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,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT SAN CARLOS APACHE TRIBE

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February 12, 2024

QUESTION PRESENTED

The Indian Health Service (IHS) provides healthcare programs for Indian Tribes under the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §1601 *et seq*. These programs are funded by congressional appropriations and revenues collected from third-party payors. The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §5301 *et seq.*, requires IHS to award contracts transferring to Indian Tribes responsibility for the Federal programs that IHS would otherwise administer under IHCIA. ISDA further directs that IHS must pay contracting Tribes the amount IHS would otherwise have provided for operating the program, §5325(a)(1), plus "contract support costs," §5325(a)(2). "Contract support costs" include "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." §5325(a)(3)(A)(ii).

As IHS does, contracting Tribes collect revenue from third-party payors like Medicaid, Medicare, and private insurers. ISDA requires such "program income" to "be used by the tribal organization to further the general purposes of the contract." §5325(m)(1). Tribes typically fulfill this requirement by using program income to further support the Federal program, just as IHS does when operating its programs.

The question presented is:

Whether IHS is required to pay contract support costs for the increased overhead expenses a Tribe incurs in connection with services funded by the exact same program income from third parties that IHS uses when operating the same program.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Xavier Becerra, Secretary of Health and Human Services; Roselyn Tso, Director of the Indian Health Service; and the United States.

Respondent is the San Carlos Apache Tribe.

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INTRODUCTION

Congress authorized and encouraged Indian Tribes to invoke their self-determination rights to take over operation of Federal programs for Indians, including healthcare programs that would otherwise be administered by the Indian Health Service (IHS) under the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §1601 *et seq.* Congress required that Tribes be on the same footing as IHS would be had it continued operating the program. To this end, the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §5301 *et seq.*, requires IHS to pay Tribes all appropriated funds that IHS otherwise would have allocated for the program, plus "contract support costs" for additional expenses that Tribes, but not IHS, incur in carrying out the program.

But that funding is indisputably insufficient to support unmet Indian healthcare needs. For that reason, both IHS (when it operates the program) and Tribes (when they operate the program) bill and collect from third-party payors, principally Medicare, Medicaid, and private insurers. Both IHS and contracting Tribes use those third-party revenues—what ISDA calls "program income"—to expand and improve healthcare services. When IHS does so, it need not use program income to cover its increased overhead expenses because most if not all of those expenses are borne *outside the program*, permitting the third-party revenue to be used for services. But when Tribes operate the enlarged program in IHS's stead, they *do* incur additional overhead expenses. If IHS refuses to reimburse those expenses, Tribes have less funding available to provide services than IHS would have if it had continued operating the program.

IHS nonetheless refuses to reimburse Tribes for overhead expenses they incur when spending program income on program services. That refusal is inconsistent with ISDA. The statute broadly requires reimbursement for "any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program … pursuant to the contract." §5325(a)(3)(A)(ii).[1] The overhead expenses Tribes incur when using program income to provide more healthcare services fall squarely within this definition.

This conclusion follows from unambiguous statutory text. Tribes are statutorily and contractually bound to spend all program income "to further the general purposes of the contract." §5325(m)(1). The healthcare services Tribes provide to fulfill that obligation are no less part of the "Federal program" than the services IHS funds with its program income. At a minimum, those services are "in connection with" the Federal program. And the resulting overhead expenses are incurred "pursuant to the contract" because the Tribe incurs them in carrying out its contractual obligation to spend program income on the program. This reading is confirmed by the statutory structure, which places contracting Tribes on par with IHS when they step into IHS's shoes to run the program. Otherwise, Tribes would be incentivized to return the program to IHS, defeating Congress's self-determination objective. Any remaining doubt must be resolved in the Tribes' favor under the Indian canon, which Congress expressly incorporated into the statute and the contract.

STATEMENT OF THE CASE

The statutes at issue reflect twin congressional objectives: improving Indian health and promoting tribal

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[1] Unless otherwise specified, all U.S.C. citations are to title 25.

self-determination. To serve these goals, Congress added third-party collections to IHS's budget and authorized Tribes to enter into contracts assuming IHS's responsibility for operating Federal healthcare programs. Congress sought to ensure that Tribes could provide the same level of services as IHS without diverting tribal resources to the program. Today, tribally-contracted Federal healthcare programs have three primary funding sources:

- the Secretarial amount, *i.e.*, the amount IHS would have spent had it operated the program, §5325(a)(1);
- program income collected from third-party payors, principally Medicare, Medicaid, and private insurers, while carrying out the contract (mirroring the additional amount IHS would have collected from the same third-party payors and used to fund the program), §5325(m); and
- contract support costs, which cover additional expenses Tribes incur in connection with their operation of the program, §5325(a)(2)–(3).

These provisions arise from decades of Congress's repeated efforts—and IHS's repeated refusal—to ensure that tribally-contracted programs are fully funded and on equal footing with IHS-operated programs. Each time Congress has revisited the statute it has reinforced IHS's obligation to fully fund tribal programs, including contract support costs, and rebuffed IHS's attempts to construe its obligations narrowly.

A. The State of Indian Healthcare

Since the 1800s, the Federal government has provided healthcare to Tribes. See S. Rep. No. 94-133, at 24 (1975) (1975 Senate Report). By the mid-1970s, IHS

was responsible for Indian healthcare programs and "provide[d] a full range of … services" through a network of facilities and clinics. *Id.* at 26. But despite improvements, "Indian health … [was] still significantly worse than that of the general population." Comptroller General, B-164031, *Progress and Problems in Providing Health Services to Indians* at 1 (1974).

Congress recognized "[t]he sad fact … that the vast majority of Indians still live[d] in an environment characterized by inadequate and understaffed health facilities." H.R. Rep. No. 94-1026, pt. 1, at 15 (1976). As a result, Indians "suffer[ed] a health status far below that of the general population." *Id.* In response, Congress enacted ISDA and IHCIA.

B. ISDA and Tribal Self-Determination

1. In 1975, Congress enacted ISDA to authorize Tribes to take over Federal programs through contracts with IHS. Pub. L. No. 93-638, §103, 88 Stat. 2203, 2206–07 (1975). "Congress, after a careful review of the United States' historical and legal responsibility to the Indian people found that the prolonged Federal domination of Indian service programs ha[d] served to retard rather than enhance the progress of Indian people and their communities." S. Rep. No. 93-682, at 14 (1974) (1974 Senate Report); see §5301(a)(1). "ISDA answered the call for a 'new national policy' of 'autonomy' and 'control' for Native Americans and Alaska Natives." *Yellen* v. *Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2439 (2021) (quoting H.R. Doc. No. 91-363, p. 3 (1970)).

ISDA "implement[ed] a policy of self-determination whereby Indian tribes are given a greater measure of control over the programs and services provided to them by the Federal government." 1974 Senate Report 13; see §5302(a). To that end, ISDA "provid[ed] direct

statutory authority for contracting of Federal programs by Indian tribes." 1974 Senate Report 14. By authorizing Tribes to assume responsibility for Federal programs, Congress sought "to render such services more responsive to the needs and desires of those communities." *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 185–86 (2012) (quoting §5302(a)).

2. Encouraging ISDA contracts, however, required Congress to fund those programs. Otherwise, Tribes would be forced to use their own resources to operate the Federal program, disincentivizing self-determination. Thus, ISDA originally required IHS to provide contracting Tribes with at least the amount the "Secretary would have otherwise provided for his direct operation of the programs or portions thereof." Pub. L. No. 93-638, §106(h), 88 Stat. at 2211; see §5325(a)(1). In this way, Congress sought to ensure that Federal programs operated by Tribes would have at least as many resources as those programs had when operated by IHS (although, as discussed below, contract support costs are necessary to achieve that goal).

C. IHCIA and Indian Healthcare

1. Shortly after enacting ISDA, Congress enacted IHCIA to increase funding for Indian healthcare programs. Congress praised ISDA's "new contracting authority tailored to meet Indian needs and to further the goal of Indian self-determination." 1975 Senate Report 33. But Indian health metrics still lagged far behind those of the general population. See *id.* "In order to overcome the gross deficiencies in the quantity and quality of existing facilities," Congress recognized that "more money must be allocated" to Indian healthcare. *Id.* at 37. IHCIA was the answer.

2. One way IHCIA accomplished this purpose was by authorizing IHS facilities, "whether operated by [IHS]

or by an Indian tribe," to earn program income by billing Medicare and Medicaid for services provided to Indian patients, and then requiring that this program income be plowed back into the program. Pub. L. No. 94-437, §§401(a) (Medicare), 402(d) (Medicaid), 90 Stat. 1400, 1408–10 (1976), codified as amended at 42 U.S.C. §§1395qq, 1396j; see also §§1621f(a)(1), 1641(c)(1)(A). Congress instructed that program income be used to "expand and improve current IHS health care services and not to substitute for present expenditures," 1975 Senate Report 128, because appropriated funds were insufficient to meet Indian healthcare needs. Congress cautioned that "any Medicare and Medicaid funds received by the [IHS] program be used to supplement—and not supplant—current IHS appropriations." *Id.*; see Pub. L. No. 94-437, §§401(c), 402(d), 90 Stat. at 1409–10.

In 1988, when Congress reauthorized IHCIA, it emphasized that program income was "for the purpose of allowing [IHS] to increase the number of Indian patients served through the use of third party resources to which they are entitled, and not as an offset for new budget authority." S. Rep. No. 100-508, at 22–23 (1988). It also reinforced that IHS "may not offset or limit the amount of funds obligated to any service unit or any entity under contract to [IHS] because of the receipt of reimbursements" from third-party payors. Pub. L. No. 100-713, §207, 102 Stat. 4784, 4812 (1988), codified as amended at §1621f(b). To maximize program income, Congress later mandated that health programs operated by IHS and Tribes "shall be the payer of last resort," requiring that appropriated funds be used only after applicable third-party payors have been billed. §1623(b).

From 1976 until 2000, IHS collected most program income, including program income arising from

healthcare services provided by Tribes under ISDA. IHS remitted those collections to the Tribes by amending the Tribes' ISDA contracts. S. Rep. No. 106-152, at 2 (1999) (1999 Senate Report). But in 2000, frustrated by the slow pace of IHS collections, Congress provided Tribes the option to bill Medicare and Medicaid directly. Pub. L. No. 106-417, §3, 114 Stat. 1812, 1813 (2000), codified as amended at §1641(d). In 1988 and 1992, Congress codified the right of IHS and Tribes, respectively, to recover from private insurers. See Pub. L. No. 100-713, §204, 102 Stat. at 4811; Pub. L. No. 102-573, §209, 106 Stat. 4526, 4551 (1992), codified as amended at §1621e(a).[2]

3. IHCIA injected substantial new funding into the Indian healthcare system. Today virtually all Federal programs operated by IHS are dual-funded programs supported by appropriations and program income. Program income has become "a significant part of the IHS … budge[t]." HHS, *Fiscal Year 2013, Indian Health Service: Justification of Estimates for Appropriations Committees*, at CJ-141 (2012) (2013 CJ). In 2013 (a year covered by the contract at issue), program income contributed over $900 million to IHS's $4 billion budget. *Id.* IHS then reinvested that income in the programs that generated it. *Id.* at CJ-141–43.

To this day, IHS describes program income as "a significant portion of the IHS and Tribal health care delivery budgets." HHS, *Fiscal Year 2024, Indian Health Service: Justification of Estimates for Appropriations Committees*, at CJ-193 (2023) (2024 CJ). In 2023, IHS projected collecting over $1.75 billion in program income. *Id.* "Some IHS health care facilities report that

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[2] For additional reimbursements, see §§1645(c) (Veterans Administration), 1621e(a) (tortfeasors, state subdivisions), 1641(d)(1) (Children's Health Insurance Program).

60 percent or more of their yearly budget relies on revenue collected from third party payers." *Id.* IHS recognizes that "[t]he collection of third party revenue is essential to maintaining facility accreditation and standards of health care." 2013 CJ at CJ-141.

This is equally true for Federal programs contracted to Tribes. IHCIA assures that Tribes, like IHS, will—indeed, *must*—collect program income. §§1621f(a)(1), 1623(b). And when Tribes do so, IHCIA imposes restrictions on use of those funds similar to those that apply when IHS operates a program—they must be spent to improve Indian healthcare. §1641(d). Since the Secretarial amount is woefully insufficient to meet Indian healthcare needs, Tribes depend on program income to provide services at least equal to those provided under IHS operation.

D. Congress's Repeated Instruction To Fully Fund Contract Support Costs

Despite the influx of new funding, tribal healthcare programs remain underfunded, in significant part due to IHS's refusal to fully fund contract support costs. Congress has responded to IHS's intransigence by repeatedly amending ISDA to require full funding.

1. As originally enacted, ISDA addressed only the Secretarial amount. "It soon became apparent," however, "that th[e] secretarial amount failed to account for the full costs to tribes of providing services." *Ramah*, 567 U.S. at 186. That is because, to operate the transferred program, Tribes incur costs that IHS does not incur or that it funds outside the program. These contract support costs include direct costs, such as workers' compensation insurance, and indirect costs, such as special auditing and financial-management costs. Most contract support costs are indirect costs "generally calculated by applying an 'indirect

cost rate' to the amount of funds otherwise payable to the Tribe." *Cherokee Nation of Okla.* v. *Leavitt*, 543 U.S. 631, 635 (2005) (citations omitted); see also JA9.

Congress described the failure to "provide funding for the indirect costs associated with self-determination contracts" as "the single most serious problem with implementation of the Indian self-determination policy." S. Rep. No. 100-274, at 8 (1987) (1987 Senate Report). See also *id.* (discussing "[t]he consistent failure of federal agencies to fully fund tribal indirect costs"); *id*. at 37. To accomplish ISDA's self-determination goals, Tribes needed sufficient resources to deliver "at least the same amount of services as [IHS] would have otherwise provided." *Id.* at 16. The alternative—diverting program funds to make up the difference—was unacceptable: "[IHS] must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." *Id.* at 12. Equally unacceptable was forcing Tribes to redirect tribal funds intended for other purposes (like law enforcement or economic development) or to "reduc[e] their level of effort to maintain their administrative systems." *Id.* at 12–13. See also H.R. Rep. No. 100-393, at 4 (1987) (1987 House Report) (discussing this self-determination "penalty"). Congress was "greatly concerned that tribes [would] choose a third alternative: to retrocede the contract back to the Federal agency." 1987 Senate Report 13. See also 1987 House Report 4 ("termination of such contracts would amount to a failure in the implementation of self-determination").

In 1988, cognizant of "concern with Government's past failure adequately to reimburse tribes' indirect administrative costs," "Congress amended ISDA to require the Secretary to contract to pay the 'full amount' of 'contract support costs' related to each self-

determination contract." *Ramah*, 567 U.S. at 186 (quoting *Cherokee Nation*, 543 U.S. at 639). Congress added §5325(a)(2), which states that IHS must pay contracting Tribes the added "contract support costs" incurred "to ensure compliance with the terms of the contract and prudent management," but which are not included in the Secretarial amount because IHS does not incur those costs or funds them from other resources. See *Cherokee Nation*, 543 U.S. at 635.

2. Rather than putting Indian programs in tribal hands, IHS responded with "a myriad of new barriers and restrictions upon contractors." S. Rep. No. 103-374, at 14 (1994) (1994 Senate Report). The "unfortunate experience" of IHS's intransigence became "a major impetus" for the 1994 ISDA amendments, *id.*, three of which are relevant here.

First, Congress provided a model contract "prescrib[ing] the terms and conditions which must be used in any contract between an Indian tribe" and IHS. *Id.* at 3; see §5329(a), (c). One contract provision states that "[e]ach provision of [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor." §5329(c) (model agreement §1(a)(2)). Congress thus "incorporat[ed] the longstanding canon of statutory interpretation that laws enacted for the benefit of Indians are to be liberally construed in their favor." 1994 Senate Report 11. In 2020, Congress expanded this rule beyond contract claims: "[E]ach provision of this chapter and each provision of a contract or funding agreement shall 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." §5321(g).

Second, in what is now §5325(a)(3), Congress "more fully define[d] the meaning of the term 'contract

support costs.'" 1994 Senate Report 8. This section, as amended, provides:

> 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.

The "objective" of the 1994 amendments was "to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation." 1994 Senate Report 9. Congress worried that otherwise "a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid." *Id.*

Third, Congress enacted what is now §5325(m), providing that "program income earned by a tribal organization in the course of carrying out a self-determination contract (1) shall be used by the tribal organization to further the general purposes of the contract; and (2) shall not be a basis for reducing the amount of

funds otherwise obligated to the contract." Subsection (m)(1) ensured Tribes would use program income to support the contracted program—as IHS would do. See 1994 Senate Report 10. Subsection (m)(2) assured that such income could not be used to reduce other contract funding to the Tribe. See also §5325(b) (prohibiting other IHS reductions).

3. Despite Congress's repeated interventions, IHS's intransigence continued. A 1999 GAO study confirmed that "shortfalls in funding for contract support costs have caused financial difficulties and frustration for the tribes administering the programs." U.S. Gov't Accountability Off., GAO/RCED-99-150, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to be Addressed* at 3 (1999). As before, many Tribes covered shortfalls by using program funds to pay overhead, reducing services to tribal members. *Id.* at 3–4, 7. Others redirected tribal resources or limited contracting for Federal programs, impeding self-determination. *Id.* at 4.

IHS continues to take an unduly narrow view of its funding obligations. Twice, this Court has enforced ISDA's requirement that IHS pay contract support costs. *Ramah*, 567 U.S. at 185 ("the Government must pay each tribe's contract support costs in full"); *Cherokee Nation*, 543 U.S. at 634 (government promises to pay contract support costs are legally binding). Here, IHS again refuses to comply with its statutory obligation to fully fund contract support costs.

E. *Ramah* v. *Lujan* and §5326

Section 5326 does not appear in this recitation of ISDA and IHCIA's history because the law in which it appeared did not amend either statute. Rather, the language codified in §5326 was enacted in an

appropriations rider in response to *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997).

1. The Tribe in *Lujan* had five ISDA contracts with the Bureau of Indian Affairs (BIA), and two criminal-justice program contracts with New Mexico. 112 F.3d at 1458–59. The state grants did not cover the Tribe's indirect costs. *Id.* at 1459. So the Tribe included the indirect costs for the state grants when it requested contract support costs from BIA. *Id.* When BIA refused to reimburse indirect costs related to the state programs, the Tribe sued for "fail[ure] to provide reimbursements mandated by Congress for indirect costs associated with other agencies' programs." *Id.*

The district court required BIA to reimburse only "indirect costs that were … 'associated with' the self-determination contracts." *Id.* at 1460 (quoting §5325(d)(2)). But the Tenth Circuit reversed, holding that ISDA "require[d] full funding of indirect costs and prohibit[ed] any adverse adjustments stemming from the failure of other agencies to pay their full share of indirect costs." *Id.* at 1462. Thus, the court required BIA to fund costs related to *non-BIA* programs.

2. BIA complained to Congress that requiring it to pay "cost shortfalls of other Federal or State programs" risked leaving insufficient funds for BIA to operate Indian programs. *Department of the Interior and Related Agencies Appropriations for Fiscal Year 1999: Hearing before Subcomm. of S. Comm. on Appropriations*, 105th Cong. 187, 281–82 (1998). Congress responded by making clear that "funds appropriated to" IHS "for self-determination or self-governance contract or grant support costs are only to be used for contract support costs associated with agreements between tribes and [IHS]." S. Rep. No. 105-227, at 108 (1998); see H.R. Rep. No. 105-609, at 108, 110 (1998) (1998 House Report); see also *id.* at 57 (similar for BIA).

That inserted language ultimately was codified in §5326, providing that "funds available to" IHS for "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" ISDA, and "no 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" IHS.

In sum, Congress concluded that making IHS responsible for paying indirect costs attributable to *non-IHS programs* put IHS funding at risk. Section 5326 was part of Congress's efforts to *protect* funding for Indian healthcare programs, ensuring it was not siphoned off to support other agencies' programs.

F. Proceedings Below

1. The San Carlos Apache Tribe is a federally-recognized Indian Tribe located in southeast Arizona, and is a party to an ISDA contract. JA50. The 2011–2013 contract at issue covered several Federal healthcare programs, including an emergency medical services program, a community health representative program, and a substance-abuse program. JA51–52.

The Tribe and IHS also entered into annual "funding agreement[s]" incorporated into the contract, JA74, 86, 92, which in turn incorporated a "scope of work" describing the Tribe's obligations, *e.g.*, JA99. When the Tribe took over the programs, it billed, collected, and spent third-party revenues just as IHS did when it operated the programs. JA12. Indeed, the contract *required* the Tribe to implement "an efficient billing system, to maximize third party revenues" from "Medicare, [Medicaid], Private Insurance, and IHS Contract

Health Services." JA101; see also JA102 (requiring Tribe to "[g]enerate maximum third party revenues").

The Tribe was required by statute and contract to use that program income "to further the general purposes of the contract." §5325(m)(1); see §5329(a)(1) & (c) (model agreement §1(a)(1)) (incorporating ISDA's provisions into every self-determination contract); JA51 (tribal contract). To fulfill this obligation, the Tribe used the program income to provide additional healthcare services. JA12. Doing so caused the Tribe to incur almost $3 million in increased administrative and overhead expenses during the three-year contract. JA17. IHS refused to reimburse those costs, saying that contract support costs are "based [only] on the Secretarial amount." JA40–43.

The Tribe filed suit. Relevant here, Count II asserted that IHS breached the contract by refusing to reimburse the indirect costs the Tribe incurred when it used program income to fund the contracted healthcare program. JA16–17. The district court granted the government's motion to dismiss Count II, ruling that IHS "is not required by [ISDA] to pay [the Tribe] indirect contract support costs associated with the income it received from third-party payors." *SCA* App. 19a. The parties settled all other claims, and the Tribe appealed the dismissal. *Id.* at 4a.

2. The Ninth Circuit reversed. The court started with the statutory language, which requires that contract support costs be paid "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." §5325(a)(2). The court found this language "straightforward." *SCA* App. 8a. "[A]ny activities that the Contract requires the Tribe to perform to comply with the Contract," the court explained, "are eligible for [contract support costs]." *Id.* The court

concluded that the contract "require[s] the Tribe to carry on those portions of its healthcare program funded by third-party revenues," because it incorporates ISDA, and "ISDA requires the Tribe to spend those monies on health care." *Id.*[3]

The court explained that §5325(a)(3)(A)(ii) "explicitly defin[es]" contract support costs to include overhead expenses "incurred by the tribal contractor in connection with the operation of the Federal program." *SCA* App. 9a. The court held that it did not need to decide whether the "Federal program" includes activities funded by program income,[4] because the statute defines contract support costs more broadly to include expenses for activities "performed 'in connection with' the operation of the Federal program." *Id.* "That language contemplates that there are at least some costs *outside* of the Federal program itself that require [contract support costs]." *Id.* at 11a. Because "the Contract requires the Tribe to provide third-party-funded health care," the court found a "'causal' relationship between the Contract defining the Federal program and the third-party-revenue-funded activities." *Id.* at 9a. The court thus concluded that "the plain language of [§5325(a)] appears to include" costs for services funded by program income. *Id.* at 12a.

The court rejected the government's reliance on other statutory provisions. First, the court explained that §5325(m)(2), which prohibits IHS from reducing

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[3] The provision the Ninth Circuit cited is part of IHCIA rather than ISDA. That is immaterial. ISDA, too, requires third-party revenues to be spent on healthcare. §5325(m)(1).

[4] Although it did not decide the question, the court observed that "it is entirely possible to read 'the Federal program' as encompassing those portions of the Tribe's healthcare program funded by third-party revenue." *SCA* App. 10a.

Tribes' funding on account of program income, "says nothing about the administrative costs of the third-party-revenue-funded programs; it therefore cannot clearly be read as taking a position on how those costs should be funded." *SCA* App. 13a. Rather, the subsection's silence on the matter left "this passage … ambiguous as to [contract support costs]." *Id.*

Second, the court rejected the government's reliance on §5326, which requires that qualifying contract support costs be "directly attributable" to the IHS contract. The spending funded by program income from third-party payors "occurs only because the Contract allows the Tribe to recover the insurance money and requires the Tribe to spend it," the court said. *SCA* App. 15a. "It is therefore not clear that this section unambiguously means that this spending is *not* 'directly attributable' to the Contract." *Id.*

Although the court found the statute ambiguous in some ways, it did not resolve these ambiguities because it applied the Indian canon, which the court emphasized is "incorporated into the Contract with binding language." *SCA* App. 6a–7a, 15a.

SUMMARY OF ARGUMENT

IHS must reimburse Tribes for overhead expenses they incur when using program income to provide additional healthcare services pursuant to the contract.

I. This follows from §5325(a)'s plain terms.

A. The overhead expenses at issue fall squarely within §5325(a)(3). Congress used broad language requiring reimbursement of "any overhead expense incurred … in connection with the operation of the Federal program … pursuant to the contract." §5325(a)(3)(A)(ii). The overhead expenses a Tribe incurs when spending program income—which the

statute and contract require the Tribe to collect and spend to further the general purposes of the contract—easily meet this definition. IHS operates the program as a single program, funded by both appropriations and third-party revenues. That does not change when IHS transfers the program to a Tribe. So when Tribes spend program income on additional healthcare services, they are doing so "in connection with" operating the Federal program. And the resulting overhead expenses are incurred "pursuant to the contract" because they arise from the Tribe performing its contractual obligation to spend program income on the program.

B. Because the overhead expenses at issue fall within §5325(a)(3), which clarifies §5325(a)(2), the Court need not separately parse §5325(a)(2). But if the Court does so, the expenses are 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." §5325(a)(2). The government agrees that the activities at issue (*e.g.*, auditing and HR functions) generate reimbursable contract support costs when Tribes incur them to support services funded by the Secretarial amount. The same is true when Tribes comply with their statutory and contractual obligations by spending program income on the contracted program. Tribal discretion on precisely *how* to fulfill the general purposes of the contract with that program income—like tribal discretion on precisely how to spend the Secretarial amount—does not preclude reimbursement. The government's contrary argument reads into the statute a limitation—*i.e.*, only those overhead costs incurred when spending the Secretarial amount—that Congress did not write.

C. The other provisions the government cites do not support its position. The Tribe does not contend that the contract requires program income to be spent on

additional services; it can (for instance) instead be spent on equipment or facilities. And Congress's instruction that program income not be used to *reduce* contract funding says nothing about IHS's obligation to reimburse overhead expenses incurred in providing services funded by program income.

II. Reimbursement is necessary to maintain congressionally-mandated parity between IHS and Tribes. The statutory scheme reflects Congress's express purpose to place IHS-operated programs and tribally-operated programs on equal footing. This parity is necessary to ensure that Indian healthcare does not suffer when programs are transferred to Tribes, and to encourage tribal self-determination. The statutory scheme is replete with parallel provisions governing IHS and Tribes. Relevant here, Congress gave IHS and Tribes many of the same rights and obligations, including the right to collect program income and the obligation to spend it on specified objectives.

IHS's refusal to reimburse Tribes for overhead expenses incurred when spending program income destroys that parity. It compels Tribes "to divert program funds" to cover those expenses, which "directly reduce[s] the funds the Tribe[s] ha[ve] available to provide health care services." JA12. Reimbursement would not sponsor endless program expansion, as the government argues, but would only ensure that Tribes can offer "at least the same amount of services" as IHS could provide. 1987 Senate Report 16.

III. Section 5326 does not bar reimbursement here.

A. Like any other expenses Tribes incur in carrying out their obligations under ISDA contracts, overhead expenses incurred in spending program income on the program are "directly attributable" to the ISDA contract. Each step the government contends renders

the relationship too indirect is simply the Tribe's performance of its obligations under the contract: to provide healthcare services, collect program income, and spend it on the program. The Tribe's reading is also strongly reinforced by the history of §5326, which was enacted to prevent IHS from being responsible for indirect costs associated with Tribes operating *other, non-IHS programs*, not to curtail funding for tribally-operated healthcare programs.

B. The overhead expenses at issue also are not "associated with" any non-IHS contract. Expenses that are "directly attributable" to an ISDA contract by definition cannot be "associated with" any other contract under §5326. Even if they could be, agreements with third-party payors are not the sort of contracts contemplated by §5326 because they provide for reimbursement for services, not "funding" to operate a program. Regardless, overhead expenses incurred in *spending* program income are not "associated with" third-party-payor contracts because those contracts say nothing about how program income must be spent.

IV. Congress has repeatedly and expressly instructed that ambiguities in ISDA and the Tribes' contracts must be "liberally construed for the benefit of the Indian tribe," with "any ambiguity … resolved in favor of the Indian tribe." §5321(g). That congressional mandate incorporates the "long-established" Indian canon, *Ysleta del Sur Pueblo* v. *Texas*, 596 U.S. 685, 703 n.3 (2022), which itself rests on constitutional and historical foundations. Congress's decision to repeat this instruction arises from decades of IHS failures to heed Congress's mandate that Tribes be reimbursed for the full cost of assuming Indian healthcare programs. Indeed, this Court has already held that to prevail against a Tribe, the government must show that its reading is "clearly required by the statutory

language." *Ramah*, 567 U.S. at 194. As detailed herein, the government does not provide the best reading of the statute, let alone one that is "clearly required."

ARGUMENT

I. SECTION 5325 REQUIRES REIMBURSEMENT OF OVERHEAD EXPENSES INCURRED IN SPENDING PROGRAM INCOME PURSUANT TO THE CONTRACT.

IHS must reimburse Tribes for overhead expenses they incur when spending program income on the program, as mandated by their statutory and contractual obligations. The plain language of §5325(a), and surrounding provisions, compels that result.

A. Overhead Expenses Incurred In Spending Program Income Fall Squarely Within §5325(a)(3).

1. Section 5325(a)(3)(A)(ii) provides that contract support costs include reimbursement for "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." §5325(a)(3)(A)(ii).

Congress cast a wide net with this language. To begin, it twice said "any." "[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). Further underscoring the provision's breadth, Congress required reimbursement of any type of expense a Tribe incurs to support the program, whether it be an "administrative" or "overhead" expense, or any "other expense"—a "broad catchall phrase." *Christopher* v. *SmithKline*

Beecham Corp., 567 U.S. 142, 163 (2012). And Congress required only that the expenses be incurred "in connection with" operating the program, a phrase this Court "has often recognized … can bear a 'broad interpretation.'" *Mont* v. *United States*, 139 S. Ct. 1826, 1832 (2019) (citation omitted). Congress's choice of that broad phrase is particularly telling given that it used a narrower phrase, "for the operation of the Federal program," in the immediately preceding subsection. §5325(a)(3)(A)(i). See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (citation omitted).

2. The overhead expenses at issue here fall squarely within the broad, plain language of §5325(a)(3)(A)(ii). The Tribe collected program income while operating Federal programs under its ISDA contract and "spen[t] those funds on additional health care services and purposes," JA12—all as required by statute and contract.[5] That spending required nearly $3 million in additional overhead over the three-year contract. JA17. Because IHS refused to reimburse those expenses, the Tribe had to "divert program funds to cover" the shortfall. JA12.

These are unquestionably "overhead" expenses. The only question is whether the Tribe incurred them "in connection with the operation of the Federal program … pursuant to the contract." §5325(a)(3)(A)(ii). It did.

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[5] It is immaterial that the right to collect program income arises from IHCIA. Govt. Br. 23. IHCIA cross-references ISDA hundreds of times. The statutes are *in pari materia* and should be "interpreted together, as though they were one law." Antonin Scalia & Bryan A. Gardner, *Reading Law* 252 (2012).

a. First, the "Federal program" is the program that IHS would operate without an ISDA contract. As explained above, that program includes services funded by both appropriations and program income. When IHS operates the program, collects program income, and spends it on the program, IHS unquestionably operates a single "Federal program." See *supra* 7–8. That does not change when IHS transfers the program to a Tribe. The government's position creates an artificial separation within tribally-operated Federal programs that has no parallel in IHS-operated Federal programs, disregarding the parity Congress sought to create between IHS and Tribes. See *infra* §II.

The statutory text is crystal clear that the "Federal program" is a single Federal program that includes *all* services transferred to the Tribe under the contract, not just those funded by the Secretarial amount. Section 5329(c) (model agreement §1(f)(2)(A)(ii)) expressly contemplates that the "programs, services, functions, and activities to be performed" under the contract "includ[e] those *supported by financial resources other than those provided by the Secretary*." (emphasis added). This does not mean that "outside funding from *any* source" triggers IHS's contract-support-cost obligation. Govt. Br. 37–38; see *infra* 26 (explaining that outside funding is not spent "pursuant to the contract"); cf. § 5325(k)(9) (addressing non-federal funds, which are not used by IHS when it operates the program and thus are not part of the "Federal program"). It does, however, refute the government's contention that the contracted services comprising the "Federal program" include only services funded by the Secretarial amount. The government provides no explanation of what services the italicized language above could refer to, if not to services funded by program income.

Second, even without this language, the "Federal program" clearly includes services funded by program income. Those services are provided under the contract, which transfers programs otherwise carried out by IHS. See §5321(a)(1); cf. §5361(8). For instance, as a condition of contracting with IHS to operate the Federal program, the Tribe was required to (1) provide healthcare services, JA51–52, (2) collect program income, JA100–01; §1623(b), and (3) spend that income to further the contract's general purposes, JA51; §5325(m)(1). As required by §1(a)(2) of ISDA's model agreement, §5329(c), the contract defines its "purpose" as transferring funding and the "related functions, services, activities, and programs" and "related administrative functions" for specified health programs, JA51–52. To further that general purpose, therefore, the Tribe must reinvest program income into the contracted program. The government concedes it must reimburse overhead expenses incurred when the Tribe provides healthcare services and collects program income, Br. 38; it contests only its obligation to reimburse overhead expenses incurred when the Tribe then spends that income. Yet that spending duplicates what IHS would spend, is required by the contract, and is thus part of the contracted "Federal program."

Third, even if contract activities funded with program income were not literally the Federal program, the associated overhead expenses are certainly incurred "in connection with" operating the Federal program. As the Ninth Circuit recognized, "in connection with" "contemplates that there are at least some costs *outside* of the Federal program itself that require" reimbursement. *SCA* App. 11a. If Congress had wanted to limit reimbursement to expenses incurred "in operating the Federal program" (or "in spending the Secretarial amount"), "it could have said so." *Bloate* v.

United States, 559 U.S. 196, 211 n.13 (2010); cf. §5325(a)(3)(A)(i) (using narrower language). Instead, Congress used conspicuously broader language.

The overhead expenses here were, at a minimum, incurred "in connection with" operating the Federal program. The healthcare services giving rise to the expenses were funded by income generated by operating the Federal program (even under IHS's unduly-narrow definition). Congress called those third-party revenues "program income," §5325(m), underscoring their direct connection to the program. And the Tribe's expenditure of that income on additional services within the program fulfilled its statutory and contractual obligation to use all "program income … to further the general purposes of the contract" pursuant to which the Tribe operates the Federal program. §5325(m)(1). This is far more than an "articulable relationship." Govt. Br. 39. It is a clear, close, and direct nexus.

b. For similar reasons, the healthcare services were provided, and the associated overhead expenses were incurred, "pursuant to the contract." When it spent program income on the program, the Tribe was carrying out the contract, which required the Tribe to spend program income to further the contract's general purposes. JA51; §5325(m)(1). Indeed, citing §5325(m)(1), HHS itself warned that program income collected by Tribes "must be reinvested in health care services or facilities." HHS, Office of Inspector General, *OIG Alerts Tribes and Tribal Organizations To Exercise Caution in Using Indian Self-Determination and Education Assistance Act Funds* (Nov. 24, 2014).[6] Fulfilling that contractual obligation generated overhead expenses. Those expenses were therefore incurred "pursuant to the contract." See Black's Law Dictionary

[6] https://oig.hhs.gov/documents/open-letters/904/20141124.pdf.

(defining "pursuant to" to mean "[i]n compliance with; in accordance with; under" or "[i]n carrying out").

The government ignores this "pursuant to the contract" limitation in (wrongly) claiming that, under the Tribe's interpretation, a Tribe "could channel outside funding from *any* source … into its ISDA programs and thereby obligate IHS to pay additional contract support costs on that amount." Br. 37–38. While the contract requires the Tribe to spend program income to further the contract's general purposes, it does *not* impose that requirement on all "outside funding." So if a Tribe were to invest outside resources, such as funds from the Tribe's general treasury, into the program, see Govt. Br. 38, it would *not* be doing so "pursuant to the contract." But the contract *does* mandate that Tribes collect and spend program income to further the contract's general purposes, so when a Tribe does so, it is acting "pursuant to the contract." The expenses at issue fall squarely within §5325(a)(3).

B. The Overhead Expenses Also Fall Within §5325(a)(2).

1. Because the expenses at issue fall within §5325(a)(3), the Court need not separately parse §5325(a)(2). See *NA* App. 13a–14a. As the government recognizes, §5325(a)(3) "clarif[ies]" §5325(a)(2), *SCA* Cert. Pet. 4, by "more fully defin[ing] the meaning of the term 'contract support costs,'" 1994 Senate Report 8–9. The driving force behind the 1994 amendments that added §5325(a)(3) was to reinforce the *breadth* of IHS's obligation to pay contract support costs, not to restrict it. See *supra* 11. Congress accordingly specified that contract support costs "shall include" the expenses described in §5325(a)(3), precluding any conclusion that those expenses are not reimbursable because they fall outside §5325(a)(2). Thus, analysis of §5325(a)(3) is sufficient to hold in the Tribes' favor.

2. Even without §5325(a)(3)'s clarification, §5325(a)(2) encompasses the expenses at issue. The question is whether the activities for which the Tribe seeks reimbursement are "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." §5325(a)(2). They are.

The "activities" that generated the overhead expenses at issue are unquestionably of the type described in §5325(a)(2). These "activities" are not the healthcare services themselves, but the administrative and supporting activities necessary to provide healthcare services (and therefore perform the ISDA contract), such as auditing, IT, and HR functions. See JA9.[7] The government concedes these activities fall within §5325(a)(2) when they support services funded by the Secretarial amount (and when they support *collection* of program income). Br. 38. There is no basis to exclude those same activities from §5325(a)(2) when they support services funded by program income.

When the Tribe engaged in those activities to support additional healthcare services funded by program income, it was performing 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." §5325(a)(2). The ISDA contract required the Tribe to use the program income to further the contract's general purposes. JA51; §5325(m)(1). Had the Tribe spent the program income on other activities, it would have violated the contract. See *SCA* App. 9a. So when the Tribe spent the program

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[7] The term "activities" cannot refer to the healthcare services themselves because healthcare services "normally" are "carried on" by IHS, §5325(a)(2)(A), and "provided" using IHS funds, §5325(a)(2)(B), when IHS operates the program.

income on healthcare services, it was performing the contract just as much as when it spent the Secretarial amount on healthcare services. And the Tribe could not have provided those services "prudent[ly]" without the administrative and supporting "activities" that generated the overhead expenses at issue.

3. The government's contrary argument "read[s] words into the statute" that do not exist. *HollyFrontier Cheyenne Refin., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2179 n.1 (2021). Had Congress wanted to limit reimbursement to costs incurred while "using the Secretarial amount," Govt. Br. 22, it could easily have said so, see *SCA* App. 10a ("§[5325](a)(2) does not limit [contract support costs] to activities … 'funded by the signatories to the contract.'"). Congress knew how to link contract support costs to the Secretarial amount when it wanted to. See §5325(a)(3)(A) (contract support costs "shall not duplicate" the Secretarial amount). But Congress did not include the limiting language the government asks the Court to read into the statute. This Court should decline the invitation, especially since Congress instructed courts to construe the statute liberally. See *infra* §IV.

The government argues that the expenses at issue do not fall within §5325(a)(2) because §5325(m)(1) refers only to the contract's "general purposes" and does not "mandate" that the Tribe "conduct any particular 'activities.'" Br. 34. But both the statute and the contract identify the contract's "purpose" as transferring the specified programs. See *supra* 24. That means the Tribe must spend program income to support the transferred program, not "a different health care program." Br. 33. The Tribe might do so by funding additional services or by using the funds to buy equipment (*e.g.*, oxygen tanks, ambulances) or build healthcare facilities (*e.g.*, a COVID field-testing facility). See *id.*

But the Tribe must spend program income *to support the program*. Had Congress intended to allow Tribes to spend program income on any health-related purposes, as opposed to *the contract's* purposes, it would have said so, as it did elsewhere in ISDA. See §5388(h) (requiring Tribes to use interest earned on transferred funds "to carry out governmental or health purposes").

It is immaterial that the Tribe has some discretion to decide precisely how to spend program income on the program. Nothing in §5325(a)(2) requires that there be a contractual mandate to engage in the "particular 'activities'" for which the Tribe seeks reimbursement. Govt. Br. 34. The language the government quotes is not about contractual mandates at all. Rather, §5325(a)(2)'s reference to activities that "must be carried on … to ensure compliance" is best understood as describing activities that are necessary to enable the Tribe to perform the contract. See Merriam-Webster Dictionary (defining "must" to mean, *inter alia*, "be compelled by physical necessity to," as in "one must eat to live"). The Tribe need not, for example, identify a contractual provision mandating operation of an accounting department or an IT department. Those are activities that "must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management," § 5325(a)(2), not because a contractual term requires them, but because without them the Tribe could not prudently provide the contracted healthcare services.

Even if §5325(a)(2) required a contractual mandate, it would be satisfied by the requirement that the Tribe use program income to further the contract's general purposes. The government's demand for greater specificity proves too much, because, as with program income, Tribes have discretion to decide which "particular activities" to fund with the Secretarial amount. For

example, in deciding how to fulfill its contractual obligation to provide emergency services, the Tribe might spend the Secretarial amount on more EMTs (which would increase overhead expenses) or buy an ambulance (which generally would not). The Tribe's discretion as to how exactly to spend the Secretarial amount, and those choices' impact on the amount of associated contract support costs, does not exclude those costs from §5325(a)(2). So too here: the Tribe's discretion to choose how to spend program income on the program does not remove the expenses from §5325(a)(2).

C. Other Provisions of §5325 Do Not Lead to a Different Result.

To avoid the plain language of §5325(a)(2)–(3), the government points to other parts of that section as "context." Those arguments fail.

1. The government argues that "[h]ad Congress intended to require tribes to use third-party income to perform additional services under the contract, it would have said so explicitly," as in §5325(a)(4)(A). Br. 33–34. This misses the point. The Tribe does not contend that the contract obligates it to use program income only to provide additional services. As just discussed, there are other ways to use program income to further the contract's general purposes (*e.g.*, equipment, facilities). The point is that *however* the Tribe uses program income to further the contract's general purposes, IHS must reimburse the Tribe for any additional overhead expenses incurred as a result, because that spending constitutes performance of the Tribe's contractual obligation under §5325(m)(1).

2. Section 5325(m)(2) also does not support the government's interpretation. It provides that program income "shall not be a basis for reducing the amount of funds otherwise obligated to the contract." As its plain

language indicates, this means that IHS cannot use the Tribe's collection of program income as a basis to decrease the Secretarial amount or the contract support costs IHS is otherwise required to pay. Congress added the provision to *increase* funding to Indian healthcare programs, including with program income, in response to IHS's repeated failures to fully fund tribally-operated programs. See *supra* 11–12; see also §5325(b) (prohibiting other IHS reductions).

The government says it would be "odd" for Congress to clarify in §5325(m)(2) that program income "cannot *reduce* contract funding if Congress understood third-party income to be a basis for *increasing* contract funding." Br. 23. That is not "odd" at all, particularly given IHS's history of underfunding tribal programs. That history explains why Congress took the trouble to specify that IHS funding may not be reduced on account of program income. It says nothing about whether IHS must reimburse Tribes for additional overhead expenses incurred when spending program income. The dubious inference the government draws from §5325(m)(2) cannot overcome the plain language of §5325(a)(2)–(3), and it certainly cannot establish that the government's reading of those provisions is "clearly required" as needed to overcome ISDA's liberal-construction command. See *infra* §IV.

Nor does §5388(j) bolster the government's interpretation. See Govt. Br. 24. When Congress says program income is "supplemental funding to that negotiated in the funding agreement," §5388(j), it means that program income is "in addition to what is already present or available to complete or enhance" the funding under the contract, not that it is apart from it. *Supplemental*, New Oxford American Dictionary. This does not speak to whether *the expenditure* of program income affects "the amount of [contract support] costs" Tribes are

entitled to. Govt. Br. 24. As with §5325(m)(2), Congress's stated concern in §5388(j) was ensuring that IHS cannot use program income as another pretext to "reduc[e]" contract funding. §5388(j).

Finally, the "location" of §5325(m) and §5388(j) does not indicate that program income is "unrelated to contract funding." Govt. Br. 24–25. In reality, there is no clear distinction between program income and contract funding. For example, when IHS transfers a Federal program to a Tribe, it also transfers unspent program income through an ISDA contract. See NIHB Amicus Br. §III.B. Similarly, until Congress gave Tribes the right to bill and collect program income, IHS collected nearly *all* program income and remitted it to Tribes, again through amendments to their ISDA contracts. 1999 Senate Report 2. For Tribes that still do not conduct their own billing and collection, that process continues today. The government's distinction between "program income" and "contract funding" is baseless. Tribes are entitled to contract support costs for overhead expenses associated with all contract expenditures, including program income.

II. IHS MUST REIMBURSE OVERHEAD EXPENSES ASSOCIATED WITH SPENDING PROGRAM INCOME TO MAINTAIN PARITY BETWEEN IHS AND TRIBES.

1. Congress has repeatedly emphasized its intent that Tribes receive the funding needed to deliver "at least the same amount of services" that IHS would provide if it were operating the program. 1987 Senate Report 16. Otherwise, Tribes would have the incentive to "retrocede" the program to IHS, defeating Congress's self-determination policy. *Id.* at 13. See also §1602(7) (declaring purpose "to provide funding for programs and facilities operated by Indian tribes and tribal organizations in amounts that are not less than the

amounts provided to programs and facilities operated directly by" IHS); §5321(f) (requiring the Secretary to negotiate contracts "in a manner that maximizes the policy of Tribal self-determination").

Congress's intent that Tribes be treated no worse than IHS when they step into IHS's shoes is woven into the structure of the statutory scheme. See, *e.g.*, §1616a(k)(1) (requiring consideration of tribal programs' staffing needs "on an equal basis with programs that are administered directly by the Service"); §1616c(b)(2) (mandating that tribal programs "be given an equal opportunity with programs that are administered directly by the Service to compete for, and receive, grants"); §1616q (exempting tribal employees from fees "to the same extent that … employees of the Service are exempt"); §1621(e) (stipulating that tribal programs be eligible for appropriated funds "on an equal basis with programs that are administered directly by the Service"); §1631(c)(1)(C) (requiring Secretary to evaluate tribal programs' needs "us[ing] the criteria used by the Secretary in evaluating the needs of facilities operated directly by the Service"); §1645(c) (requiring Departments of Veterans Affairs and Defense to reimburse services provided to beneficiaries "regardless of whether such services are provided directly by the Service [or] an Indian tribe"); §1680a (requiring IHS to provide funds to tribal programs for "expenses relating to the provision of health services" "on the same basis as such funds are provided to programs and facilities operated directly by the Service").

Contract funding is no exception to this equal treatment. The Secretarial amount must "not be less than [IHS] would have otherwise provided for the operation of the programs." §5325(a)(1). And when the Tribe incurs additional overhead costs, IHS must reimburse those expenses. §5325(a)(2)–(3). ISDA even requires

reimbursement of "startup costs" to ensure that IHS and Tribes begin on equal footing. §5325(a)(5).

Further reflecting the parity that Congress intended, the statutory scheme gives IHS and Tribes the same rights and obligations. Both have the right to earn program income by collecting from third-party payors. §§1621e, 1621f. Both can collect that income without triggering reductions of appropriations. §§1621f(b), 1641(a), 5325(m)(2). And both must comply with restrictions on spending program income. §§1641(c)(1)(B), (d)(2)(A), 5325(m)(1).

2. Reimbursing overhead expenses incurred when spending program income is necessary to achieve the equal footing Congress intended.

IHS annually collects over $1 billion in program income and spends it on the program. 2024 CJ at CJ-193; 2013 CJ at CJ-141. When it does so, it does not incur the additional overhead expenses Tribes incur, either because the government does not incur those costs (such as audit costs) or because they are borne outside of the IHS program. When Tribes take over the program, however, they incur additional overhead expenses that, if paid for with program income, would result in diminished services compared to what IHS would have provided—precisely the result the government agrees Congress sought to avoid. Br. 28.

The government contends this underfunding "concern is absent" here because "the third-party income itself is the funding." Br. 28. This ignores that IHS-operated programs collect the same third-party income but neither incur the same overhead expenses as Tribes nor divert those collections to fund the overhead IHS does incur, destroying the parity that Congress intended. The San Carlos Apache Tribe presents a case in point. IHS's failure to reimburse its overhead

expenses "compelled the Tribe to divert program funds" to cover those expenses, which "directly reduced the funds the Tribe had available to provide health care services." JA12. Reimbursing those expenses does not "sponsor tribes' expenditures of outside funding," Govt. Br. 46; rather it ensures—as Congress intended—that Tribes are not forced to divert program income that IHS would spend on providing healthcare.

3. Despite these parallels, the government claims IHS and Tribes are "differently situated" in collecting and spending program income. Br. 30. Those alleged differences are exaggerated and cannot support the funding shortfall the government's position entails.

First, the government argues that a Tribe could "unilaterally decide to offer health care services to non-Indians" and "thereby increase its third-party income based on the expanded patient population." Br. 29. This assertion is at odds with IHS's assertion elsewhere that services to non-Indians are "not part of the IHS Programs transferred to the Tribe." *Jamestown S'Klallam Tribe* v. *Azar*, 486 F. Supp. 3d 83, 88 (D.D.C. 2020). Moreover, IHS can also provide services to non-Indians upon the Tribe's request, §1680c(c)(1)(A), so IHS and Tribes are not as differently situated as the government suggests.

Second, the government claims that, whereas IHS must first use Medicare and Medicaid proceeds to ensure compliance with relevant requirements, Tribes' use of those proceeds is not so restricted. Br. 29–30. That is a distinction without a difference. Both IHS and Tribes must reinvest program income into healthcare. Further, Tribes cannot bill and collect from Medicare and Medicaid, as required by the contract, without complying with the conditions for participating in those programs. And while Congress has through "annual appropriations bills" restricted IHS's

ability to use Medicare and Medicaid proceeds to build new facilities, Br. 30, that is not the result of anything in ISDA or IHCIA and sheds no light on their meaning. It also makes no difference here because construction does not generate overhead expenses. See §5325(h).

The government's argument that Tribes should not be able to conduct the same program that IHS would conduct using third-party payments reduces to a policy concern about "program expansion." Br. 44–46. But the government's fear that Tribes will engage in endless "program expansion," Br. 31, is pure speculation; Indian healthcare is indisputably inadequate. And if it sees the need, Congress can limit funding. See §5325(b) (limiting ISDA contract funding "to the availability of appropriations"); *Ramah*, 567 U.S. at 200–01 ("Congress is not short of options."). In all events, the government's policy "arguments [cannot] overcome the statute's plain language, which is [the] 'primary guide' to Congress' preferred policy," *Sandoz Inc.* v. *Amgen Inc.*, 582 U.S. 1, 21 (2017) (citation omitted)—particularly when those policy arguments are inconsistent with Congress's oft-expressed purpose of ensuring parity between IHS and Tribes.

III. SECTION 5326 DOES NOT BAR REIMBURSEMENT OF OVERHEAD EXPENSES INCURRED IN SPENDING PROGRAM INCOME PURSUANT TO THE CONTRACT.

The government argues that even if the expenses at issue are reimbursable contract support costs under §5325, reimbursement is barred by §5326. Br. 25–27, 40–43. Of the numerous circuit judges to consider this argument, only one embraced it. For good reason: in light of its text, structure, and history, §5326 cannot reasonably be read to bar reimbursement of overhead expenses Tribes incur in spending program income pursuant to their ISDA contracts with IHS.

A. Overhead Expenses Incurred In Spending Program Income Pursuant To An ISDA Contract Are "Directly Attributable" To That Contract.

1. The first clause of §5326 stipulates that IHS may expend funds available for contract support costs "only for costs directly attributable to contracts, grants and compacts pursuant to [ISDA]." The first question, therefore, is whether the overhead expenses at issue are "directly attributable" to the Tribe's ISDA contract. They are. Like any other expenses Tribes incur in performing their obligations under ISDA contracts, the overhead expenses Tribes incur in spending program income pursuant to their ISDA contracts are "directly attributable" to those contracts.

Start with the word "attributable." One thing is "attributable to" another when it is "regarded as being caused by" it. New Oxford American Dictionary. The overhead expenses associated with activities funded by program income are indisputably caused by the ISDA contract—the program income and the activities it funds literally could not exist without that contract. See *Burrage* v. *United States*, 571 U.S. 204, 212 (2014) ("[I]t is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter."). The ISDA contract requires the Tribe both to collect program income, JA101–02, and to use it "to further the general purposes of the contract," JA51 (incorporating ISDA). Overhead expenses associated with activities the Tribe undertakes to fulfill these contractual obligations are thus "attributable to" the ISDA contract.

Those expenses are also "directly" attributable to the ISDA contract. A causal relation is "direct" when it occurs "without intervening factors or intermediaries." New Oxford American Dictionary. Nothing stands

between the ISDA contract and activities funded by program income. The ISDA contract directly imposes an obligation on the Tribe to use the program income to further the contract's general purposes. When the Tribe fulfills that contractual obligation, any resulting overhead expenses it incurs are directly attributable to the ISDA contract, in the same way that any other expenses the Tribe incurs in carrying out the ISDA contract are directly attributable to the ISDA contract.

2. The government does not dispute that the expenses at issue are "attributable" to the Tribe's ISDA contract. But it argues that the causal relation is insufficiently direct because, for the expenses to arise, "[t]he 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." Br. 26. That argument is unpersuasive.

Each step in this chain is directly required by the Tribe's ISDA contract. Indeed, the steps in the government's chain are literally just the Tribe's performance of its duties spelled out in the contract, which requires the Tribe to perform healthcare services; to bill and collect payment for those services from third parties; and to use the proceeds to further the contract's general purposes. Critically, the government "does not dispute" that it must reimburse Tribes for overhead expenses they incur when billing and collecting from third-party payors. Br. 38. The first two steps thus concededly involve the requisite "directness."

The government appears to think the third step—the Tribe's fulfillment of the contractual requirement to use the proceeds to further the contract's general purposes—renders the causal relation indirect because a Tribe's expenditures of program income are

expenditures the Tribe "chooses to make." Br. 26. That is incorrect. The Tribe *must* spend program income to further the contract's general purposes. If the Tribe used the money for other purposes, it would breach the contract, as OIG itself warned. See *supra* 25; *NA* App. 32a (faulting the government's "contradictory interpretation" for "ignor[ing] the mandatory aspect of the spending"). Spending program income is not a mere "downstream effect" of the ISDA contract. Govt. Br. 41. It is a contractual mandate. True, the Tribe has some discretion about the precise way it spends program income to support the contracted program. But that limited discretion does not trigger §5326. If it did, §5326 would bar contract support costs for activities funded by the Secretarial amount too, because Tribes also have discretion over how to spend the Secretarial amount. See *supra* 29–30. That would be absurd.

This does not leave the word "directly" without meaningful work to do. Without that modifier, Tribes could argue that IHS must reimburse overhead expenses associated with *other programs* that the Tribes would not have entered into but for their ISDA contracts. Many tribal health facilities, for example, also apply to become designated community health centers under 42 U.S.C. §254b. Under that separate Health Resources and Services Administration (HRSA) program, participating Tribes receive grant funding to provide healthcare services (often the same type of services provided under the ISDA contract) to an expanded population. While the overhead to run that program may be attributable to the ISDA contract (if the Tribe did not have an ISDA contract to operate a rural health center, it would not qualify for the HRSA program), it is not *directly* attributable to the ISDA contract because the ISDA contract does not require the Tribe to enter the HRSA program. By contrast, the

ISDA contract *does* require Tribes to spend their ISDA program income on activities that further the general purposes of their ISDA contracts.

3. The Tribe's interpretation is not only the most natural reading of the statutory text, it is also strongly supported by the history of §5326. As the government acknowledges, Br. 8, Congress enacted §5326 in 1998 in response to *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997), which had held that BIA was required to pay contract support costs to support not just BIA programs, but also separate state criminal-justice programs. See 1998 House Report 57. While "the [C]ourt's role is to give effect to the text," Govt. Br. 40, in construing that text the Court need not "blind [itself]" to the circumstances of the provision's enactment, *Wooden* v. *United States*, 595 U.S. 360, 373 n.5 (2022), or to the "mischief" it aimed to fix, see Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 1004 (2021) ("An interpreter who is reading the legislative words in their context, which includes the mischief, is a more faithful agent.").

The government strains to argue that this case "presents exactly the kind of problem that led to Section 5326's enactment." Br. 40. Hardly. The Tenth Circuit in *Lujan* had required BIA to reimburse "indirect costs associated with other agencies' programs." 112 F.3d at 1459. In contrast, the indirect costs here are not associated with carrying out any other agency program—they support healthcare services provided as part of the IHS program, pursuant to the Tribe's contract with IHS. The intent of §5326 was to *protect* Indian healthcare funding by ensuring it is not diverted to support other agencies' programs. See *supra* 14. There is no basis to conclude that Congress intended to bar reimbursement for indirect costs Tribes incur in using

program income to provide additional healthcare services pursuant to their ISDA contracts with IHS.

B. Overhead Expenses Incurred In Spending Program Income Pursuant To An ISDA Contract Are Not "Associated With" Any Non-IHS Contract.

Nor does §5326's second clause bar reimbursement of the expenses at issue. That clause provides that no appropriated 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" between a Tribe and "any entity other than [IHS]." The clause does not apply here because overhead expenses Tribes incur in spending program income pursuant to their ISDA contracts are not "associated with" any non-IHS contract.

1. Initially, the Court need not separately analyze §5326's second clause. As Judge Moritz explained, §5326 is best read—and, at least, can reasonably be read—"as stating two different sides of the same limitation." *NA* App. 25a n.12. That is, §5326 creates a dichotomy between costs that are "directly attributable" to ISDA contracts, on the one hand, and costs that are "associated with" non-IHS contracts, on the other, such that "costs 'directly attributable' to an IHS contract are necessarily not 'associated with' a non-IHS contract." *Id.* This makes sense: there is no reason Congress would have wanted to bar reimbursement of costs that are directly attributable to an ISDA contract. Because overhead expenses associated with services funded by program income are "directly attributable" to the ISDA contract, they are by definition not "associated with" a non-IHS contract.

2. Even if the second clause were parsed in isolation, it yields the same conclusion. The initial question

under the second clause is whether there is any non-IHS "contract" within the provision's meaning that the expenses at issue could potentially be "associated with." The government says there is because "tribes receive payments and reimbursements pursuant to separate agreements with Medicare and Medicaid authorities (for instance)." Br. 42; see also Br. 27. But the government cites no third-party-payor contract in the record. And while Tribes may need to enter into agreements with Medicare and Medicaid authorities to receive reimbursement, that is not true of private insurers, who are obligated by law to reimburse Tribes, with or without a contract. §1621e(c). It would be bizarre to construe §5326 as turning on the happenstance of whether the Tribe has a contract with the third-party payor from which it collected the program income.

More fundamentally, agreements with third-party payors are not the sort of contracts to which §5326 refers. As Judge Eid explained, a "broad reading" of §5326's second clause "would vitiate most, if not all, of [ISDA's] contract support costs funding." *NA* App. 32a. Many of the overhead activities that support a Tribe's provision of healthcare services (whether funded by the Secretarial amount or program income) involve contracts with third parties, such as contracts with accounting firms to provide auditing and tax services and contracts with insurers for workers' compensation insurance. *Id.* at 32a–33a. Construing §5326 to foreclose recovery of these costs "would eliminate the meaning of much of §5325; and, therefore, the interpretation must be rejected as unreasonable." *Id.* at 33a; see *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 185–86 (2011) (rejecting interpretation that would vitiate portions of statute).

Recognizing this problem, the government rightly concedes that not every contract triggers §5326's

second clause after all. As the government then posits, "consistent with the 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." Br. 42. The government is on the right track: the *noscitur a sociis* canon does limit the kinds of contracts to which §5326 applies. This Court has consistently invoked that canon "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) (citation omitted); *accord Yates* v. *United States*, 574 U.S. 528, 543 (2015) (plurality opinion).

But the government misidentifies the limiting principle. What defines the arrangements listed in §5326 is not the Tribe's mere receipt of money, but—as the government previously put it—the Tribe's receipt of "funding," *SCA* Cert. Reply 6 n.2, meaning "money provided, especially by an organization or government, *for a particular purpose*." New Oxford American Dictionary (emphasis added). Consistent with the historical backdrop of §5326, Congress listed arrangements whereby Tribes receive "funding" to operate programs.

A Tribe's participation agreement with Medicare or Medicaid authorities, or a contract, if any, with some other third-party payor, does not provide "funding" for the Tribe to operate a program (or for any other particular purpose). Rather, such a contract agrees to compensate the Tribe for healthcare services rendered to covered beneficiaries. No healthcare provider would describe its agreement with Medicare or a private insurer as a "funding agreement" requiring it to do something with the money received, or think it belongs in the same category as a "grant," a "cooperative

agreement," or a "self-governance compact." The same is true here. See NAFOA Amicus Br. §II.B.2. For that reason alone, §5326's second clause does not bar reimbursement for the expenses Tribes incur when spending program income, whether or not the Tribe has a contract with the third-party payors.

3. Even if a Tribe's contract with a third-party payor were the type of contract contemplated by §5326, overhead expenses incurred in spending program income are not "associated with" *that* contract. Importantly, the question under §5326 is not whether *program income* is "associated with" the third-party-payor contract. It is whether the indirect *costs* a Tribe incurs when it *spends* program income are "associated with" the third-party-payor contract. They are not.

Revenues collected under a contract with a third-party payor are not then spent under *that* contract. They are spent under (and as required by) *the ISDA contract*, and that is the point where contract support costs are incurred. Those costs are not connected to fulfilling any contract with any third-party payor. The third-party-payor contract does not even address how the Tribe must spend the third-party revenues. The only contract that does that is the ISDA contract. The costs Tribes incur when spending program income are thus "associated with" (and "directly attributable to," see *supra* §III.A) only their ISDA contracts. They are not associated with any third-party-payor contract.

The government's contrary contention stretches the meaning of "associated with" beyond the breaking point. Like relations and connections, associations are potentially endless. See New Oxford American Dictionary (defining "associated" as "connected with something else," and "connected" as "associated or related in some respect"). Thus, "a non-hyperliteral reading is needed to prevent the statute from assuming

near-infinite breadth." *FERC* v. *Elec. Power Supply Ass'n*, 577 U.S. 260, 278 (2016). Here, "associated with" is best read to require that the non-IHS contract provide for, require, or at least envision the costs at issue. Third-party-payor contracts do not do that. The mere fact that the contracts provide for the payment of money that a Tribe could subsequently spend in a way that produces overhead costs is not enough. No one would say that a private medical practice's overhead costs are "associated with" the practice's insurance contracts just because the practice uses the insurance proceeds to fund services and incurs overhead costs as a result. The same is true here: the connection between overhead expenses associated with spending program income and any contracts with third-party payors is "highly attenuated." *NA* App. 34a.

IV. CONGRESS HAS REPEATEDLY INSTRUCTED THAT COURTS SHOULD APPLY THE INDIAN CANON IN INTERPRETING ISDA AND SELF-DETERMINATION CONTRACTS THAT EFFECTUATE IT.

The Tribes have offered the best reading of the statute and the Tribes' self-determination contracts. Were there any ambiguity about the meaning of either, both the Indian canon and the canon requiring construction of a contract against its drafter would mandate acceptance of the Tribes' interpretation. See *Cnty. of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *Ysleta*, 596 U.S. at 703 n.3 (Indian canon is "long established by our precedents"); *United States* v. *Seckinger*, 397 U.S. 203, 210, 216 (1970) ("[A]s between two reasonable and practical constructions of an ambiguous contractual provision, … the provision should be

construed less favorably to that party which selected the contractual language," even where the drafter "was the United States.").[8]

Here, moreover, Congress chose to underline these judicial rules of construction with an explicit *statutory* instruction that ambiguity in both ISDA and self-determination contracts must be resolved in the Tribes' favor. Initially, in 1994, by statute, Congress required that the Indian canon be written into every self-determination contract. See §5329(c) (model agreement §1(a)(2)). As a result, each contract, including the contracts at issue here, includes a provision stating: "[e]ach provision of [ISDA] … and each provision of this Contract shall be liberally construed for the benefit of the contractor." JA51.

Frustrated by IHS's long history of recalcitrance and stingy reading of ISDA, when Congress amended the statute in 2020, it repeated this liberal-construction command to apply to all issues arising under ISDA. §5321(g). Congress thus made the Indian canon a statutory and contractual requirement, in addition to being a background principle for the interpretation of treaties and federal laws.[9]

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[8] See also Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 152 (2010) (the Indian canon "began in the treaty context as essentially a rule of contract interpretation" and "resembles the approach that courts take in the construction of adhesion contracts").

[9] ISDA is not unique in this regard. Since the self-determination era began in the 1970s, Congress has expressly incorporated particular rules to serve the same purpose and have the same effect as the judicially established Indian canon. See Jarrod Shobe, *Congressional Rules of Interpretation*, 65 Wm. & Mary L. Rev. 1997, 2020 (2021) (identifying 246 enacted rules of interpretation of Indian law as of 2017).

On top of—and effectuating—Congress's repeated instruction, this Court has already explained what the statute requires: to prevail, the government must show that its reading is "clearly required by the statutory language." *Ramah*, 567 U.S. at 194. Otherwise, the Tribes' reading is adopted.

When engaged in statutory construction, this Court's decisions have applied the Indian canon as an established, constitutionally-based rule of construction,[10] see *Ysleta*, 596 U.S. at 703 n.3, and, where applicable, as required by a specific congressional instruction. Respect for this congressional instruction is particularly appropriate here in light of Congress's primary authority over Indian affairs, see *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 800–01 (2014), and Congress's undoubted focus on Indian self-determination since the 1970s, see *Okla. Tax Comm'n* v. *Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991). To act as "faithful agents of Congress," courts must implement this repeated and longstanding rule of construction for ISDA and self-determination contracts. See Barrett, *supra*, at 112.

The government recognizes that if ISDA or a Tribe's contract is ambiguous, the relevant provisions must be "liberally construed" for the Tribe's benefit. In its view, however, ISDA is not ambiguous. Br. 46. It makes this

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[10] See *McGirt* v. *Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (describing the "significant constitutional authority" Congress possesses "when it comes to tribal relations"); *United States* v. *Lara*, 541 U.S. 193, 202 (2004) (describing the unique "government-to-government" relationship between tribal sovereigns and the United States); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 421–22 (1993) (explaining that the canon arises from the "sovereign-to-sovereign, structural relationship" between Indian nations and the United States).

claim while failing to acknowledge *Ramah*'s holding that it must show its reading is "clearly required." 567 U.S. at 194. The government's position is hard to square with the decisions of five circuit judges who have found either that ISDA plainly requires reimbursement of the Tribes or, at least, that the statute is ambiguous and the Tribes' interpretation is reasonable. Respect for legislative supremacy in the United States' relations with Indian tribes and for Congress's clear instructions thus requires application of the Indian canon and adoption of the Tribes' interpretation.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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February 12, 2024