's expenditure of third-party reimbursement income under 25 U.S.C. 1641(d)(2)(A) (which is part of IHCIA, not ISDA), the court concluded that "ISDA requires the Tribe to spend those [third-party] monies on health care." *SCA* Pet. App. 8a. From that premise, the court further concluded that tribal services funded with third-party income could qualify as "activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract" within the meaning of Section 5325(a)(2). *Id.* at 8a-9a. For similar reasons, the Ninth Circuit determined that the Tribe's costs of spending third-party income could qualify as indirect contract support costs under Section 5325(a)(3)(A)(ii). *Id.* at 9a.

On that basis, the Ninth Circuit stated that it could not conclude "that § 5325(a) *unambiguously* excludes those third-party-revenue-funded portions of the Tribe's healthcare program from [contract-support-cost] reimbursement." *SCA* Pet. App. 12a. The court separately dismissed the express limitations on IHS's contract-support-cost obligation in Section 5326, suggesting that

Section 5326 may not be "relevant" at all, *id.* at 13a, and describing it as not "clear," *id.* at 15a.

Having found the relevant statutory provisions "ambiguous," the Ninth Circuit concluded that ISDA's language "must be construed in favor of the Tribe." *SCA* Pet. App. 15a. The court accordingly "depart[ed]" from the D.C. Circuit's decision in *Swinomish Indian Tribal Community* v. *Becerra*, 993 F.3d 917 (2021), which had rejected a tribe's materially identical request for contract support costs associated with its expenditure of third-party income. *SCA* Pet. App. 9a; see *id.* at 9a-10a.

2. Northern Arapaho Tribe

a. In 2016, the Northern Arapaho Tribe entered into a self-determination contract to operate certain IHS programs under ISDA, including outpatient ambulatory medical care and physical therapy programs. J.A. 122-125. The Tribe contracted with IHS to receive roughly $457,000 in contract support costs for that year. J.A. 145-146.[2]

In 2021, the Northern Arapaho Tribe filed suit under 25 U.S.C. 5331(a), claiming that it was entitled to additional contract support costs for fiscal years 2016 and 2017. J.A. 116-117. Specifically, the Tribe contended that its expenditures of third-party income gave rise to direct and indirect contract support costs, and that the "direct cost base" used to calculate the indirect contract-support-cost amount should include the Tribe's third-party revenues. J.A. 108, 112-115. The Tribe sought

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[2] The record does not reflect the amount the Northern Arapaho Tribe received in Secretarial amount funding for 2016, nor the amount of contract support costs it received for any year other than 2016.

roughly $1.5 million in additional contract support costs for that two-year period. J.A. 118.

b. The government filed a motion to dismiss, which the district court granted. *NA* Pet. App. 40a-56a. The court agreed with the government that ISDA requires IHS to pay contract support costs only to support IHS-funded activities. *Id.* at 47a-48a. It observed that Section 5325(a)(2) sets forth a "limited scope" for contract support costs "and does not mention or include the Tribe's earned program income." *Id.* at 48a. The court also emphasized ISDA's separate treatment of "program income" as "'supplemental funding'" to that furnished by IHS under the contract. *Id.* at 49a (quoting 25 U.S.C. 5388(j)). The court alternatively concluded that Section 5326 bars IHS from providing the disputed funding because the Tribe's costs of spending third-party income are not "'directly attributable'" to the ISDA contract but are instead "associated with agreements with Medicare, Medicaid[,] and other third-party payers." *Id.* at 53a (quoting 25 U.S.C. 5326); see *id.* at 51a-54a.

c. The Tenth Circuit reversed in a fractured decision with no controlling opinion and one dissent. *NA* Pet. App. 1a-39a.

Writing for herself only, Judge Moritz first found it unclear whether the disputed category of costs has to meet the definition of "contract support costs" in Section 5325(a)(2) at all, or whether the costs need only fit one of the descriptions of eligible costs in Section 5325(a)(3) standing alone. *NA* Pet. App. 12a-14a. Assuming that issue in the Tribe's favor, Judge Moritz concluded that Section 5325(a)(3)(A) could be read to call for IHS's payment of the disputed costs. See *id.* at 14a-15a & n.7. And Judge Moritz similarly accepted the

Tribe's narrow interpretation of the limits on IHS's contract-support-cost obligation in Section 5326. *Id.* at 23a-25a.

Judge Eid also voted to reverse the district court's decision. *NA* Pet. App. 26a-35a. She recognized that a "tribe with an [ISDA] contract will already be fully reimbursed through the secretarial amount and contract support costs," and that "therefore, program income is extra money on top of basic reimbursement." *Id.* at 29a. Judge Eid nonetheless concluded that ISDA's funding provisions in Section 5325(a)(2) and (3) unambiguously require IHS to pay contract support costs for third-party-funded activities. *Id.* at 28a-30a. Judge Eid also concluded that IHS's payment of those costs would not violate Section 5326. *Id.* at 31a-34a.

Judge Baldock dissented in part. *NA* Pet. App. 35a-39a. Although he agreed with Judge Eid that the disputed costs qualify as contract support costs under Section 5325(a), he concluded that Section 5325(a) is independently "limited by [Section] 5326." *Id.* at 36a. And Judge Baldock did not see how the Tribe could get around Section 5326's directive that IHS not pay for costs "associated with" non-IHS contracts. *Id.* at 38a.

SUMMARY OF ARGUMENT

The courts of appeals erred in interpreting ISDA to require IHS to provide additional contract funding to cover expenses associated with the Tribes' expenditure of supplemental income that they receive from third-party health care payors.

A. Statutory text, context, and structure demonstrate that IHS must pay contract support costs to support only activities performed under the ISDA contract and funded by the Secretarial amount, not activities tribes undertake using other sources of funding.

1. ISDA permits Indian tribes to assume operation of federal health care programs that IHS would otherwise operate for the tribe's benefit. When a tribe enters into such a contract, ISDA entitles it to receive the appropriated funds that IHS otherwise would have spent on the transferred program. 25 U.S.C. 5325(a)(1). That appropriated funding often did not allow the tribal contractor to provide the full equivalent of the IHS-run program because the tribe had to incur additional costs, and Congress has accordingly provided for IHS's payment of "contract support costs" to bridge those gaps. 25 U.S.C. 5325(a)(2). But the text of Section 5325(a)(2) ties this limited contract-support-cost obligation to the contract's primary funding mechanism—the Secretarial amount in Section 5325(a)(1)—and the activities the tribe undertakes to carry out the program transferred from IHS.

Section 5325(a)'s contract-funding provisions do not mention payments that the tribal contractor may collect from non-IHS payors for the health care services it performs. And other ISDA provisions specify that such third-party income "shall not be a basis" for reducing the tribe's contract funding, 25 U.S.C. 5325(m)(2), and "shall be treated as *supplemental* funding to that negotiated in the funding agreement" with IHS, 25 U.S.C. 5388(j) (emphasis added)—reinforcing that Congress considered such income to be a separate revenue stream that does not affect funding the tribe receives under its ISDA contract.

2. The text of 25 U.S.C. 5326, which permits IHS to pay contract support costs "only for costs directly attributable to [ISDA] contracts" and prohibits IHS from covering costs "associated with any [non-IHS] contract," confirms that Section 5325(a) does not require

IHS to provide the additional funding that the Tribes seek. And because the prohibitions in Section 5326 apply "notwithstanding any other provision of law," they would independently bar IHS from paying the costs at issue here even if such expenses might otherwise be thought to qualify as "contract support costs" under an expansive reading of Section 5325(a)(2) or (3) in isolation.

3. Requiring IHS to pay contract support costs to support activities funded by a tribe's third-party income would also upend ISDA's design. The underlying rationale for contract support costs—to cover certain activities that are necessary for the tribal contractor to carry out the IHS-transferred program using the Secretarial amount, but which the Secretarial amount does not fund—is not present when the tribe spends funds from supplemental revenue streams. And while IHS also collects and spends third-party income in the course of running its own programs, Congress allows tribes to collect more revenue than IHS would have and grants tribes more flexibility in spending those funds.

B. The contrary reasoning of the Ninth and Tenth Circuits below is not persuasive.

1. The three opinions ruling in the Tribes' favor located a potential obligation to pay the disputed contract support costs in three ISDA provisions: Section 5325(a)(2), Section 5325(a)(3)(A)(i), or Section 5325(a)(3)(A)(ii). None of those provisions is fairly read in the manner that the opinions suggested. The Ninth Circuit primarily reasoned that tribal activities funded by third-party income are "activities that must be carried out * * * to ensure compliance with the terms of the contract" with IHS within the meaning of Section 5325(a)(2). But no provision of the Tribes' contracts

obligates them to conduct specific activities with third-party income, and the Ninth Circuit erred in concluding that ISDA itself imposes such an obligation. For similar reasons, the Ninth Circuit and the two Tenth Circuit opinions were wrong to suppose that the costs of spending third-party income might qualify under the descriptions of direct and indirect contract support costs in Section 5325(a)(3)(A)(i) or (ii). And all three opinions improperly disregarded the clear prohibitions in Section 5326, as Judge Baldock concluded in dissent in *Northern Arapaho*.

2. The Tribes' theory—which contravenes three decades of IHS practice—would have destabilizing effects. It would require IHS to provide an estimated $800 million to $2 billion in additional contract funding per year—an amount that could be expected to grow as tribes expand their programs to earn *more* third-party income.

3. Contrary to the reasoning of the Ninth Circuit and Judge Moritz's opinion in *Northern Arapaho*, the Indian canon of construction does not compel a decision in the Tribes' favor. Especially when read as a unified whole, ISDA's provisions and Section 5326 conclusively demonstrate that contract support costs are available only to support the tribe's use of IHS funds, and income from third parties does not determine contract funding. The Indian canon therefore should not come into play, as the principle "does not permit reliance on ambiguities that do not exist." *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

ARGUMENT

THE INDIAN HEALTH SERVICE CANNOT PAY CONTRACT SUPPORT COSTS TO SUPPORT A CONTRACTING TRIBE'S EXPENDITURE OF INCOME RECEIVED FROM THIRD PARTIES

A. ISDA's Text, Context, And Structure Establish That IHS Is Not Required To Pay Contract Support Costs For A Tribe's Expenditure Of Third-Party Income

In the decisions under review, the Ninth Circuit and two members of a Tenth Circuit panel ruled that IHS must pay contract support costs not only to support the programs transferred by IHS to the tribe and paid for out of appropriated funds, but also to subsidize activities paid for with third-party income that a tribe collects from third parties. That interpretation contravenes the only natural reading of the statutory scheme and should be rejected: ISDA's "text and structure do not require payment of contract support costs when a tribe spends money received from sources other than Indian Health Service, like insurance providers." *Swinomish Indian Tribal Community* v. *Becerra*, 993 F.3d 917, 920 (D.C. Cir. 2021).

1. ISDA's text, context, and structure demonstrate that IHS must pay contract support costs only to support the IHS-funded program, not activities that the tribe carries out with non-IHS funding

a. The ISDA provisions governing the funding that IHS must provide under a self-determination contract work together as a comprehensive and coherent scheme to (1) transfer IHS's appropriated funding to the contracting tribe, and (2) fill specific gaps in that funding so that the tribes are not put at a disadvantage when running the transferred program in IHS's stead. Those

provisions do not instruct IHS to pay contract support costs to subsidize activities that tribes undertake with funding other than the Secretarial amount received from IHS.

Section 5325(a)(1) defines the Secretarial amount. That paragraph states that the Secretary of Health and Human Services must provide to a contracting tribe "[t]he amount of funds" that he "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. 5325(a)(1). In other words, IHS must take the appropriated funding it would have spent on the transferred program in the absence of the ISDA contract and transfer that funding to the tribal contractor instead. See *Fort McDermitt Paiute & Shoshone Tribe* v. *Becerra*, 6 F.4th 6, 7-8 (D.C. Cir. 2021); see also *id.* at 13-14 (holding that the Secretarial amount includes only the agency's appropriated funding).

The rationale of this funding mechanism is simple: if the agency provides the tribe with all of the federal funds it would have spent on running a health care program for the tribe's benefit, then the tribe should be able to replicate the agency's program or even improve upon it (if the tribe identifies program savings or efficiencies that the agency could not). However, Congress soon recognized that "[i]n practice," tribal contractors routinely incurred certain costs that the agency did not previously have to cover with the Secretarial amount. 1987 Senate Report 9; see pp. 4-5, *supra*. This caused tribal contractors to divert part of the Secretarial amount to cover those necessary costs, resulting in a "diminution" in the overall level of services that the tribe could provide as compared to the IHS-run program. 1994 Senate Report 9.

Responding to this problem, Congress in 1988 added Section 5325(a)(2) to cover those specific gaps in the Secretarial amount. That paragraph states that "[t]here shall be added to the amount required by paragraph (1) [*i.e.*, the Secretarial amount]" additional funding in the form of "contract support costs." 25 U.S.C. 5325(a)(2). Such contract support costs, the statute instructs, "shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management," but which either "normally are not carried on by the respective Secretary in his direct operation of the program" or else "are provided by the Secretary in support of the contracted program from resources other than those under contract." 25 U.S.C. 5325(a)(2)(A) and (B).

The requirement to pay contract support costs in Section 5325(a)(2) is thus tied to the primary contract-funding mechanism set forth in Section 5325(a)(1). Section 5325(a)(1) defines "[t]he amount of funds provided under the terms of [a] self-determination contract[]" as the Secretarial amount. 25 U.S.C. 5325(a)(1). The next paragraph, Section 5325(a)(2), then requires the Secretary to "add[] to" that amount "contract *support* costs"—*i.e.*, complementary funding that *supports* the tribe's execution of the program transferred under the contract and funded by IHS appropriations. 25 U.S.C. 5325(a)(2) (emphasis added). Moreover, subparagraphs (A) and (B) of Section 5325(a)(2) describe the types of activities that trigger contract-support-cost payment by comparison to the Secretary's "direct operation of the program" and functions he formerly "provided"—*i.e.*, by comparison to how IHS would have carried out the transferred program. 25 U.S.C. 5325(a)(2)(A) and

(B). The contract-support-cost obligation is accordingly limited to those costs that a tribe incurs in carrying out the contracted program in the Secretary's stead using the Secretarial amount transferred to the tribe.

In 1994, Congress added Section 5325(a)(3) to divide those "contract support costs" into two subcategories—commonly known as "direct" and "indirect" contract support costs—for the purpose of clarifying that both must be funded, so long as the expense is not covered by the Secretarial amount. 25 U.S.C. 5325(a)(3)(A); see pp. 5-6, *supra*. Here, too, the statutory language ties IHS's contract-support-cost obligation to the tribe's role as a contractor carrying out the IHS-transferred program: those subparagraphs cover "direct program expenses" incurred by the tribe as a "contractor" in "the operation of the Federal program that is the subject of the contract," as well as certain other "expense[s]" incurred "in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." 25 U.S.C. 5325(a)(3)(A)(i) and (ii).

Whether considered separately or taken together, these ISDA funding provisions are clear and straightforward. Under Section 5325(a)(1), IHS transfers all of the appropriated funds it previously spent on the program under contract (the Secretarial amount). Under (a)(2), the tribal contractor receives contract support costs to cover costs that necessarily arise as a consequence of the tribe's use of the Secretarial amount to operate the IHS program, but which IHS did not previously cover with the Secretarial amount. And (a)(3) clarifies that contract support costs meeting the (a)(2) definition must be paid regardless of whether they are direct program expenses (like worker's compensation payments for program employees) or indirect expenses

(like overhead costs). But nowhere do those provisions mandate that IHS pay contract support costs to support tribal activities funded by *non-IHS* sources.

b. "[A] wider look at * * * statutory structure" reinforces the conclusion that ISDA does not require IHS to pay contract support costs to support a tribe's expenditure of third-party income. *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1482 (2021).

To begin with, a tribal contractor's ability to collect payment for health care services does not come from ISDA. Rather, it was in IHCIA, beginning in 1976 and through later amendments, that Congress enabled both IHS and tribal contractors to collect payment from third parties like Medicare and Medicaid, private insurers, state workers compensation programs, and tortfeasors. See 25 U.S.C. 1621e, 1621f, 1641; 42 U.S.C. 1395qq, 1396j; see also p. 9, *supra*.

When Congress eventually addressed tribes' receipt of third-party income in ISDA in 1994 and 2000, it confirmed the status of such income as a separate revenue stream independent of contract funding. In 1994, Congress added Section 5325(m), which requires tribal contractors to spend such third-party "program income earned * * * in the course of carrying out a self-determination contract" to "further the general purposes of the contract." 25 U.S.C. 5325(m)(1). Notably, Section 5325(m) also provides that program income "shall not be a basis for reducing the amount of funds otherwise obligated to the contract." 25 U.S.C. 5325(m)(2). It would have been odd for Congress to see a need to clarify that a tribe's receipt of third-party income cannot *reduce* contract funding if Congress understood third-party income to be a basis for *increasing* contract funding under Section 5325(a)(2) and (3). At the very least,

if that were Congress's understanding, it would have made far more sense to simultaneously address both matters.

Section 5388(j), which Congress added to Title V of ISDA in 2000, restates the same principle as Section 5325(m)(2) even more clearly. Section 5388(j) provides that "[a]ll Medicare, Medicaid, or other program income earned by an Indian tribe *shall be treated as supplemental funding to that negotiated in the funding agreement*," and "[s]uch funds shall not result in any offset or reduction in the * * * funding agreement." 25 U.S.C. 5388(j) (emphasis added). There is no dispute that the funding "negotiated in the funding agreement" includes contract support costs. See 25 U.S.C. 5325(a)(3)(C). Section 5388(j) is thus clear that program income is a *supplemental* funding stream, in addition to contract support costs, but which does not determine the amount of such costs.

While Section 5388(j), by its terms, applies only to self-governance compacts under Title V of ISDA, see p. 9, *supra*, there is no reason to believe that Congress had a different understanding for self-determination contracts under Title I. Title V incorporates the same funding mechanisms as Title I, including contract support costs. See 25 U.S.C. 5388(c), 5396(a). For this reason, the clarification reflected in Section 5388(j)—which serves the same purpose that 5325(m)(2) serves for self-determination contracts—is probative regarding the construction of Section 5325(a)'s funding provisions. Cf. *Fort McDermitt*, 6 F.4th at 14 (relying on Section 5388(j) to resolve a dispute about what the Secretarial amount in Section 5325(a)(1) includes).

The location of Section 5325(m) and Section 5388(j) is also telling. When Congress saw fit to address third-

party income in ISDA, it did not amend Section 5325(a) (which addresses IHS contract funding) or the analogous funding provision for Title V compacts in Section 5388(c). Instead, Congress created two standalone provisions—again highlighting the nature of third-party income as a separate revenue stream unrelated to contract funding. Thus, "just as [ISDA] speaks of contract support costs without any mention of insurance money, it elsewhere speaks of insurance money without any mention of contract support costs." *Swinomish*, 993 F.3d at 920.

Together with the plain text of Section 5325(a), these additional "contextual clues" demonstrate that IHS's longstanding understanding of third-party income as separate from IHS funding "is exactly how an ordinary reader would understand this [scheme]." *Luna Perez* v. *Sturgis Pub. Sch.*, 143 S. Ct. 859, 864 (2023). The proposition that a tribe's expenditure of this supplemental revenue nonetheless increases IHS's contract-support-cost obligation is fundamentally inconsistent with ISDA's structure and implementation.

2. Section 5326 independently precludes IHS from paying costs associated with non-IHS funding

The text of Section 5326 confirms that contract support costs are available to support only the IHS-funded activities that a tribe assumes under its contract, and cannot be paid to subsidize additional activities that tribes carry out with other funding streams.

Section 5326 contains two prohibitions related to IHS's payment of contract support costs, both of which apply "notwithstanding any other provision of law." 25 U.S.C. 5326. The first prohibition instructs that IHS funds "may be expended only for costs *directly attributable* to contracts, grants and compacts pursuant to the

Indian Self-Determination Act." *Ibid.* (emphasis added). The second prohibition instructs that no IHS funds "shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service." *Ibid.*

Both prohibitions bar IHS from providing the funding that the Tribes are seeking here. As to the first, expenditures that a tribe chooses to make using third-party income are not "directly attributable" to the tribe's ISDA contract with IHS. As the *San Carlos Apache* district court observed, Congress's use of the word "directly" in Section 5326 reflects a significant drafting choice; several other ISDA provisions use "attributable" without the modifying adverb. *SCA* Pet. App. 28a-29a; see 25 U.S.C. 5325(a)(4), (e), and (k)(11). Accordingly, while the word "attributable" could perhaps suggest a looser causal link standing alone, the word "'directly'" requires the connection to be "close," *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 831 (1983) (citation omitted), and "immediate," *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992) (citation omitted).

A tribe's expenditure of income received from third-party payors does not come about as an immediate result of its contract with IHS, as both district courts concluded below. *SCA* Pet. App. 27a-31a; *NA* Pet. App. 51a-54a. The tribe has to perform health care services that are eligible for payment from third parties; seek and receive that payment by operation of non-ISDA law (and possibly another contract); and then decide how to spend those proceeds for some health-related purpose.

Costs arising from that chain of events cannot be deemed "directly attributable" to the ISDA funding contract.

Section 5326's second prohibition likewise applies here, as Judge Baldock concluded in *Northern Arapaho* below. *NA* Pet. App. 38a-39a (Baldock, J., dissenting in part). To receive Medicare and Medicaid reimbursements, tribal providers enter into agreements with Medicare and Medicaid authorities. See *SCA* Pet. App. 30a-31a. The costs of spending those reimbursements are therefore "associated" with "contract[s]" with entities "other than the Indian Health Service." 25 U.S.C. 5326. The same would be true for payments a tribe receives pursuant to contracts or agreements with private insurers. See *NA* Pet. App. 53a.

Section 5326's "plain and unambiguous" language thus bars contract support costs for third-party-funded activities. *NA* Pet. App. 39a (Baldock, J., dissenting in part). In this way, Section 5326 powerfully confirms the proper reading of Section 5325(a). But even if costs associated with tribal expenditures of third-party income might arguably be thought to qualify as contract support costs under Section 5325(a)(2) and (3) standing alone, Section 5326's prohibitions apply "notwithstanding any other provision of law," and therefore would independently preclude IHS from paying the disputed amounts. 25 U.S.C. 5326; see *NA* Pet. App. 38a (reading Section 5326 "as a superseding provision that bars the Tribe from receiving the funds it seeks even though § 5325 would otherwise allow it").

3. Payment of contract support costs to support tribal expenditures of third-party income would lead to illogical consequences

Payment of contract support costs to support activities funded by a tribe's third-party income would also contravene the underlying logic of contract support costs and upend ISDA's design.

As discussed, Congress required the payment of contract support costs to cover certain activities that are necessary for the tribal contractor to carry out the IHS program but were left systematically unfunded. See pp. 4-5, 21, *supra*. The concern was that, without this "added" amount, 25 U.S.C. 5325(a)(2), those unfunded costs would result in a "diminution" in program services as compared to what IHS would have provided directly, 1994 Senate Report 9, unless tribes "use[d] their own financial resources to subsidize federal programs," 1987 Senate Report 9.

That concern is absent in the third-party-income context. As even Judge Eid recognized in her *Northern Arapaho* concurrence, a "tribe with an [ISDA] contract will already be fully reimbursed through the secretarial amount and contract support costs," and "therefore, program income is extra money on top of basic reimbursement." *NA* Pet. App. 29a. Nor does a tribe's receipt of supplemental revenue from third-party payors give rise to activities that "must be carried on by a tribal organization as a contractor" but are left unfunded. 25 U.S.C. 5325(a)(2). While federal law obligates tribes to spend third-party income for a health-related purpose, 25 U.S.C. 5325(m)(1); see 25 U.S.C. 1641(d)(2)(A); see also pp. 33-35, *infra*, that obligation is not unfunded—the third-party income itself is the funding.

Moreover, unlike a tribe's use of the Secretarial amount under Section 5325(a)(1), a contracting tribe is not expected to essentially stand in IHS's shoes when collecting and spending third-party income. Both with respect to how much third-party income can be earned and how that income may be spent, Congress has placed IHS under *greater* restrictions than contracting tribes —allowing tribes to collect more revenue than IHS in the ordinary course and allowing tribes more flexibility in spending those funds.

For one thing, in its direct operation of its own programs, IHS cannot offer health care services to non-Indians unless the beneficiary tribe requests it. 25 U.S.C. 1680c(c)(1)(A). IHS and the beneficiary tribe must also make a joint determination "that the provision of such health care services [to non-Indians] will not result in a denial or diminution of health services to eligible Indians." 25 U.S.C. 1680c(c)(1)(B). By contrast, a contracting tribe running its own program may unilaterally decide to offer health care services to non-Indians—and thereby increase its third-party income based on the expanded patient population. See 25 U.S.C. 1680c(c)(2). IHS has informed this Office that, as a result of these distinct statutory requirements, IHS programs do not typically serve non-Indians, while IHS estimates that about half of tribal-contractor programs do.

In addition, when IHS collects Medicare and Medicaid proceeds—which IHS has informed this Office compose the majority of IHS's program income—the agency must "first" use such proceeds to ensure the program's compliance with relevant Medicaid and Medicare authorities. 25 U.S.C. 1641(c)(1)(B). By contrast, when a tribal contractor directly bills Medicare and Medicaid, see 25 U.S.C. 1641(d)(1), it has the option to

use the proceeds on "any health care-related purpose" or "otherwise to achieve the objectives" of IHCIA. 25 U.S.C. 1641(d)(2)(A). And IHCIA's objectives include aims as general and varied as "ensur[ing] the highest possible health status for Indians" and "increas[ing] the proportion of all degrees in the health professions and allied and associated health professions awarded to Indians." 25 U.S.C. 1602.

In addition, in nearly all annual appropriations bills dating back to 1978, Congress has prohibited IHS from using Medicaid and Medicare proceeds to construct new facilities.[3] But Congress has not extended this prohibition to tribal contractors—who remain free to spend Medicaid and Medicare proceeds to construct new health-care-related facilities and thereby expand their operations.

Because IHS and contracting tribes are thus differently situated both in how much third-party income they may receive and how that income may be spent, payment of contract support costs based on a tribe's expenditure of such income would fundamentally distort ISDA's operation. It would allow contracting tribes to expand their programs beyond what IHS would have undertaken directly, at a far greater cost to IHS as a contractee. Indeed, because there is no statutory limit on the amount of third-party income contracting tribes may earn, a corresponding contract-support-cost obligation would have the potential to exceed the

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[3] See, *e.g.*, Department of the Interior and Related Agencies, Appropriations, Fiscal Year 1979, Pub. L. No. 95-465, 92 Stat. 1296-1297; Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, 105 Stat. 1026; Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. G, Tit. III, 136 Stat. 4809.

Secretarial amount for the program that IHS transferred—a result at odds with the targeted role of contract support costs as mere "support" to fill specified gaps in IHS's appropriated funding. 25 U.S.C. 5325(a)(2); see pp. 21-22, *supra*.

For example, as noted above, a tribal contractor could build new hospital facilities using Medicare and Medicaid proceeds from a contracted program. Under the Ninth and Tenth Circuits' rulings, the tribe would be able to collect contract support costs from IHS to subsidize the construction expenditures, and then use those new facilities to generate even more third-party income—including by serving non-Indian patients. And the tribe could then obtain more contract support costs from IHS to spend *that* third-party income—continuing the cycle of ever-expanding federal outlays. By contrast, when operating its own program for a non-contracting tribe's benefit, IHS would not have been authorized to engage in that sort of program expansion in the first place.

B. The Courts Of Appeals' Contrary Reasoning Lacks Merit

The Ninth Circuit in *San Carlos Apache*, and a splintered Tenth Circuit panel in *Northern Arapaho*, nonetheless ruled that IHS must pay contract support costs to support activities that a tribe chooses to conduct with third-party income. The Ninth Circuit and Judge Moritz's *Northern Arapaho* opinion concluded that ISDA does not "unambiguously" foreclose the Tribes' theory, and they therefore applied the Indian canon of construction to require IHS to provide this additional category of funding, *SCA* Pet. App. 12a; see *NA* Pet. App. 2a (opinion of Moritz, J.). Judge Eid's concurring opinion in *Northern Arapaho* would have found that the statute unambiguously requires this additional funding.

NA Pet. App. 26-27a (Eid, J., concurring in the judgment). Those interpretations should be rejected because they reflect strained statutory analysis and mistaken understandings of the relevant statutory schemes.

1. The courts of appeals adopted strained interpretations of the relevant statutory provisions

The opinions below ruling in the Tribes' favor located the potential obligation to pay the disputed amounts in strained readings of three ISDA provisions: Section 5325(a)(2), Section 5325(a)(3)(A)(i), or Section 5325(a)(3)(A)(ii). None can be fairly read in the manner that the opinions suggested.

a. The Ninth Circuit and Judge Eid (but not Judge Moritz) concluded that costs related to spending third-party income qualify as contract support costs under the definition in Section 5325(a)(2). *SCA* Pet. App. 8a-9a; *NA* Pet. App. 29a (Eid, J., concurring in the judgment). The Ninth Circuit's logic, the essentials of which Judge Eid appears to have shared, was as follows: the San Carlos Apache Tribe's ISDA contract (like the Northern Arapaho Tribe's contract) incorporates the provisions of ISDA by reference in the contract's "Authority" section. *SCA* Pet. App. 8a; see J.A. 51, 123-124. ISDA, in the Ninth Circuit's view, obligates the Tribe to "spend third-party revenue on its healthcare program." *SCA* Pet. App. 9a. Therefore, the ISDA contract itself requires the Tribe to spend third-party income on additional program services, and those tribal expenditures are thus "activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract" within the meaning of Section 5325(a)(2). 25 U.S.C. 5325(a)(2); see *SCA* Pet. App. 8a-9a.

At each crucial step of that chain, the Ninth Circuit's reasoning lacks support—resulting in an erroneous interpretation of Section 5325(a)(2)'s text. Even assuming that the incorporation of ISDA's provisions as the contract's "Authority" has the effect that the Ninth Circuit supposed, no provision of ISDA requires tribal contractors to "spend third-party revenue on [the ISDA] healthcare program" or "spend those monies on health care." *SCA* Pet. App. 8a-9a. The only ISDA provision that addresses the expenditure of third-party income is Section 5325(m)(1), which merely requires tribes to spend such income "to further the *general purposes* of the contract." 25 U.S.C. 5325(m)(1) (emphasis added).

An open-ended obligation to use funds for the "general purpose[]" of tribal health is not the equivalent of a requirement to devote those funds to providing additional services under the contracted ISDA program. Indeed, the San Carlos Apache Tribe acknowledges that tribes need not spend third-party income on "additional healthcare services under the program" to satisfy Section 5325(m)(1). *SCA* Resp. Br. 5 (stating that tribes "typically" fulfill Section 5325(m)(1)'s requirement this way); see *id.* at i. For instance, a tribe could instead spend those funds on a different health care program (*i.e.*, not one originally operated by IHS and transferred under the contract), or on constructing new health care facilities (which would require a separate contract if done pursuant to ISDA, see 25 C.F.R. 900.114).

Thus, far from converting every tribal expenditure of third-party income into a contractually required "activit[y]," 25 U.S.C. 5325(a)(2), Section 5325(m) serves the far more modest purpose of ensuring that tribes do not spend this revenue on matters unrelated to tribal health. Had Congress intended to require tribes to use

third-party income to perform additional services under the contract, it would have said so explicitly—as it did in another provision of Section 5325. See 25 U.S.C. 5325(a)(4)(A) (requiring tribes to use certain savings "to provide additional services or benefits under the contract"). Section 5325(m)(1)'s language, in contrast, tracks the way that Congress described how tribes may spend other kinds of *outside* funds they may receive in the course of the ISDA program. See 25 U.S.C. 5325(k)(9) (stating that tribes may seek "funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives" of the contract); 25 U.S.C. 5388(h) (allowing tribes to "retain interest earned" on compact funds "to carry out governmental or health purposes"). It would make little sense to say that those other external sources of funds trigger IHS's contract-support-cost obligation, and to our knowledge, no court has so held.

Indeed, the Ninth Circuit did not even rely on Section 5325(m)(1) as the source of the supposed statutory and contractual requirement that tribal contractors spend third-party income on providing additional services under the ISDA program. Instead, the Ninth Circuit cited 25 U.S.C. 1641(d)(2)(A). *SCA* Pet. App. 8a-9a. But Section 1641 appears in *IHCIA*, not ISDA, and it is therefore not incorporated into the Tribes' ISDA contracts in the manner the court supposed. See *ibid.*; see also p. 9, *supra*.

In any event, Section 1641(d)(2)(A) likewise imposes no mandate to conduct any particular "activities" "as a contractor" to "ensure compliance with the terms of the contract." 25 U.S.C. 5325(a)(2). Instead, Section 1641(d)(2)(A) lists a number of acceptable uses of third-party income, with the two catch-alls that tribes may

use such proceeds for "any health care-related purpose" "or otherwise to achieve the objectives" of IHCIA, which are varied. 25 U.S.C. 1641(d)(2)(A); see 25 U.S.C. 1602, 1621f(a)(1) and (2)(D); see also p. 30, *supra*. So that provision, like Section 5325(m)(1), does not require tribes to commit their income from third parties to services under the program transferred from IHS.

b. Judge Moritz's opinion, like the Northern Arapaho Tribe's certiorari-stage response, simply bypasses the language of Section 5325(a)(2). See *NA* Pet. App. 14a-15a; *NA* Resp. Br. 16-17. That was because Judge Moritz considered the statute "ambiguous" regarding whether, to be an eligible contract support cost, the expense in question must meet Section 5325(a)(2)'s basic requirements or need only meet one of the further descriptions in Section 5325(a)(3)(A)(i) or (ii) standing alone. *NA* Pet. App. 12a-14a. Although this particular interpretive dispute need not be resolved to answer the question in this case, see pp. 37-40, *infra*, Judge Moritz was wrong to find the statute unclear on this point. To qualify as an eligible "contract support cost," a cost must meet the umbrella definition in Section 5325(a)(2) regardless of whether it is thought to fit under one of the subcategories in Section 5325(a)(3)(A).

Section 5325(a)(2) furnishes the basic definition of "contract support costs." It introduces the term and instructs that those costs "*shall consist* of an amount" for "activities which must be carried on by a tribal organization * * * to ensure compliance with the terms of the contract" and which fit one of two criteria: either the activities "normally are not carried on" by the agency, or they "are provided by the [agency] * * * from resources other than those under contract." 25 U.S.C. 5325(a)(2)(A) and (B) (emphasis added). Those

two criteria are the essential characteristics of contract support costs and provide the underlying rationale for this added category of funding.

Section 5325(a)(3)(A) then cross-references and elaborates upon Section 5325(a)(2)'s definition by clarifying subcategories of "contract support costs" that are "eligible" for funding, if "reasonable" and "allowable." 25 U.S.C. 5325(a)(3)(A). As the D.C. Circuit has explained, however, Section 5325(a)(3)(A)'s subcategories "do[] not expand the types of contract support costs made available to tribes by § (a)(2)," but "merely divide[] into two the contract support costs already defined by § (a)(2)." *Cook Inlet Tribal Council, Inc.* v. *Dotomain*, 10 F.4th 892, 895-896 (2021); cf. 140 Cong. Rec. 28,629 (1994) (statement of Rep. Richardson) ("The Committee wishes to make clear that by adding a new paragraph (3) [to Section 5325(a)], the Congress is not creating a third funding category in addition to direct [program costs] and contract support costs.").

The contrary reading suggested by Judge Moritz could render Section 5325(a)(2) largely superfluous, given the potential breadth that might be attributed to the descriptions in Section 5325(a)(3)(A) if read in isolation as if they were standalone definitions. It would also render the Secretarial amount irrelevant in significant respects, as tribal contractors could simply reclassify as a "contract support cost" any direct or administrative expense that they wish to incur in excess of IHS's appropriated funding. That result cannot be squared with the text of Section 5325(a) and the nature of contract support costs as mere "support" for the Secretarial amount. See *Cook Inlet*, 10 F.4th at 896.

In any event, the expenditures at issue here do not qualify under the terms of Section 5325(a)(3)(A)(i) or (ii)

either. The Ninth Circuit and Judge Moritz suggested that a tribe's expenditures of third-party income might qualify as "direct program expenses for the operation of the Federal program" under Section 5325(a)(3)(A)(i). *SCA* Pet. App. 10a-11a; *NA* Pet. App. 15a-16a (opinion of Moritz, J.). But the Ninth Circuit reached that result by employing the same mistaken chain of reasoning addressed above. See *SCA* Pet. App. 11a (deeming it "possible that all activities required by the Contract, regardless of funding source, comprise one 'Federal program'"); but see pp. 33-35, *supra* (explaining that the contract does not require the San Carlos Apache Tribe to spend third-party income on particular activities). Similarly, Judge Moritz relied on Section 5325(m)(1) to conclude that expenditures of third-party income could constitute part of "the Federal program." See *NA* Pet. App. 16a. But again, Section 5325(m)(1) merely states that "program income earned in the course of carrying out" the ISDA contract "shall be used by the tribal organization to further" the contract's "general purposes." 25 U.S.C. 5325(m)(1). That provision does not deem such expenditures to actually be part of "the Federal program" transferred by contract from IHS.

The San Carlos Apache Tribe has offered broader reasoning, arguing that "the contracted 'program' * * * extends to services funded by other resources, *like* program revenue collected from third-party payors." *SCA* Resp. Br. 15-16 (emphasis added). In other words, the Tribe appears to suggest that any health care services it provides trigger IHS's contract-support-cost obligation, regardless of whether those services are funded by IHS or "other resources" of the Tribe. See *ibid.* But under that logic, a tribe could channel outside funding from *any* source—including funds from the tribe's

general treasury, or proceeds from a tribal business—into its ISDA programs and thereby obligate IHS to pay additional contract support costs on that amount. That would mean that IHS "would be on the line for unlimited contract support costs based on the unlimited sources of outside-the-contract funding available to a tribe." *Swinomish*, 993 F.3d at 921. As the D.C. Circuit recognized, that cannot possibly be "what the Act requires." *Ibid.*

The Tribes, and both Tenth Circuit opinions below, have also emphasized that the Tribes' ISDA contracts require them to set up third-party billing systems. See *SCA* Resp. Br. 6, 14; *NA* Resp. Br. 1-2, 8, 10-11; *NA* Pet. App. 15a-16a (opinion of Moritz, J.), *id.* at 30a (Eid, J., concurring in the judgment); see also J.A. 101, 185-186. But the question is not whether IHS funding should cover the cost of *collecting* third-party payments for services. IHS does not dispute that point, and IHS funding already covers that expense when billing functions are transferred to the contracting tribe. The question is instead whether IHS must pay contract support costs to subsidize the *subsequent* expenditures that the tribe makes with the payments it *receives*. See *Swinomish*, 993 F.3d at 921 (rejecting that tribe's similar attempt to conflate the two). Any billing obligation does not address that distinct question. See *ibid.*

The Ninth Circuit and Judge Moritz additionally reasoned that tribal expenditures of third-party income could qualify as indirect contract support costs under Section 5325(a)(3)(A)(ii), which includes "additional administrative or other expense[s] incurred by" the tribal contractor or its governing body "in connection with the operation of the Federal program, function, service,

or activity pursuant to the contract." 25 U.S.C. 5325(a)(3)(A)(ii). That reasoning is likewise mistaken.

The Ninth Circuit first interpreted the subparagraph's phrase "in connection with" to require nothing more than a "'causal' relationship" between the Federal program and the expenditures at issue. *SCA* Pet. App. 9a. That relationship, the court determined, is present here by virtue of the purported contractual requirement "to provide third-party-funded health care." *Ibid.* But again, no such contractual or statutory requirement exists; Section 5325(m)(1) merely obligates the Tribe to dedicate its third-party income to health-related objectives, not to provide additional services under the contract. See pp. 33-34, *supra*; compare 25 U.S.C. 5325(a)(4)(A).

The Ninth Circuit and Judge Moritz alternatively reasoned that the phrase "in connection with" might authorize payment of contract support costs to support "some costs *outside* of the Federal program itself." *SCA* Pet. App. 11a; see *NA* Pet. App. 20a (opinion of Moritz, J.). A statutory phrase's meaning, however, "does not always turn solely on the broadest imaginable definitions of its component word[s]." *Dubin* v. *United States*, 599 U.S. 110, 120 (2023) (citation omitted). When read in context, the words "in connection with" do not have the surprising effect of expanding contract support costs to any tribal expense with an articulable relationship to the ISDA program. Rather, the phrase simply indicates that the relevant cost must be incurred *for*, or *in the course of*, the tribe's operation of the contracted program, even if it is not a direct program expense (for instance, because it is an overhead cost). That reading is consistent with how Congress used the

phrase "in connection with" elsewhere in Section 5325. See 25 U.S.C. 5325(k)(7) and (8).

c. In addition to misconstruing the text of Section 5325(a)'s funding provisions, the opinions below also failed to give effect to the separate prohibitions in Section 5326. As explained above, those prohibitions confirm IHS's longstanding position that contract support costs may only be paid to support activities funded by IHS. See pp. 26-27, *supra*. And in any event, the clear terms of Section 5326 would independently preclude IHS from paying the disputed costs even if those expenses were thought to otherwise qualify as contract support costs under Section 5325(a)(2) or (a)(3) read in isolation. See pp. 27-28, *supra*.

The Ninth Circuit first suggested that Section 5326 is not "relevant" at all because the specific funding dispute that preceded its enactment is not the same as the one in this case. *SCA* Pet. App. 13a. But the court's role is to give effect to the text that Congress enacted, not to cabin that text to address only its primary catalyst. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

In any event, the dispute here presents exactly the kind of problem that led to Section 5326's enactment. Congress added the provision in response to a judicial decision that extended the Department of the Interior's contract-support-cost obligation to cover activities funded by other sources, including another federal source (the Department of Justice). See *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1458-1459, 1462-

1463 (10th Cir. 1997); see also p. 8, *supra*. And the *Ramah Navajo* court reached that counterintuitive conclusion based in part on the court's belief that the definition of contract support costs in Section 5325(a)(2) was ambiguous on the disputed issue, triggering the Indian canon of construction. See 112 F.3d at 1460-1462. The decisions below reach the same erroneous result based on the same mistaken reasoning.

When the opinions below did address Section 5326's text, their analysis was unpersuasive. With respect to the provision's requirement that IHS pay contract support costs "only for costs directly attributable to [ISDA] contracts," 25 U.S.C. 5326, the Ninth Circuit and the two Tenth Circuit opinions reasoned that the Tribes' costs of spending third-party income arise as a downstream effect of their ISDA contracts. As the Ninth Circuit explained, the San Carlos Apache Tribe's expenditure of third-party income "occurs only because the Contract allows the Tribe to recover the insurance money and requires the Tribe to spend it." *SCA* Pet. App. 15a; see *NA* Pet. App. 24a-25a (opinion of Moritz, J.); *id.* at 31a-32a (Eid, J., concurring in the judgment). And the Ninth Circuit and Judge Moritz further concluded that Section 5326 is "ambiguous[]" as to whether this kind of but-for cause relationship is sufficient. *SCA* Pet. App. 15a; see *NA* Pet. App. 24a-25a (opinion of Moritz, J.).

But employing a but-for causation standard writes the word "directly" out of Section 5326's "directly attributable" standard. Again, this Court has recognized that the word "direct" requires an effect to be an "immediate consequence" of the triggering condition, not a mere downstream consequence. *Republic of Argentina*, 504 U.S. at 618 (citation omitted); cf. *Black's Law*

Dictionary 472 (7th ed. 1999) (defining "directly" as "in a straight line or course" and "immediately"). And as noted above, Congress used the word "directly" here and not elsewhere in ISDA—further eliminating any ambiguity about whether a looser causal connection could suffice. See p. 26, *supra*.

The opinions below similarly erred in disregarding Section 5326's language forbidding IHS from paying "contract support costs or indirect costs associated with any contract" or "funding agreement" between the tribe and a non-IHS entity. 25 U.S.C. 5326. As explained, tribes receive payments and reimbursements pursuant to separate agreements with Medicare and Medicaid authorities (for instance), not pursuant to their ISDA contracts with IHS. The resulting costs of spending that income are therefore "associated with" those other contracts and do not qualify for contract support costs. *Ibid.*; see p. 27, *supra*.

The Ninth Circuit and Judge Moritz did not separately focus on this second prohibition in Section 5326. See *SCA* Pet. App. 14a-15a; *NA* Pet. App. 24a-25a & n.12 (opinion of Moritz, J.). Judge Eid asserted that the government's reading of this language would "destroy" ISDA "entirely." *NA* Pet. App. 32a (Eid, J., concurring in the judgment). Specifically, Judge Eid believed that the government's understanding would bar IHS reimbursement of program expenses involving any contract, such as a tribe's contract with an auditing firm it has hired. *Id.* at 32a-33a. But consistent with statutory context and the *noscitur a sociis* canon of interpretation, Section 5326's "associated with" prohibition is properly read to apply only to contracts whereby the tribe *receives* funds from an entity other than IHS. See 25 U.S.C. 5326 (referring to "any contract, grant,

cooperative agreement, self-governance compact, or funding agreement"). Regardless, whatever interpretive difficulties this provision could conceivably pose in the context of hypothetical other disputes does not counsel in favor of ignoring its plain language here.

2. The Tribes' interpretation would upend the statutory scheme, not further its purposes

The opinions below ruling in the Tribes' favor also relied heavily on a policy consideration. They reasoned that, because IHS also collects and spends third-party income when running its direct programs, requiring IHS to pay contract support costs for tribal contractors' third-party-income-supported activities would place tribes on "equal footing" with the agency. *SCA* Pet. App. 15a; see *id.* at 3a; see also *NA* Pet. App. 20a-21a (opinion of Moritz, J.). The Tribes have likewise emphasized the fact that IHS collects and spends third-party income, contending that because IHS reinvests this income in its own programs, IHS should subsidize tribal contractors when they do something similar. See *SCA* Resp. Br. 14-15; *NA* Resp. Br. 18. That is necessary, the Tribes argue, to ensure that "Tribes who contract with IHS" are not "worse off than Tribes whose health care services are directly provided by IHS." *NA* Resp. Br. 18.

But as explained above, such parity concerns have no traction in the third-party-income context because Congress has put tribal contractors in a *better* position than IHS in this regard. Through various enactments, Congress has enabled tribal contractors to earn more third-party revenue than IHS would have earned in running its own programs and given tribal contractors greater flexibility in spending that revenue. See pp. 29-31, *supra*. If those distinctions allow the Tribes to grow and

improve their health care offerings in ways that IHS could not, that is a policy outcome that Congress might have welcomed. But it is highly unlikely that Congress would have intended for IHS to subsidize such expansions on an open-ended basis.

It is therefore the Tribes' interpretation that would subvert ISDA's scheme by requiring escalating contract-support-cost payments far exceeding those costs' role as mere "support" to fill gaps in the Secretarial amount paid out of funds appropriated by Congress. See pp. 30-31, *supra*. IHS has informed this Office that it estimates that the added financial impact of the decisions below, if affirmed, would fall somewhere between $800 million and $2 billion annually. That could increase IHS's contract-support-cost expenditures by close to 200% percent from the current level (around $1.043 billion annually). FY2024 IHS Budget Justification CJ-235. And that amount would be expected to grow over time, as tribes' expanded operations—fueled by third-party income and added contract support costs—produce more and more income, triggering additional contract-support payments from IHS.

To illustrate, in this litigation, the San Carlos Apache Tribe has sought additional contract support costs of nearly $3 million for fiscal years 2011-2013, plus over $5 million in alleged lost revenue deriving from those missing costs. See p. 11, *supra*. If awarded, that additional amount would come close to doubling the Secretarial amount that IHS owed under the Tribe's ISDA contract for that three-year period. Other pending cases involve even larger contract-support-cost requests. See Compl. at ¶ 46, *Gila River Indian Cmty.* v. *Becerra*, No. 22-cv-1993 (D. Ariz. Nov. 23, 2022) (seeking nearly $110 million in additional contract support costs and associated

damages for a single fiscal year); First Am. Compl. at 15-23, *Alaska Native Tribal Health Consortium* v. *Becerra*, No. 21-cv-260 (D. Alaska Aug. 18, 2023) (seeking over $40 million for a single fiscal year and over $90 million for another fiscal year based primarily on the same legal theory).

Due to realities of agency budgeting, such a dramatic increase in the government's contract-support-cost obligation under ISDA could imperil the services that IHS provides to non-contracting tribes. Although (following this Court's 2012 decision in *Salazar* v. *Ramah Navajo Chapter*, *supra*) the annual appropriation for contract support costs is not itself capped, the amounts expended still count against the overall suballocation limit for discretionary spending under the provisions of the Congressional Budget Act of 1974, 2 U.S.C. 621 *et seq.*[4] An increase of this magnitude to IHS's expenditures could consume IHS's total annual funding increases under the suballocation, which are considerably less. And the resulting fiscal pressure could lead to reductions in IHS's own programs, which benefit some of the most underserved tribal communities in the country.[5]

ISDA, and the important policies of tribal self-determination that it furthers, does not call for that result. While the statutory scheme is designed to enable contracting tribes to assume IHS-run programs using IHS

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[4] See 2 U.S.C. 633(b); see also generally Drew C. Aherne, Congressional Research Service, *Enforceable Spending Allocations in the Congressional Budget Process: 302(a)s and 302(b)s* (Jan. 18, 2023).

[5] In its most recent budget submission, IHS asked for contract-support-cost funding to be shifted to mandatory funding. FY2024 IHS Budget Justification CJ-2 to CJ-3. Congress has not granted that request.

funds, it does not require the agency to sponsor tribes' expenditures of outside funding, and the courts below were wrong to create such an obligation.

3. The Indian canon of construction does not support adoption of the Tribes' theory

Both the Ninth Circuit's decision and Judge Moritz's opinion ultimately rested not on a determination that the Tribes' position represents the best reading of the relevant ISDA provisions, but instead on the Indian canon of construction. *SCA* Pet. App. 7a, 9a, 11a-12a, 14a-15a; *NA* Pet. App. 1a, 14a-15a, 25a-26a (opinion of Moritz, J.). Examining each relevant provision largely in isolation, those opinions concluded that the statutory language could be viewed as sufficiently "ambiguous" with respect to the dispute here to permit a decision in the Tribes' favor. See *SCA* Pet. App. 15a; *NA* Pet. App. 14a-15a (opinion of Moritz, J.).

Even if the opinions' identification of ambiguity in one or another of the individual provisions was plausible, but see pp. 20-28, 32-42, *supra*, the "ambiguity of statutory language is determined" not only "by reference to the language itself," but by "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). When the mutually reinforcing provisions of the statutory scheme are properly read in that manner, ISDA's provisions and the express limitations in Section 5326 clearly and conclusively demonstrate that contract support costs are available only to support the tribe's use of funds received from IHS pursuant to the contract, and that third-party income is a supplemental funding stream that does not determine contract amounts.

The Indian canon therefore does not come into play. As this Court has explained, that canon "does not permit reliance on ambiguities that do not exist," *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), and cannot be used to "produce an interpretation that * * * would conflict with the intent embodied in the statute Congress wrote," *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001). In other words, even when it comes to statutes affecting tribal interests, "courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (citation omitted). Those principles govern here, and the decisions below erred in relying on the Indian canon of construction to produce a result contrary to ISDA's text, context, structure, and purpose.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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