No. 23-250

In the Supreme Court of the United States

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

v.

SAN CARLOS APACHE TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In this case, as well as in *Northern Arapaho Tribe* v. *Becerra*, 61 F.4th 810 (10th Cir. 2023), petition for cert. pending, No. 23-253 (filed Sept. 15, 2023), the court of appeals held that the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 5301 *et seq.*, requires the Indian Health Service (IHS) to pay contract support costs to subsidize activities that contracting tribes carry out using funds they receive from third-party health care payors. The respondent tribes in both cases agree with the government that this Court should review that determination and resolve an issue of substantial importance that has given rise to a circuit conflict. Certiorari should be granted.[1]

[1] Any reference in this brief to provisions of the United States Code are to the current version unless otherwise noted. This brief

A. All Parties Agree That The Court Should Grant Certiorari

As explained in the petitions, ISDA allows an Indian tribe to enter into a contract with IHS to operate federal health care programs that IHS would otherwise have operated for the tribe's benefit, using the appropriated funds that IHS would otherwise have allocated for the program. Because those allocated funds may not be sufficient for the tribe to fully replicate the transferred program—either because the tribe is required to incur compliance costs that IHS would not have incurred, or because IHS would have drawn on other federal resources to cover certain administrative and overhead costs, see 25 U.S.C. 5325(a)(2)(A) and (B)—ISDA also obligates IHS to provide "contract support costs" to bridge those gaps. But contract support costs are available only for that purpose: to *support* the IHS-transferred activities that the tribe assumes under the contract and for which IHS transfers its appropriated funds. The decision below and the Tenth Circuit's decision in *Northern Arapaho*, *supra*, nonetheless require IHS to pay contract support costs to supplement the tribe's expenditure of funds it receives from non-IHS health care payors. The D.C. Circuit reached the opposite conclusion, holding that 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 Cmty.* v. *Becerra*, 993 F.3d 917, 920 (2021).

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uses "*SCA* Pet.," "*SCA* Pet. App.," and "*SCA* Resp. Br." to refer to the filings in this case and "*NA* Pet.," "*NA* Pet. App.," and "*NA* Resp. Br." to refer to the filings in *Northern Arapaho*, *supra* (No. 23-253).

Both respondents agree with the government that there is a square split, that the question presented warrants this Court's review, and that the Court should grant certiorari now without waiting for further percolation. See *SCA* Resp. Br. 2, 12; *NA* Resp. Br. 1, 12.

B. The Ninth and Tenth Circuits' Decisions Are Erroneous

Respondents dedicate most of their briefs to defending the Ninth and Tenth Circuits' determination on the merits. Because respondents acquiesce in the granting of certiorari, we only briefly respond here with respect to the principal points.

Respondents primarily argue that their costs associated with spending third-party income qualify as contract support costs under the terms of Section 5325(a)(3)(A). *SCA* Resp. Br. 13-19; *NA* Resp. Br. 16-18. That argument lacks merit. The San Carlos Apache Tribe first contends that its expenditures of income from third parties qualify as "direct program expenses for the operation of the Federal program," 25 U.S.C. 5325(a)(3)(A)(i), because "the contracted 'program' * * * extends to services funded by other resources, like program revenue collected from third-party payors." *SCA* Resp. Br. 15-16; see *id.* at 14-16. But under that logic, a tribe could invest outside funding from *any* source—such as funds from the tribe's general treasury—into its ISDA programs and thereby obligate IHS to pay additional contract support costs on that unlimited amount. See *Swinomish*, 993 F.3d at 921. "That's not what the Act requires." *Ibid.*

Both the San Carlos Apache Tribe and the Northern Arapaho Tribe also rely on the description of indirect contract support costs in Section 5325(a)(3)(A)(ii). *SCA* Resp. Br. 19; *NA* Resp. Br. 16-18. But to qualify under that provision, the expense must be "incurred * * * *pur-*

suant to the contract." 25 U.S.C. 5325(a)(3)(A)(ii) (emphasis added). Respondents' arguments thus hinge on the proposition that ISDA—and therefore, in their view, the contract—requires tribes to reinvest third-party income into the programs they operate in IHS's stead. See *SCA* Pet. Resp. Br. 19 (citing 25 U.S.C. 5325(m)(1)); *NA* Pet. Resp. Br. 16 (same). Unlike 25 U.S.C. 5325(a)(4)(A), however—which expressly requires tribes to use certain savings "to provide additional services or benefits under the contract"—Section 5325(m)(1) merely obligates tribes to use third-party income to "further" the ISDA contract's "general purposes." 25 U.S.C. 5325(m)(1); see *SCA* Pet. 21-22. Indeed, the San Carlos Apache Tribe elsewhere acknowledges that ISDA does not require tribes to reinvest third-party income in contract services. See *SCA* Resp. Br. i (stating that tribes "typically" fulfill Section 5325(m)(1)'s requirement by providing additional program services). Moreover, Section 5325(m) reinforces ISDA's separate treatment of third-party income by instructing that such funding should not decrease the Secretarial amount—which would be an odd instruction if Congress implicitly meant for such income to *increase* the amount of contract support costs. See 25 U.S.C. 5325(m)(2); see also *SCA* Pet. 22-23.

Respondents' reliance on Section 5325(a)(3)(A) also overlooks that a prior subsection, Section 5325(a)(2), defines "contract support costs" in the first instance as the costs of activities necessary to comply with the contract that "normally are not carried on" by the agency or that "are provided by the [agency] * * * from resources other than those under contract." 25 U.S.C. 5325(a)(2)(A) and (B). Section 5325(a)(3)(A) then cross-references and elaborates upon that definition by delineating the sub-

categories of "contract support costs" that are reimbursable. 25 U.S.C. 5325(a)(3)(A). Accordingly, a disputed cost must meet the terms of either Section 5325(a)(2)(A) or (B). See *Cook Inlet Tribal Council, Inc.* v. *Dotomain*, 10 F.4th 892, 895-896 (D.C. Cir. 2021). Respondents' contrary view—that a cost need only meet one of the descriptions in Section 5325(a)(3)(A)(i) or (ii)—would render Section 5325(a)(2) superfluous and would largely render the Secretarial amount superfluous as well, as tribal contractors could simply classify as "contract support costs" any expense that they wished to incur beyond the Secretarial amount. See *id.* at 896. Respondents' position thus underscores the degree to which they seek to upend the funding scheme that Congress adopted.

Both respondents also emphasize that their contracts require them to maintain a third-party billing system. *SCA* Resp. Br. 6, 14; *NA* Resp. Br. 1-2, 8, 10-11. But the question here is not whether IHS funding should cover the cost of *collecting* third-party payment for services (a point IHS does not dispute). It is whether IHS must pay contract support costs to subsidize the tribe's later *expenditure* of the funds it receives. See *Swinomish*, 993 F.3d at 921 (rejecting tribe's similar attempt to conflate the two).

In any event, even if Section 5325(a)(2) or (3), viewed in isolation, might otherwise be read to cover these disputed expenditures, Section 5326—which forbids IHS from covering costs not "directly attributable" to the IHS contract and costs "associated with any contract" between the tribe and any non-IHS entity, 25 U.S.C. 5326—would foreclose that reading. See *SCA* Pet. 18-19, 23-24. Indeed, as Judge Baldock concluded in dissent in *Northern Arapaho*, Section 5326 independently

prohibits IHS from reimbursing the disputed costs. *NA* Pet. App. 36a-39a.

The San Carlos Apache Tribe relies on Judge Eid's concurring opinion in *Northern Arapaho* to argue that the government's interpretation of Section 5326 "vitiat[es] the text of § 5325." *NA* Pet. App. 34a; see *SCA* Resp. Br. 22-23. That is incorrect. Under the government's reading, contract support costs are available when an eligible cost arises as a *direct* result of the tribe's agreement to operate a contracted program in exchange for IHS funding—such as the cost of required compliance audits. But contract support costs are not available when the cost comes about *indirectly*, as a result of the tribe's receipt of funds from third parties and the tribe's own decisions about how to spend those amounts. See *SCA* Pet. 18.[2] Moreover, tribes routinely receive such funds pursuant to separate contracts with third parties—not under their contracts with IHS—thus triggering Section 5326's second prohibition on payment of contract support costs. See *SCA* Pet. 18-19.

Both respondent tribes also maintain that their interpretation of ISDA is necessary to achieve parity between IHS-run programs and tribal programs. *SCA* Resp. Br. 15-17; *NA* Resp. Br. 18. But Congress has permitted contracting tribes to earn greater amounts of

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[2] The San Carlos Apache Tribe errs in suggesting (at Br. 23) that the government's reading of Section 5326 would mean that contract support costs are unavailable for tribal expenditures that involve *any* contract, such as a tribe's contract with an auditing firm it has hired. Consistent with context and the *noscitur a sociis* canon of interpretation, Section 5326's "associated with" prohibition is best read to apply to contracts whereby the tribe *receives* funding from some other entity. See 25 U.S.C. 5326 (referring to "any contract, grant, cooperative agreement, self-governance compact, or funding agreement").

third-party income than IHS and placed greater restrictions on how IHS may spend those funds—thus enabling contracting tribes to operate larger programs than IHS could have operated directly. See *SCA* Pet. 20-21, 27. And neither respondent denies that its position puts IHS on the hook for an ever-expanding amount of contract support costs that could eventually dwarf the Secretarial amount. See *SCA* Pet. 21, 26-27.

Finally, as explained in the *San Carlos Apache* petition, the dispute here is not simply a matter of the government's responsibility to safeguard federal funds. The dramatic increase in IHS's contract-support-cost obligation that the Ninth and Tenth Circuits' decisions would bring about would likely require IHS to reallocate resources away from the direct health care services the agency provides to tribes that have not elected to operate their own programs. See *SCA* Pet. 27-28. This Court should grant certiorari and reverse.

C. *San Carlos Apache* Presents A Suitable Vehicle For Plenary Review

As explained in the petitions (*SCA* Pet. 13-28 & n.2; *NA* Pet. 14-15), the government suggests that this Court grant plenary review in *San Carlos Apache* and hold *Northern Arapaho*. The San Carlos Apache Tribe agrees that its case is a proper vehicle. *SCA* Resp. Br. 12. *San Carlos Apache* was the first-decided case, and the only case in which all members of the panel were able to agree on a common rationale. And the government has identified no reason to grant review in both cases, which would needlessly complicate the proceedings for no apparent benefit since the underlying question of statutory interpretation is the same in each case. If this Court concludes otherwise, however, it could

grant review in both this case and in *Northern Arapaho* and consolidate the two cases.

The Northern Arapaho Tribe argues that its case is the better vehicle because *San Carlos Apache* assertedly presents a contract-specific argument that *Northern Arapaho* does not, which could prevent the Court from reaching the question presented. *NA* Resp. Br. 12-16. That is mistaken. In both cases, the respective tribe agreed to calculate contract support costs according to the methodology in the Indian Health Manual, and also agreed to a specific amount of such costs, as part of the contract. See *SCA* C.A. E.R. 72, 78, 82; *NA* C.A. App. 84. Accordingly, in both cases, the government argued in the lower courts that the tribe could not thereafter recover a different amount by bringing suit. See, *e.g.*, *SCA* Gov't C.A. Br. 16, 20-26; *NA* Gov't C.A. Br. 15, 19-24. In response, both tribes invoked language in their respective contracts that (in their view) indicated that the contractual amounts and the Manual's methodology could be displaced if the statute itself required the payment of additional costs. See *SCA* Resp. C.A. Reply Br. 6-8; *NA* Resp. C.A. Reply Br. 18-19.

The government did not prevail on that threshold contractual argument in either court of appeals. See *SCA* Pet. App. 4a-5a; *NA* Pet. App. 17a (opinion of Moritz, J.). Without conceding that the lower courts' rulings on this point were correct, in light of the need for prompt nationwide resolution of the statutory question, the government does not intend to pursue the threshold contractual argument before this Court. As a result, the Court need not consider the Northern Arapaho Tribe's vehicle argument—which in any event provides no basis for distinguishing between the cases.

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For the foregoing reasons and those stated in the petitions for writs of certiorari, the Court should grant this petition.

Respectfully submitted.

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