Nos. 23-250 AND 23-253

IN THE

Supreme Court of the United States

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

v.

SAN CARLOS APACHE TRIBE,
Respondent.

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

v.

NORTHERN ARAPAHO TRIBE,
Respondent.

On Writs of Certiorari
to the United States Courts of Appeals
for the Ninth and Tenth Circuits

RESPONDENTS' JOINT MOTION FOR DIVIDED ARGUMENT

Pursuant to Supreme Court Rule 28.4, the respondent Tribes respectfully move for divided argument, specifically that the San Carlos Apache Tribe be allocated 15 minutes and that the Northern Arapaho Tribe be allocated 15 minutes. The Tribes are independent sovereigns; the issue presented in this case lies at the core of each Tribe's ability to perform a critical governmental function on their reservation lands—providing healthcare to each Tribe's members; and this Court's analysis of the complex statutory regime will benefit from understanding the text's application to two different Tribes' Federal healthcare programs. Allowing divided

argument in these circumstances is consistent with this Court's practice. Petitioners do not oppose this motion.

1. These consolidated cases arise under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 5301–5423, and the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §§ 1601–1685. They present a vitally important question for the two respondents, which have invoked 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). At stake is the Tribes' ability to fully and effectively carry out this governmental function that Congress encouraged them to take on. As separate sovereigns whose governmental interests and functions are directly at issue, the Tribes request that this Court allow each to appear and argue on its own behalf. The Court's decision to grant each Tribe's separate petition, notwithstanding the Solicitor General's recommendation simply to grant in one case and hold the other, recognizes the important sovereign interest each Tribe has in the outcome of this case.

2. In IHCIA, Congress required that Tribes taking on the operation of Federal Indian healthcare programs be on the same footing as IHS would be had IHS continued operating the program. To achieve this goal, ISDA 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. Here, however, the government asserts that

IHS is not required to reimburse all of these additional costs, dramatically reducing the funding available to provide services, in violation of ISDA. See 25 U.S.C. § 5325(a)(3)(A)(ii). If the government's position prevails, Tribes that contract with the government to provide healthcare and other governmental services will be unable to provide the same level of services that IHS would have provided had it continued operating the program, penalizing Tribes for exercising their contracting rights, in contravention of Congress's self-determination objectives.

3. Here, for example, as part of their governmental responsibilities, the San Carlos Apache Tribe and the Northern Arapaho Tribe administer Federal healthcare programs that serve 13,000 and 12,000 patients, respectively. Indian Health Service, Dep't of Health & Human Services, *User Population Estimates—Fiscal Year 2021 Final* 7, 13 (Jan. 8, 2022). The funding the Tribes receive from IHS has never been close to sufficient to fund the healthcare programs the Tribes have contracted to administer under ISDA and IHCIA. Both Tribes rely heavily on the program income they bill and collect in the course of providing healthcare services that are reimbursed principally by Medicare, Medicaid, and private insurers. They reinvest that program income back into their Federal healthcare programs to support additional services, just as IHS does when it operates a Federal Indian healthcare program. If Tribes are not reimbursed for their contract support costs for providing these services, they must reduce services to cover those expenses. In that setting, the Tribes could receive more healthcare services by returning the program to IHS, contrary to Congress's purpose in enacting ISDA and IHCIA. These cases,

accordingly, strike at the heart of the Tribes' efforts—with strong Congressional encouragement—to assert their self-determination rights by stepping into the shoes of the Federal government to take on one of the important responsibilities of a sovereign.

4. Both Tribes' participation in oral argument will aid the Court in two respects. *First*, counsel for each Tribe has direct and deep insight into the concrete details of the Tribes' processes for billing and collecting program income from third-party payers, the ways in which that program income is used in each Tribe's program, and the differences in the two Tribes' contracts. To interpret the statutory provisions implicated by this case, it is important to understand precisely what the scope of the Federal program is, and precisely how the funds collected from third parties are used—when they generate contract support costs and when they do not. Tribal counsel have expertise in contract support cost litigation under ISDA and IHCIA, and are intimately familiar with the functioning of these individual contracts and programs.

Second, while the San Carlos Apache Tribe and the Northern Arapaho Tribe agree that this Court should affirm the decisions of the Ninth and Tenth Circuit Courts of Appeals, they offer complementary but not identical approaches to the interpretation of the statutes at issue. Likewise, the opinions of the two courts of appeals under review analyze the statutes somewhat differently. The Court has granted divided argument in consolidated cases where parties emphasize different points in support of the same legal proposition. See, *e.g.*, *Rucho* v. *Common Cause*,

139 S. Ct. 1316 (2019) (mem.); *McDonald* v. *City of Chicago*, 559 U.S. 902 (2010) (mem.); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 230 (2020) (mem.).

Third, as sovereigns with long experience with self-determination contracts, including for Federal healthcare programs, each Tribe is uniquely situated to explain to the Court the evolution of the statutory self-determination regime, the forces in Indian country driving that evolution, and the challenges Congress sought to address by changing legislation over decades. In a case such as this one, where Congress, the federal agency (IHS), and Indian country interacted over decades to refine and define a Federal program, each Tribe can provide this Court with the benefit of its individual historical knowledge and experience of the regime and its effect on tribal programs.

Finally, and importantly, respondents are sovereign entities and their ability to govern effectively could be diminished if the government's position in this case is accepted. They should be allowed to present their arguments directly to the Court by their designated counsel and not be required to defer to counsel for the other Tribe. The effective presentation of the unique views of each sovereign Tribe should not depend on a coin flip.

5. Granting this motion is consistent with this Court's prior practice. This Court has recognized the interests of sovereigns and governmental authorities in participating in oral argument when their vital interests are at stake. See, *e.g.*, *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 974 (2018) (mem.) (dividing argument between AFSCME Council 31 and the State

respondents). Indeed, this Court has allowed sovereigns and governmental entities to participate in oral argument even when they were merely amici rather than, as here, parties to a case. See *Dep't of Com.* v. *New York*, 139 S. Ct. 1543 (2019) (mem.) (U.S. House of Representatives); *Sturgeon* v. *Frost*, 587 U.S. 28 (2019) (State of Alaska); *Animal Sci. Prods., Inc.* v. *Hebei Welcome Pharm. Co., Ltd.*, 138 S. Ct. 1865 (2018) (Ministry of Commerce of the People's Republic of China); *Off. of Sen. Mark Dayton* v. *Hanson*, 549 U.S. 1335 (2007) (mem.) (U.S. Senate); *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 541 U.S. 901 (2004) (mem.) (Commission of the European Communities); *Air France* v. *Saks*, 469 U.S. 1103 (1985) (mem.) (Republic of France).

For all these reasons, the respondent Tribes respectfully request that the Court grant divided argument.

Respectfully submitted,

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