No. 23-253

IN THE
Supreme Court of the United States

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

v.

NORTHERN ARAPAHO TRIBE,
Respondent.

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

BRIEF FOR RESPONDENT NORTHERN ARAPAHO TRIBE

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QUESTION PRESENTED

The Indian Self-Determination and Education Assistance Act ("'ISDA") authorizes Indian tribes to enter into contracts with the Indian Health Service ("IHS"), under which tribes provide services that IHS would otherwise be obligated to provide. ISDA authorizes tribes to recover "contract support costs," which include, among other costs, "direct program expenses for the operation of the Federal program that is the subject of the contract," as well as "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." 25 U.S.C. § 5325(a)(3)(A)(i), (ii).

Respondent Northern Arapaho Tribe contracted with IHS to provide healthcare services. The contract requires Northern Arapaho to undertake activities related to generating, collecting, monitoring, and spending revenues from third parties such as Medicare and Medicaid. ISDA requires Northern Arapaho to use those third-party revenues "to further the general purposes of the contract." 25 U.S.C. § 5325(m)(1).

The question presented is:

Whether, under ISDA, a tribe is entitled to recover contract support costs for the expenses it incurs when spending third-party revenues to operate its healthcare program.

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Indian Health Serv., *Disparities* (Oct. 2019), https://www.ihs.gov/newsroom/factsheets/disparities 12

Indian Health Serv., *The First 50 Years of the Indian Health Service: Caring & Curing* (2005), https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/GOLD_BOOK_part1.pdf 4

Indian Health Serv., U.S. Dep't of Health & Hum. Servs., *Fiscal Year 2024 Justification of Estimates for Appropriations Committees* (Mar. 10, 2023), https://www.ihs.gov/sites/budgetformulation/themes/responsive2017/display_objects/documents/FY2024-IHS-CJ32223.pdf 5, 6, 11

Indian Health Serv., *Wind River Service Unit*, https://www.ihs.gov/billings/healthcarefacilities/windriver/ (last visited Feb. 1, 2024) 12

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U.S. Gen. Acct. Office, RCED-99-150, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed* (1999) 7

Wind River Inter-Tribal Council, *Resources Required to Raise Wind River Available Resources to Parity with National Health Expenditures* (2020), https://www.windriver.care/images/pdf/Complete_Report_-_Underfunded_Health_Care_Resource_Study.pdf 12

INTRODUCTION

The Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 5301 *et seq.*, authorizes tribes to contract with the Indian Health Service ("IHS") to administer healthcare programs that IHS would otherwise administer. Under ISDA, tribes receive not only what IHS "would have otherwise provided for the operation of the programs," but also "contract support costs" that make tribes whole for overhead and other administrative costs—such as worker's compensation and the cost of certain financial audits—that tribes incur but IHS does not. § 5325(a)(1)-(3). These and other ISDA provisions are incorporated into the contract at issue here between IHS and Respondent Northern Arapaho Tribe ("Northern Arapaho" or "Tribe") for provision of healthcare services on the Wind River Reservation.

There is no dispute that, under these provisions, Northern Arapaho may recover contract support costs that result from its expenditure of funds appropriated for the programs that Northern Arapaho has contracted to administer. But appropriated funds make up only a portion of the funding that IHS and contracting tribes use to administer federal healthcare programs. Under the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. § 1601 *et seq.*, both IHS and contracting tribes must collect "program income" from Medicare, Medicaid, and private insurers when providing services. The question here is whether Northern Arapaho is owed

contract support costs that result from its provision of healthcare services funded by that program income.

The answer is yes. As relevant here, contract support costs "shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of" "direct program expenses for the operation of the Federal program that is the subject of the contract," as well as overhead expenses "incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." 25 U.S.C. § 5325(a)(3)(A)(i), (ii).

The disputed contract support costs are recoverable under those provisions. First, when IHS runs tribal healthcare, it is statutorily required to spend program income on healthcare. As such, the healthcare programs funded by program income are part of the "Federal program."

Second, IHS's contract with Northern Arapaho transfers the obligation to collect and spend program income to the Tribe. The contract explicitly requires the Tribe to collect program income by billing Medicare, Medicaid, and private insurers, and to use this program income to "further the general purposes of the contract." § 5325(m)(1). Hence, when carried out by the Tribe, those services are part of the federal program that is "the subject of the contract" under Section 5325(a)(3)(A)(i), and part of the federal program "pursuant to the contract" under Section 5325(a)(3)(A)(ii). Contract support costs incurred in

connection with those services are therefore recoverable.

This interpretation accords with the congressional purpose to ensure parity between IHS and contracting tribes. When tribes spend program income to carry out the purposes of their contract, just as when they spend appropriated funds, they incur overhead and other administrative costs that IHS can avoid. If tribes cannot recover the contract support costs that they incur when making the same expenditures as IHS, they are penalized for entering into ISDA contracts—precisely the result Congress sought to avoid in ensuring that contract support costs would be paid.

ISDA's unambiguous text supports the Tribe's position. But if the Court concludes the text is ambiguous, the Tribe must still prevail. ISDA's mandatory model contract includes a liberal construction provision favoring tribes. *See* § 5329(c), sec. 1(a)(2). That provision is incorporated into the contract at issue in this case. Under that provision, the government cannot prevail unless it shows that its interpretation is "clearly required by the statutory language" and "unambiguous[ly] correct." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194, 197 (2012) (quotation marks omitted). The government's arguments, resting largely on delicate and contestable textual inferences and generalized concerns about excessive expenditures, do not satisfy this high standard.

STATEMENT

I. Tribal Healthcare Programs and ISDA

Pursuant to its trust obligations to Indian tribes, the federal government funds healthcare programs for Native Americans. *See* 25 U.S.C. § 1601(1). Historically, these programs were administered by the federal government. Indian Health Serv., *The First 50 Years of the Indian Health Service: Caring & Curing* at 8 (2005), https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/GOLD_BOOK_part1.pdf. In 1975, however, Congress worked a sea change to the administration of federal programs for Native Americans by enacting ISDA.

ISDA's purpose is to establish "a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 5302(b). To achieve that goal, ISDA "decentralized the provision of federal Indian benefits" by allowing tribes to enter into contracts with federal agencies under which tribes themselves "deliver[] federally funded economic, infrastructure, health, or education benefits to the tribe's membership." *Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434, 2439 (2021). Thus, although tribes retain the option of allowing IHS to continue to administer their healthcare programs, ISDA allows tribes to administer their programs under a contract with IHS so as to obtain the benefits of local control.

When IHS administers a tribal healthcare program, it relies on two funding streams: direct appropriations from Congress and collections from third-party payors like Medicare, Medicaid, and private insurers. *See, e.g.*, 42 U.S.C. §§ 1395qq(a), 1396j(a); 25 U.S.C. § 1621e(a). IHS must use this third-party revenue to provide additional healthcare services. *See* 25 U.S.C. §§ 1621f(a)(1), 1641(c)(1)(B). Congress has specified that these third-party collections are to be in addition to, rather than in lieu of, direct appropriations. § 1641(a).

These third-party collections are an essential source of funding for tribal healthcare. Direct appropriations from Congress are nowhere near sufficient to address the existing healthcare needs of tribal populations. "[O]verall IHS funding covers only a fraction of Native American health care needs." U.S. Comm'n on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* 7 (2018) (U.S. Comm'n on Civil Rights Report), https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf. Indeed, per-capita IHS expenditures are dramatically less than per-capita expenditures for any other recipients of federally funded healthcare, including federal prisoners and Medicaid patients. *Id.* at 68.

IHS itself acknowledges that third-party collections "represent a significant portion" of its "health care delivery budget[]," and it anticipated collecting nearly $1.76 billion from third-party insurers in Fiscal Year 2023. Indian Health Serv., U.S. Dep't of Health & Hum. Servs., *Fiscal Year 2024 Justification of Estimates for Appropriations Committees*, at CJ-193 (Mar. 10, 2023) (Fiscal Year 2024 Congressional Justification),

https://www.ihs.gov/sites/budgetformulation/themes/responsive2017/display_objects/documents/FY2024-IHS-CJ32223.pdf. Indeed, "[s]ome IHS health care facilities report that 60 percent or more of their yearly budget relies on revenue collected from third party payers." *Id.*

Funding works the same way when tribes contract with IHS to administer their tribal health programs under ISDA. Congress has expressly stated in IHCIA that it intends "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 the Service." 25 U.S.C. § 1602(7). To achieve that goal, ISDA authorizes contracting tribes to draw on the same two funding streams available to IHS.

First, under Section 5325(a)(1), the contracting tribe is entitled to a sum that "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." § 5325(a)(1). This amount is referred to as the "Secretarial amount."

Second, under Section 5325(m), tribes use third-party "program income" to fund the health programs they operate. § 5325(m). As with IHS, Congress has directed contracting tribes to collect revenue from Medicare, Medicaid, private insurers, and other third parties while administering the contracted-for programs. *See, e.g.*, § 1641(d)(1); 42 U.S.C. §§ 1395qq(a), 1396j(a). IHS and contracting tribes must bill and collect from third-party payors where possible, with IHS and the tribes serving as "the payer of last resort." 25 U.S.C. § 1623(b). Section 5325(m)(1) in turn specifies that this

"program income" must be spent "to further the general purposes of the contract." § 5325(m)(1). And in this context as well, Congress has provided that the collection of program income "shall not be a basis for reducing the amount of funds otherwise obligated to the contract." § 5325(m)(2).

II. Contract Support Costs

After ISDA's enactment, it "soon became apparent" that providing contracting tribes with the Secretarial amount "failed to account for the full costs to tribes of providing services." *Salazar*, 567 U.S. at 186. That was because ISDA failed to compensate tribes for certain overhead and other administrative expenses that IHS did not incur when it ran tribal healthcare programs directly.

For example, when IHS runs tribal healthcare programs, it can avoid certain administrative costs because it relies on other federal agencies, such as the Office of Personnel Management and the General Services Administration, for certain administrative functions. *See, e.g.*, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005). IHS, as a federal agency, also does not bear the costs of annual audits, certain taxes, and state-mandated workers' compensation insurance that tribes incur when they run tribal health programs directly. *See*, e.g., U.S. Gen. Acct. Office, RCED-99-150, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed* 46 (1999); S. Rep. No. 100-274, at 8-9 (1987) (1987 Senate Report). Because IHS does not need to spend appropriated funds on such costs, it can devote its appropriated funds to healthcare.

ISDA's initial failure to compensate tribes for these administrative and overhead costs, known as "contract support costs," was seen as the "single most serious problem with implementation of the Indian self-determination policy." 1987 Senate Report at 8. Because these costs could not be recovered, tribes were effectively "required to pay a penalty for the right to contract for the administration of the Federal programs." H.R. Rep. No. 100-393, at 4 (1987). Indeed, the 1987 Senate Report observed that the "consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements." 1987 Senate Report at 8-9.

As relevant here, Congress has made three amendments to ISDA to address the issue of contract support costs.

First, in 1988, Congress added Section 5325(a)(2), which provides:

> There shall be added to the amount required by [Section 5325(a)(1)] contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

This provision codified the requirement to pay contract support costs, reflecting Congress' determination that "Indian tribes should not be forced to use their own financial resources to subsidize federal programs." 1987 Senate Report at 9. Permitting tribes to recover contract support costs would help ensure that tribes could provide "at least the same amount of services as the Secretary would have otherwise provided." *Id.* at 16.

Second, in 1994, Congress added Section 5325(a)(3), a new subsection regarding contract support costs. In its current form,[1] Section 5325(a)(3)(A) states that contract support costs "*shall include* the costs of reimbursing each tribal contractor for reasonable and allowable costs of":

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[1] Prior to 2020, Section 5325(a)(3)(A)(ii) read: "any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." *See* PROGRESS for Indian Tribes Act, Pub. L. No. 116-180, § 204, 134 Stat 857, 881 (2020) (prescribing this alteration). Neither party argues that this amendment affects the analysis.

> (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 [Section 5325(a)(1)].

This provision was meant to "more fully define the meaning of the term 'contract support costs'" and, again, to "assure[] that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation." S. Rep. No. 103-374, at 8-9 (1994) (1994 Senate Report).

Finally, in response to the Tenth Circuit's holding that IHS was required to pay contract support costs incurred by a tribe in connection with its contracts with a state, *see Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), Congress added Section 5326 to clarify that contract support costs do not include support costs associated with non-ISDA contracts:

> [N]otwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-

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

III. Factual Background

The dispute in this case is whether Northern Arapaho is entitled to contract support costs that result from its expenditure of program income to provide additional healthcare services.

That question arises in the context of chronic underfunding of Indian health programs. In 2017, IHS healthcare spending per person was $3,332, about a third of the $9,207 spent per person for federal healthcare spending nationwide. U.S. Comm'n on Civil Rights Report at 66-67. As of 2021, tribal populations had an average life expectancy of 65.2 years, which is nearly 11 years fewer than the U.S. all-races population and equal to the life expectancy of the general U.S. population in 1944. *See* Fiscal Year 2024 Congressional Justification at CJ-3. And tribal populations "continue to die at higher rates than other Americans in many categories, including chronic liver disease and cirrhosis, diabetes mellitus, … and chronic lower respiratory diseases."

Indian Health Serv., Disparities (Oct. 2019), https://www.ihs.gov/newsroom/factsheets/disparities.

The Northern Arapaho Tribe is a federally recognized tribe located on the Wind River Reservation in Wyoming. The Wind River Service Unit, which serves approximately 12,000 patients primarily from the Northern Arapaho and Eastern Shoshone Tribes, is tied for the lowest level of funding sufficiency across all IHS-funding programs. *See* Wind River Inter-Tribal Council, *Resources Required to Raise Wind River Available Resources to Parity with National Health Expenditures* 1 (2020), https://www.windriver.care/images/pdf/Complete_Report_-_Underfunded_Health_Care_Resource_Study.pdf; Indian Health Serv., *Wind River Service Unit*, https://www.ihs.gov/billings/healthcarefacilities/windriver/. Due to this severe underfunding, health services on the Wind River Reservation are provided from a health center that was constructed as a military commissary in 1884—the oldest IHS facility in the nation. Gregory Nickerson, *Northern Arapaho Seek Better Healthcare at IHS Clinics*, WyoFile (Jan. 20, 2015), https://wyofile.com/northern-arapaho-seek-better-healthcare-ihs-clinics.

In 2016, Northern Arapaho contracted with IHS to administer a broad range of "direct health care services and programs" on the Wind River Reservation. J.A. 124. The contract follows the mandatory "model agreement" set forth in 25 U.S.C. § 5329(c). Article I of the contract provides that the "provisions of title I of [ISDA] are incorporated in this agreement." J.A. 124. The contract transfers a variety of direct healthcare services and programs to the Tribe, including outpatient ambulatory

medical care and primary care; nursing; mental health; the clinical medical laboratory; radiology; physical therapy; the pharmacy; optometry; dental care; and community health. J.A. 124-25; *see also* J.A. 162-72.

The contract also includes an Annual Funding Agreement and a Scope of Work attachment. J.A. 121-87. Consistent with the principle that the Tribe is the "payer of last resort," 25 U.S.C. § 1623(b), the Scope of Work requires Northern Arapaho to collect funds from third parties, including Medicare and Medicaid. In particular, the Tribe must:

- "maintain accreditation standards in order to qualify for funds through third party-payers";
- "[u]se [IHS's] third-party billing system" until the Tribe can "set up its own functioning … third-party billing system";
- undertake "[b]enefits coordination to perform alternate resource determination[s]";
- secure "Medicare and Medicaid numbers for billing purposes … in order to meet the requirements of the Centers for Medicaid and Medicare Services (CMS) and Medicaid contracts with Managed Care Organizations (MCOs)";
- meet requirements to ensure "periodic renewal of accreditation or certification in order to continue to maintain eligibility for these funds";
- manage claims; and
- conduct "[q]uality assurance and all third-party billing processes."

J.A. 185-86; *see also* Pet. App. 16a (opinion of Moritz, J.).

The parties' contract states that the "parties' estimate of the Tribe's full CSC requirement" is "$619,978.62 for Indirect CSC," but this estimate "shall be recalculated as necessary … to reflect the full [contract support costs] required under [ISDA]." J.A. 146.

Finally, the contract recites: "Each provision of [ISDA] and each provision of this Contract shall be liberally construed for the benefit of [Northern Arapaho]." J.A. 124; *see* 25 U.S.C. § 5329(c), sec. 1(a)(2) (same, in model contract).

IV. Proceedings Below

IHS refused to pay Northern Arapaho for contract support costs resulting from its expenditure of program income. The Tribe filed a breach-of-contract suit under the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.*, to recover those costs. The complaint alleged that "[a]ll third-party revenue or 'program income' must be, and is, expended on [programs, functions, services, and activities] included in the Tribe's [Annual Funding Agreement] with IHS." J.A. 110 (Compl. ¶ 22).

The District of Wyoming dismissed the complaint. Pet. App. 40a-56a. The Tenth Circuit reversed by a 2-1 vote with all three judges writing. Every member of the panel agreed that the costs at issue were recoverable under Section 5325; the dissenting judge would have affirmed solely based on Section 5326.

Judge Moritz concluded that ISDA was ambiguous as to whether these contract support costs could be

recovered, which "trigger[ed] the Indian canon of construction." Pet. App. 14a. She explained that the Scope of Work "plainly contemplate[s] that the Tribe will engage in third-party billing to generate revenue," and that "once the Tribe establishes this infrastructure and collects third-party revenue, the [ISDA] requires the Tribe to deploy its program income 'to further the general purposes of [its] contract' with IHS." Pet. App. 16a (quoting 25 U.S.C. § 5325(m)(1)). Because Northern Arapaho "seeks reimbursement for administrative costs associated with services it provided pursuant to its self-determination contract with IHS," Judge Moritz concluded that the Act "entitles the Tribe to reimbursement for those administrative costs." Pet. App. 20a.

Judge Eid concluded that ISDA unambiguously provides for the contract support costs at issue. In her view, the "Tribe presents the only reasonable construction because the government's interpretation vitiates much of the statutory scheme." Pet. App. 26a-27a. The "term 'contract support costs' has a broad meaning," and the "government cannot pay less because of program income, which the statute requires to be injected back into the Tribe's program and which itself only exists because of the IHS contract." Pet. App. 30a. Thus, "[b]ased on the plain meaning of both the contract and § 5325, the Tribe must be reimbursed for these contract support costs." *Id.*

Judge Baldock dissented. He agreed with Judge Eid that Section 5325 "is unambiguous and that under its terms, the Tribe wins." Pet. App. 36a. But he read Section 5326 to act as a "superseding provision that bars

the Tribe from receiving the funds it seeks even though § 5325 would otherwise allow it." Pet. App. 38a.

SUMMARY OF ARGUMENT

ISDA requires the government to reimburse the Tribe for contract support costs that arise from the Tribe's expenditure of program income on healthcare services.

I.A.1. The disputed contract support costs are recoverable under the plain text of Section 5325(a)(3)(A). That provision allows a tribe to recover support costs arising from expenditures on the federal program and in accordance with the tribe's ISDA contract. Services funded by program income satisfy both requirements. They are part of the federal program because IHS, when it runs tribal healthcare, collects such income and spends it on healthcare services. And they accord with the contract because the contract incorporates Section 5325(m)(1), which requires the tribe to spend such income to further the "general purposes" of the contract.

I.A.2. The government insists that Section 5325(m)(1)'s "general purposes" requirement is too broad to support recovery of contract support costs. But Section 5325(m)(1) meaningfully limits tribes' discretion to spend program income. In any event, broad or not, Section 5325(m)(1) is part of the contract. Services that comply with it therefore give rise to recoverable contract support costs.

I.A.3. At minimum, Northern Arapaho is unambiguously entitled to recover contract support costs when program income is used to fund services enumerated in

the contractual scope of work—which, for Northern Arapaho, represents all of the contract support costs in dispute.

I.B. The government's reliance on Section 5325(a)(2) is misplaced. Section 5325(a)(3)(A) states that contract support costs "shall include" costs that meet its terms, and nothing in Section 5325(a)(3)(A) suggests that costs satisfying that provision are excluded unless they also satisfy Section 5325(a)(2). In any case, the contract support costs at issue here do satisfy Section 5325(a)(2) as well.

I.C. The government's hodgepodge of textual arguments lacks support. They largely rely on inapposite provisions of ISDA, and in any event, misread those provisions.

I.D. Allowing tribes to recover the contract support costs at issue would align with ISDA's purpose. ISDA is intended to ensure that the same level of services is provided whether IHS provides the services directly or whether a tribe contracts with IHS to do so. Contract support costs themselves reflect Congress' intent to ensure an equal playing field by compensating tribes for overhead and other administrative expenses that tribes incur but IHS does not when it operates a federal health program. Both IHS and contracting tribes rely heavily on third-party collections to address chronic underfunding via direct appropriations. To hold that the tribe must divert some of that program income to administrative and overhead costs instead of to healthcare services would once again impose a self-determination penalty on tribes despite Congress' intent to avoid that result.

II. Section 5326 does not preclude IHS from paying the disputed contract support costs. That provision states that costs "may be expended only for costs *directly attributable* to contracts, grants[,] and compacts pursuant to [ISDA]" and "no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs *associated with* any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service." 25 U.S.C. § 5326 (emphases added). This provision was added to override *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), in which the Tenth Circuit construed ISDA to require the government to pay contract support costs to support *state* contracts with no relationship to ISDA contracts. The facts here are very different: the costs are in fact "directly attributable" to the ISDA contract because the contract requires that program income be spent on healthcare services. And the costs are "associated with" the ISDA contract under which the services are provided, not the third-party contracts that merely facilitated the collection of program income.

III. Finally, if ISDA is ambiguous, the Tribe prevails. The longstanding Indian canon, the liberal construction provision in the ISDA model agreement and the contract itself, and the liberal construction provision added to ISDA in Section 5321(g) all require reading ambiguities in the Tribe's favor. The government's arguments are all based on contestable statutory glosses and do not establish the kind of clear statement that would overcome the liberal construction canon.

ARGUMENT

I. The Plain Text of Section 5325 Requires the Government to Reimburse the Tribe for the Disputed Contract Support Costs.

When IHS runs tribal healthcare, it is required to collect and spend program income on healthcare services. When a tribe enters into an ISDA contract, responsibility for collecting and spending program income on healthcare services is transferred to the tribe. Therefore, under the unambiguous text of Section 5325, contract support costs arising from those services are recoverable.

A. The Contract Support Costs at Issue Are Recoverable Under Section 5325(a)(3)(A).

Congress first authorized recovery of contract support costs in 1988, when it enacted Section 5325(a)(2). In 1994, Congress enacted the two provisions at the center of this case: Section 5325(a)(3)(A), which delineates two categories of recoverable contract support costs, and Section 5325(m), which governs tribes' collection and spending of "program income," *i.e.*, income tribes collect from third-party sources such as Medicare and Medicaid while administering ISDA contracts. The question in this case is whether Northern Arapaho is owed contract support costs that result from its provision of healthcare services funded by that program income.

The answer is yes. This brief first explains why the disputed contract support costs are recoverable under Section 5325(a)(3)(A). It then explains that, contrary to the government's position, Section 5325(a)(2) need not

be analyzed independently, but that the costs are recoverable under Section 5325(a)(2) in any event.

1. The disputed costs are recoverable because services that comply with Section 5325(m)(1) are part of the "federal program" transferred under "the contract."

Northern Arapaho seeks to recover both direct contract support costs, which are governed by Section 5325(a)(3)(A)(i), and indirect contract support costs, which are governed by Section 5325(a)(3)(A)(ii), incurred from spending third-party income to operate its health program. Both types of costs are recoverable under ISDA's unambiguous text.

Begin with indirect contract support costs, which are the bulk of the disputed costs in this case. J.A. 118. Indirect costs are costs "benefiting more than one contract objective," such as the cost of information technology used across multiple contracts. 25 U.S.C. § 5304(f). Such costs are recoverable if they are "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).

This text imposes two requirements for recovering indirect costs. First, the services must be part of the "Federal program, function, service, or activity." *Id.* Second, the services must be "pursuant to the contract." *Id.* Services funded by program income meet both requirements.

First, services funded by program income are part of the "Federal program, function, service, or activity," because they are services IHS undertakes when it runs tribal healthcare. IHS collects income from third parties, *see* 42 U.S.C. §§ 1395qq(a), 1396j(a), and is statutorily required to spend those third-party collections on Indian healthcare, *see* 25 U.S.C. §§ 1621f(a)(1), 1641(c)(1)(B). As such, those services are part of the "Federal program" of Indian healthcare.

Second, when the Tribe provides such services, it acts "pursuant to the contract." That is so because the Tribe's contract transfers responsibility over both the collection and the spending of program income from IHS to the Tribe. As to collection, consistent with the principle that the Tribe is the "payer of last resort," 25 U.S.C. § 1623(b), the contractual Scope of Work requires the Tribe to obtain and maintain "accreditation standards in order to qualify for funds" from "third party-payers," "set up its own functioning … third-party billing system," and "monitor the number of billings submitted, claims completed and total payments received." J.A. 185-86. As to spending, the contract specifies how the Tribe must use the program income. It does so by expressly incorporating Title I of ISDA, J.A. 124, which includes Section 5325(m)(1)'s requirement that program income be used "to further the general purposes of the contract." § 5325(m)(1).

Because these collection and spending activities are set forth in and required by the contract, they are "pursuant to" it. "Pursuant to" means "[i]n compliance with; in accordance with; under," or "[a]s authorized by." *Black's Law Dictionary* 1493 (11th ed. 2019). When

Northern Arapaho collects and spends program income on tribal healthcare, it does so as a means of complying with its contractual obligation to bill third parties and then to spend the resulting program income to "further the general purposes of the contract." J.A. 124 (incorporating Title I of ISDA); *see* 25 U.S.C. § 5325(m)(1). Those services are hence in compliance with, and are authorized by, the contract.

As such, contract support costs arising from those expenditures are incurred "in connection with the operation of the Federal program, function, service, or activity pursuant to the contract," § 5325(a)(3)(A)(ii), and are recoverable.

That takes care of the indirect costs. The Tribe also seeks a smaller amount of direct contract support costs—*i.e.*, costs "that can be identified specifically with a particular contract objective." § 5304(c).[2] For substantially similar reasons, those costs are recoverable, too.

Under Section 5325(a)(3)(A)(i), a tribal contractor may recover "direct program expenses for the operation of the Federal program that is the subject of the contract." For the reasons already explained, services funded by program income are part of the "Federal program." And because the ISDA contract transfers responsibility for carrying out services funded by program income to the Tribe, those services are part of "the Federal program that is *the subject of the contract*."

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[2] Those direct costs consist of certain fringe employee benefits. J.A. 114-15.

§ 5325(a)(3)(A)(i) (emphasis added). Accordingly, the Tribe's "direct program expenses for the operation of" those services, *id.*, are recoverable.

2. The government misconstrues Section 5325(m).

The government's contrary position rests on the premise that "[a]n open-ended obligation to use funds for the 'general purpose[]' of tribal health is not the equivalent of a requirement to devote those funds to providing additional services under the contractual ISDA program." Pet. Br. 33. That argument lacks merit for several reasons.

To begin, the government's characterization of Section 5325(m)(1) as "[a]n open-ended obligation to use funds for the 'general purpose[]' of tribal health," Pet. Br. 33, is incorrect. To the contrary, Section 5325(m)(1) requires tribes to use funds for the general purposes of *the contract*.

What are the "general purposes of the contract"? Notably, the statutory "model agreement," 25 U.S.C. § 5329(c), sec. 1(a)(2), requires ISDA contracts to include a "purpose" clause reciting that the contract's purpose is to transfer not only funding but also "the following related functions, services, activities, and programs (or portions thereof)," followed by a "[l]ist" of "functions, services, activities, and programs" in that particular contract. *See, e.g.*, J.A. 124 ("purpose" clause in Northern Arapaho's contract). Thus, an ISDA contract's "purpose" is not to advance healthcare in general, but instead to transfer a particular set of responsibilities to the tribe. *Id.*

To be sure, Section 5325(m)(1) refers to a contract's "*general* purposes" rather than its "purpose." But any expenditure that furthers the "general purposes" of the contract must at least be related to the enumerated functions in the contractual statement of purpose. Otherwise, Section 5325(m)(1)'s "general purposes" requirement would do no work. Section 5325(m)(1) thus does not permit tribes to spend program income on "a different health care program," as the government contends. Pet. Br. 33.

The government's argument is also conceptually flawed. The government's theory appears to be that it is hypothetically possible to spend program income in a manner that *does* "further the general purposes of the contract," Section 5325(m)(1), but *does not* fall within the list of services specifically enumerated in the contract. And therefore, the government's argument goes, programs resulting from those expenditures cannot give rise to contract support costs. *See, e.g.*, Pet. Br. 33.

But the government misreads Section 5325(a)(3)(A). The government's argument might have had some merit if Section 5325(a)(3)(A) were limited to contract support costs arising from "services enumerated in the contractual scope of work," or similar language. But Congress instead enacted broader language: it permitted recovery of costs arising from the "Federal program" that is "the subject of," or "pursuant to," the contract. 25 U.S.C. § 5325(a)(3)(A). That language is easily capacious enough to encompass the healthcare expenditures that are mandated by the contract via Section 5325(m)(1). Indeed, the very fact that Section 5325(m)(1) refers to "*program* income" naturally

suggests that services under Section 5325(m)(1) are part of the "Federal *program*" under Section 5325(a)(3)(A).

The government's theory has puzzling consequences. The government does not appear to dispute that, if Section 5325(m)(1) required tribes to spend the program income on services specifically enumerated in the contractual scope of work, then those services would be part of the "Federal program" under Section 5325(a)(3)(A). But because Section 5325(m)(1) gives tribes somewhat broader operational flexibility, allowing them to use the money to further the contract's "general purposes," the government claims that services funded by program income suddenly cease to be part of the "Federal program," stripping tribes of their ability to recover contract support costs. That outcome is incongruous in light of ISDA's purpose to *encourage* operational flexibility.

Affording tribes this flexibility would not allow tribes to generate contract support costs with other funding sources. Taking a cue from the D.C. Circuit, the government contends that the Tribe's position implies that "a tribe could channel outside funding from any source—including funds from the tribe's general treasury, or proceeds from a tribal business—into its ISDA programs and thereby obligate IHS to pay additional contract support costs on that amount." Pet. Br. 37-38; *see Swinomish Indian Tribal Cmty. v. Becerra*, 993 F.3d 917, 921 (D.C. Cir. 2021). This is wrong. If the Tribe spent funds from its general treasury on healthcare, it would not be doing so as a means of satisfying any contractual obligation, and hence would not be carrying out any Federal program

that is the "subject of the contract" or acting "pursuant to the contract," as required by Section 5325(a)(3)(A). By contrast, when the Tribe spends program income on healthcare, it does so to comply with its contractual obligation to further the general purposes of the contract, and therefore satisfies Section 5325(a)(3)(A)'s requirements.

More generally, it should not be surprising that Section 5325(m)(1) grants flexibility to tribes. IHS *also* has flexibility in spending program income. When IHS runs tribal healthcare, it must first use program income to ensure a program's compliance with relevant Medicaid and Medicare requirements, 25 U.S.C. § 1641(c)(1)(B), which tribes also must also comply with when running ISDA contracts, *see* § 1641(d)(2)(A). But once IHS ensures Medicare and Medicaid compliance, it has flexibility: it may spend those excess funds, as it sees fit, on "reducing the health resource deficiencies" of tribes. § 1641(c)(1)(B). In Section 5325(m)(1), Congress similarly gave tribes a measure of flexibility, though anchored to the contract's general purposes. Congress' decision to offer this parallel treatment—in line with ISDA's broader goal of putting IHS and tribes on equal footing—did not cause services funded by those expenditures to somehow *cease* to be part of the "Federal program" under Section 5325(a)(3)(A).

The government nonetheless suggests that expenditures under Section 5325(m)(1) must exceed the scope of contract support costs available under Section 5325(a)(3)(A) because Congress could have used narrower language in Section 5325(m)(1), such as the language in Section 5325(a)(4)(A), if it wanted to require

that program income be spent on additional contract services. Pet. Br. 34 (noting that Section 5325(a)(4)(A) allows tribes to use certain savings "to provide additional services or benefits under the contract"). But even if Section 5325(m)(1) is broader than Section 5325(a)(4)(A), it does not follow that contract support costs are unrecoverable. The pertinent question is whether services funded under Section 5325(m)(1) are part of the "federal program" under Section 5325(a)(3)(A). As explained above, they are.

One final point. For many ISDA contracts, including Northern Arapaho's, the gap between what Section 5325(m)(1) authorizes and what falls within the contractual scope of work is largely academic. Like many ISDA contracts, Northern Arapaho's contractual scope of work covers a wide range of healthcare services and is written in very general terms. *See* J.A. 124, 162-72. Virtually any healthcare expenditure that furthers the "general purposes of the contract" will also fall within one of those general categories. It would be perverse if Congress' decision to grant a measure of *theoretical* flexibility were construed as a basis for wiping out recovery of contract support costs.

3. At a minimum, contract support costs are recoverable when program income is used to fund enumerated services within the contractual scope of work.

For the reasons described in Sections I.A.1 and I.A.2, tribes may recover contract support costs arising from *all* expenditures of program income that satisfy Section

5325(m)(1)'s "general purposes" requirement, even if those services do not fall within the list of services specifically enumerated in the contractual scope of work.

But in the alternative, at a minimum, if a tribe spends program income on services that *do* fall within the list of services specifically enumerated in the contractual scope of work, then at least contract support costs arising from *those* services should be recoverable.

As before, start with indirect costs. Section 5325(a)(3)(A)(ii) permits recovery of costs "in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." If a tribe spends program income on the services enumerated in the contractual scope of work, it is operating the "Federal program, function, service, or activity" under a straightforward reading of that phrase. Additionally, expenditures on contractually enumerated services would comply with Section 5325(m)(1)'s mandate—which is incorporated into the contract—to further the general purposes of the contract. As such, those expenditures are readily characterized as "pursuant to the contract."

The analysis is similar for direct costs. If a tribe spends program income on the actual services enumerated in the contractual scope of work, it is operating the "Federal program that is the subject of the contract." Hence, direct costs arising from such expenditures qualify as "direct program expenses for the operation of the Federal program that is the subject of the contract" under Section 5325(a)(3)(A)(i).

Even under this narrower interpretation, Northern Arapaho would win this case on remand. As noted above, from Northern Arapaho's perspective, the gap between Section 5325(m)(1)'s "general purposes" language and the contractual scope of work is largely academic. Northern Arapaho is prepared to prove that every penny of program income was, in fact, spent on activities enumerated in the contractual scope of work.

Northern Arapaho spends its program income in this manner because the Secretarial amount is insufficient to fund the services in the scope of work. The Tribe uses program income to fill that funding gap, precisely as IHS does when it runs tribal healthcare.

Indeed, this is the inevitable result of how tribal healthcare works. The government portrays tribal healthcare as composed of two distinct programs—one funded by the Secretarial amount, the other funded by program income. It does not work that way. The Tribe has two sources of money—the Secretarial amount and program income—but all of the money goes into a single bucket which funds tribal healthcare programs. That is why Section 5325(m)(2) specifically contemplates that program income "shall not be a basis for reducing the amount of funds otherwise obligated to the contract," *i.e.*, program income will be *added* to the Secretarial amount and tribes will spend the *sum* of that money on healthcare.

The government nonetheless contends that *even if* the Tribe spends program income on services enumerated in the contractual scope of work, the Tribe should not recover contract support costs associated with those services because it *could, hypothetically* have

spent that program income on an unspecified category of other services that further the contract's "general purposes" while somehow falling outside of the scope of work. Section 5325(a)(3)(A)'s text does not contemplate this harsh result.

B. Satisfying Section 5325(a)(2) Is Unnecessary, but the Tribe Does So in Any Event.

The government primarily relies not on Section 5325(a)(3)(A), but instead on Section 5325(a)(2), Pet. Br. 19-21—a provision enacted years before Section 5325(m). According to the government, Section 5325(a)(2) does not authorize recovery of contract support costs arising from program income expenditures. The government's argument regarding Section 5325(a)(2) is irrelevant. As long as the costs at issue satisfy Section 5325(a)(3)(A), they need not independently satisfy Section 5325(a)(2).

This conclusion follows from the plain text of Section 5325(a)(3)(A). Section 5325(a)(3)(A) recites that contract support costs "*shall include*" costs meeting the definition in that provision. "Shall" is mandatory language. *See, e.g.*, *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320-21 (2020). As long as the Tribe shows that the costs satisfy Section 5325(a)(3)(A), they "shall" be included in the Tribe's contract support cost amount, and the inquiry is complete.

Congress regularly enacts definitional provisions that recite that a particular statutory term "includes" something. The point of these provisions is to clarify that the term's scope extends to the thing that it also

"includes." Thus, when a statute says that "[t]he term 'State' includes the District of Columbia," 28 U.S.C. § 1442(d)(5), the statute clarifies an ambiguity created by the use of the word "State" alone. Likewise, because Congress recited that contract support costs "shall include" the costs enumerated in Section 5325(a)(3)(A), they are included, irrespective of whether they would be included under Section 5325(a)(2) standing alone.

The government concedes that Section 5325(a)(3)(A) "clarif[ies]" Section 5325(a)(2), yet insists that Section 5325(a)(2) must be independently analyzed. Pet. Br. 36. An independent analysis of Section 5352(a)(2) is unwarranted. The point of a clarifying amendment is to resolve an ambiguity. Thus, it makes sense to analyze the statute *as clarified*. Here, Section 5325(a)(3)(A) resolves any ambiguity as to whether the contract support cost requirement first set out in Section 5325(a)(2) includes those categories of costs defined in Section 5325(a)(3)(A). Analyzing the clarifying amendment, and then *separately* analyzing the ambiguous provision that needed to be clarified, would defeat the purpose of the clarifying amendment.

The government's contrary position would also render Section 5325(a)(3)(A) superfluous. In the government's view, if the contract support costs do not satisfy Section 5325(a)(2), the Tribe loses, regardless of whether the costs satisfy Section 5325(a)(3)(A). And if the contract support costs do satisfy Section 5325(a)(2), the Tribe would prevail. There would again be no need to independently analyze Section 5325(a)(3)(A), because that provision does not limit recoverable costs but instead specifies that recoverable costs "shall include"

the enumerated categories. There is no scenario, under the government's view, in which Section 5325(a)(3)(A) does any work.

The government characterizes the Tribe's interpretation as rendering Section 5325(a)(2) superfluous. Pet Br. 36. But Section 5325(a)(2) clearly did work at the time of its enactment in 1988, when Section 5325(a)(3)(A) did not yet exist, by mandating payment of contract support costs. Under the government's view, Section 5325(a)(3)(A)—enacted six years later—*never* had any practical effect.

The government asserts (Pet. Br. 36) that the Tribe's position would allow tribes to "reclassify as a 'contract support cost' any direct or administrative expense that they wish to incur in excess of IHS's appropriated funding." Not so. Section 5325(a)(3)(A) requires the costs to be "reasonable and allowable costs."

In any case, even accepting the government's premise that the contract support costs at issue must satisfy Section 5325(a)(2), the Tribe can make that showing.

Section 5325(a)(2) permits recovery for certain "reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 5325(a)(2). As explained above, "compliance with the terms of the contract" requires the Tribe to use program income to further the contract's general purposes. When the Tribe uses program income to fund services, those services require administrative support, yielding overhead costs. If the

Tribe did not provide the administrative support, it could not offer the healthcare services. As such, the activities that generate overhead costs are "activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract." *Id.* Under Section 5325(a)(2), the Tribe may recover the "reasonable costs" of those activities. *Id.*

Moreover, Section 5325(a)(2) encompasses costs arising from activities carried out "to ensure compliance with the terms of the contract *and prudent management*" (emphasis added). *Id.* When a tribe expends program income on services, "prudent management" would necessitate providing an appropriate measure of administrative support. Those support activities hence "must be carried on by a tribal organization as a contractor to ensure … prudent management," *id.*, entitling the Tribe to recover the "reasonable costs" of those activities.

Section 5325(a)(2) also requires that costs "(A) normally are not carried on by the respective Secretary in his direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract." The government does not dispute that these criteria are satisfied. As such, the contract support costs at issue in this case are recoverable under Section 5325(a)(2).

C. The Government's Textual Arguments Fall Short.

The government's contrary textual arguments largely rely on inapposite provisions of ISDA, and in any event, misconstrue those provisions.

The government opens its argument by asserting that Section 5325(a)(2) is "tied to" the contract-funding mechanism in Section 5325(a)(1). Pet. Br. 21. It highlights the phrase "contract *support* costs" in Section 5325(a)(2), and then says: "*i.e.*, complementary funding that *supports* the tribe's execution of the program transferred under the contract and funded by IHS appropriations." *Id.* That "*i.e.*" has no basis in the statutory text. Nothing in Section 5325(a)(2) suggests that contract support costs are "tied to," or limited to, programs "funded by IHS appropriations."

Next, the government observes that Section 5325(a)(2) contemplates a comparison to how IHS would have carried out the transferred program. Pet Br. 21. It then states, incorrectly, that the contract support cost obligation "is accordingly limited to those costs that a tribe incurs in carrying out the contracted program in the Secretary's stead using the Secretarial amount transferred to the tribe." Pet. Br. 21-22. Again, that "accordingly" is not supported by anything in the statutory text. The statute does not actually say that contract support costs are limited to costs incurred when the Tribe spends the Secretarial amount. This is the government's gloss.

The government proceeds to offer a single paragraph on Section 5325(a)(3)(A), which merely summarizes the

statutory text without actually explaining why the Tribe does not satisfy it. Pet. Br. 22-23. The government then declares that "[w]hether considered separately or taken together"—a telltale sign that the government does not have a clear view on which statutory provision it is actually relying on—ISDA's provisions foreclose recovery of the disputed contract support costs in this case. Pet. Br. 22. The government's paragraph of explanation does not cite any particular provision; the government simply asserts that it deserves to win. This purported textual analysis is an extremely thin basis to deny the Tribe its contract support costs.

Moreover, the government's theory boils down to its view that services cannot be "the subject of the contract" or "pursuant to the contract" under Sections 5325(a)(3)(A)(i) and (ii) unless funded by the Secretarial amount. Yet that argument is in significant tension with ISDA's mandatory "model agreement," which includes the following provision: "The annual funding agreement under this Contract shall … contain … a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree." 25 U.S.C. § 5329(c), sec. 1(f)(2)(A)(ii); *see* J.A. 140. The model agreement presupposes that the "programs, services, functions, and activities" described in the "funding agreement under this Contract" include those "supported by financial resources other than those provided by the Secretary," directly contrary to the government's premise.

The government then embarks on a "wider look" at ISDA, Pet. Br. 23 (quotation marks omitted), but that voyage through the statute comes up empty.

The government first points to Section 5325(m)(2), which provides that the receipt of program income "shall not be a basis for reducing the amount of funds otherwise obligated to the contract." 25 U.S.C. § 5325(m)(2). The government declares that it "would have been odd" for Congress to say this if Congress had also wanted the tribes to recover contract support costs. Pet. Br. 23. But there is nothing "odd" about this. Congress had an obvious reason for clarifying that program income should not reduce the Secretarial amount: if it did not, the Secretary might say that the tribes had received sufficient funds from program income and therefore did not need more money from the Secretary. There is no basis for drawing a negative inference that Congress did not want tribes to get contract support costs of the kind at issue here.

Indeed, the opposite inference is more plausible. Congress enacted Section 5325(m), which addresses program income, and 5325(a)(3)(A) at the same time. Congress had program income squarely in mind when it enacted Section 5325(a)(3)(A), and it could have written that provision to exclude programs funded by program income—but it did not. In view of this drafting history, there is no basis for rewriting Section 5325(a)(3)(A) to include an unwritten limitation to programs funded by the Secretarial amount.

The government next turns to Section 5388(j), which, as the government concedes, is an ISDA Title V provision that does not even apply to this Title I case.

See Pet. Br. 24. Moreover, this provision has nothing to do with contract support costs. It accomplishes a similar function as Section 5325(m)(2)—it ensures that a tribe's receipt of program income shall not *reduce* its funds received from the Secretary. Again, this is a pro-tribe provision that prevents the Secretary from telling tribes that they do not need money from the agency because they are getting it from other sources. This provision, which neither relates to Title I nor relates to contract support costs, provides no support for the government's argument.

The government then deems the "location of Section 5325(m)" to be "telling." Pet. Br. 24-25. According to the government, because Congress did not embed Section 5325(m) in Section 5325(a), it follows that program income should be viewed as a "separate revenue stream unrelated to contract funding." Pet. Br. 25. This argument is perplexing. Program income is undoubtedly a separate revenue stream from the Secretarial amount, but that unremarkable observation does not answer the question of whether activities funded by that separate revenue stream can yield recoverable contract support costs.

To the contrary, ISDA's organization—including the "location of Section 5325(m)"—aligns comfortably with the Tribe's position. Section 5325(a) talks about funds that are received from the Secretary—including the Secretarial amount and *all* contract support costs needed to put the Tribe in the same position as IHS. Section 5325(m) talks about funds that are not received from the Secretary. This is a sensible way of organizing the statute, and it does not remotely support the

inference that the Secretary does not owe all contract support costs needed to put the Tribe in the same position as IHS.

D. Allowing Tribes to Recover Would Align with ISDA's Purpose.

A major thrust of the government's brief is that it would be incongruous for tribes to recover contract support costs stemming from program income expenditures. The opposite is true. Allowing tribes to recover such contract support costs is necessary to ensure that the statute works as intended.

Contract support costs are specifically designed to ensure that tribes are not penalized for entering into ISDA contracts. As explained above, contract support costs reimburse tribes for costs the government does not face (*e.g.*, worker's compensation), or costs that are funded by other appropriations (*e.g.*, personnel and payroll matters). *Supra*, at 7-8. Thus, paying contract support costs ensures that tribes are not penalized for entering into self-determination contracts.

It makes perfect sense that tribes should get the contract support costs at issue in this case: that is the only way to avoid the self-determination penalty.

Consider the following example. Suppose IHS collects $1 million in appropriations and $500,000 in program income with respect to a particular tribe, which it is statutorily required to spend on healthcare. *See* 25 U.S.C. §§ 1621f(a)(1), 1641(c)(1)(B). It will then spend $1.5 million on healthcare, without needing to spend any of that money on overhead costs.

Now, suppose a tribe enters into an ISDA contract with IHS, and similarly collects $1 million in appropriations and $500,000 in program income. In light of Congress' aim "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 the Service," 25 U.S.C. § 1602(7), the tribe should similarly be able to spend $1.5 million on healthcare.

However, under the government's position, the tribe will be unable to do so because of overhead costs. Suppose in this example the tribe incurs $150,000 in overhead costs. Under Northern Arapaho's position, the tribe could collect $150,000 in contract support costs from the government to cover those overhead costs, and therefore keep the full $1.5 million to spend on healthcare, thus fulfilling ISDA's goal of ensuring that tribes are not penalized for entering into ISDA contracts. Under the government's position, the tribe could recover overhead costs *only* for services funded by appropriations. And, because the Secretarial amount funded by appropriations ($1 million) is only two-thirds of the total expenditures ($1.5 million), the tribe could recover only two-thirds of its contract support costs, *i.e.*, $100,000, leaving $50,000 in unfunded costs. The tribe would thus likely have to reduce its healthcare spending by $50,000, making the tribe worse off for having entered into the ISDA contract.[3]

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[3] This simplifies several aspects of the complex calculation

Nothing in ISDA suggests that when Congress decided to fund Indian healthcare via two different funding streams—direct appropriations and program income—it surreptitiously decided to reintroduce the self-determination penalty. Indeed, the legislative history of the 1994 ISDA amendments (which included the additions of Sections 5325(a)(3)(A) and 5325(m)) says the exact opposite:

> [T]he Committee's objective has been to assure that there is no diminution in program resources when programs, services, functions, or activities are transferred to tribal operation. In the absence of section [5325(a)(2)], as amended, a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.

1994 Senate Report at 9.

Even more perversely, if the government prevails, receiving program income could *reduce* the contract support costs tribes may recover from the government *relative to what they would have received if they never collected program income.* This effect arises because

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methodology. For example, it assumes that the tribe has entered into only one funding agreement with IHS. In reality, a tribe may enter into multiple funding agreements, contracts, or grants across all its governmental programs. OMB regulations, along with ISDA and other authorities, prescribe a method of allocating overhead costs to each one. *See* Br. Amicus Curiae of NAFOA (offering detailed explanation of methodology).

overhead costs are a mix of fixed and variable costs and therefore do not increase at a 1:1 ratio with program costs. The government's position would require allocating some portion of those fixed costs to the services funded by program income—thus foreclosing recovery of those fixed costs—even though the tribe *would* have recovered the fixed costs if it had never spent program income.

For example, suppose a tribe spends $1 million in appropriations and $0 in program income, and incurs $100,000 in overhead costs. Both parties agree that the tribe could recover the full $100,000.

Now, suppose that the tribe collects and spends an additional $500,000 in program income on healthcare, yielding a total of $1.5 million in expenditures. However, its overhead costs do not increase 1:1 with the increase in the program base—perhaps only from $100,000 to $125,000. This might occur, for example, because the tribe had to purchase more IT equipment to support the expanded program but the existing IT staff was still sufficient.

Under Northern Arapaho's position, the tribe would recover $125,000, thus allowing it to spend $1.5 million on healthcare. But under the government's position, the tribe could recover only the portion of that $125,000 allocable to the Secretarial amount. Because the Secretarial amount ($1 million) is two-thirds of the total expenditures ($1.5 million), the tribe could recover two-thirds of the overhead, or $83,333. Thus, even though program income expenditures would cause the tribe's overhead costs to go *up* (from $100,000 to $125,000), the tribe's recovery of contract support costs would go *down*

(from $100,000 to $83,333). Nothing in ISDA suggests that *spending* program income—and thus *increasing* overhead costs—should *reduce* recovery of contract support costs.

The government's efforts to reconcile its position with the statutory objective are unpersuasive. First, the government claims: "While federal law obligates tribes to spend third-party income for a health-related purpose, that obligation is not unfunded—the third-party income itself is the funding." Pet. Br. 28 (citations omitted). What the government is saying here is that the Tribe is free to take the contract support costs from the program income. This is true, but that still leaves the Tribe worse off than IHS, which can use all of the program income for healthcare and have administrative costs paid for by non-IHS funds.

Next, the government claims: "Both with respect to how much third-party income can be earned and how that income may be spent, Congress has placed IHS under *greater* restrictions than contracting tribes—allowing tribes to collect more revenue than IHS in the ordinary course and allowing tribes more flexibility in spending those funds." Pet. Br. 29; *see* Pet. Br. 43-44. This argument fails.

To begin, even if "Congress has placed IHS under *greater* restrictions than contracting tribes," Pet. Br. 29, that would not imply that Congress intended to deny contract support costs. The point of ISDA is to give tribes, who are closer to and more knowledgeable about the service population, additional flexibility. Thus, placing fewer restrictions on tribes would not suggest

that Congress would have wanted to re-create the self-determination penalty.

In any event, the government's theories about why tribes do not "stand in IHS's shoes," Pet. Br. 29, do not withstand scrutiny.

The government first observes that when IHS runs healthcare services, IHS decides whether to serve non-Indians with the tribe's consent, whereas when a tribe enters into an ISDA contract, this is up to the tribe alone. Pet. Br. 29. This is irrelevant. In deciding whether to serve non-Indians, tribes with ISDA contracts are statutorily required to apply the identical substantive considerations as IHS. 25 U.S.C. § 1680c(c)(2). While ISDA allows contracting tribes to apply those substantive considerations by themselves, this is what one would expect from a statute called the "Self-Determination Act." The government's point has no discernible bearing on whether Congress would have intended to deny contract support costs.

The government next states that IHS (unlike contracting tribes) "first" spends money to ensure a program's compliance with relevant Medicaid and Medicare authorities. Pet. Br. 29. This distinction is illusory. Tribes, too, maintain compliance with Medicaid and Medicare authorities using program income. *See* 25 U.S.C. § 1641(d)(2)(A). Moreover, Northern Arapaho's contract requires the Tribe to "maintain accreditation standards in order to qualify for funds through third party-payers." J.A. 186. Just like IHS, then, if a tribe does not ensure that it complies with Medicaid and Medicare requirements, it will lose access to those revenues.

The government finally raises the point that various appropriations riders bar IHS from spending appropriated funds on new facilities (which are funded via a distinct facilities-specific appropriations process), whereas tribes can spend program income on new facilities. Pet. Br. 30. The government posits that tribal contractors "could build new hospital facilities using Medicare and Medicaid proceeds from a contracted program," and "collect contract support costs from IHS to subsidize the construction expenditures." Pet. Br. 31. The government expresses fear of tribes building "new facilities to generate even more third-party income," yielding a "cycle of ever-expanding federal outlays." *Id.*

The government's argument is meritless. For starters, according to the applicable regulations, construction expenditures would largely be excluded from the cost base for purposes of calculating contract support costs.[4] Therefore, contract support costs cannot "subsidize the construction expenditures." *Id.*

Even setting aside those regulations, no "cycle" will occur. Contract support costs reimburse the tribes for out-of-pocket overhead expenses actually incurred by the tribes. Once those expenses are paid, the well of contract support costs runs dry—the tribes cannot use those costs to fund new projects leading to new contract support costs, as the government suggests.

Finally, the government represents that "IHS has informed this Office that it estimates that the added

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[4] More precisely, construction costs are largely composed of capital expenditures and subcontractor costs, which are excluded from the cost base. 2 C.F.R. pt. 200, App. VII, ¶ C.3.e.

financial impact of the decisions below, if affirmed, would fall somewhere between $800 million and $2 billion annually." Pet. Br. 44. Even assuming this number (which is not in the record) is accurate, it does not warrant a ruling in the government's favor. If the government believes these costs are too high, it should direct its complaint to Congress.

II. Section 5326 Does Not Preclude IHS from Paying the Disputed Contract Support Costs.

Section 5326 provides that contract support costs "may be expended only for costs directly attributable to contracts, grants and compacts pursuant to [ISDA] and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service." 25 U.S.C. § 5326. Contrary to the government's contention, Section 5326 does not apply to the disputed contract support costs in this case.

To begin, the costs at issue are "directly attributable to" the ISDA contract. The ISDA contract requires the Tribe to collect program income. It then requires the Tribe to spend that money to further the contract's general purposes. When a contract *requires* a tribe to collect program income and then *requires* the tribe to spend that program income on healthcare, costs resulting from those expenditures qualify as "directly attributable" to the contract.

This case is dramatically differently from *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), which, as the government acknowledges (Pet. Br. 8), Section 5326 was intended to override. In *Lujan*, the Tenth Circuit construed ISDA to require the government to pay contract support costs incurred in connection with a contract with New Mexico that had no relationship to any ISDA contract. That is nothing like this case, where the ISDA contract itself compels the tribe to collect and spend the program income.

The government insists that this argument would give insufficient weight to the word "directly." Pet. Br. 26, 41-42. Not so. The word "directly" ensures tribes cannot recover contract support costs several steps down the causal chain. In *Lujan*, for example, the ISDA contract was, in part, for law enforcement, while the state contract was, in part, for juvenile offender restitution programs. 112 F.3d at 1458–59. Those juvenile offender restitution programs were arguably *indirectly* attributable to the ISDA contract: after all, the law enforcement activities funded by the ISDA contract gave rise to prosecutions of juveniles, which in turn gave rise to the need for restitution. The word "directly" forecloses an argument that contract support costs arising from juvenile offender restitution programs are recoverable on that basis.

That is not the Tribe's theory here, however. Rather, the ISDA contract *itself* directs the Tribe to expend program income to further the contract's general purposes, thus satisfying Section 5326's "directly attributable" requirement.

Next, the government contends (Pet. Br. 26-27, 42-43) that the contract support costs at issue in this case are "associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service." 25 U.S.C. § 5326. The government's theory is that "[t]o receive Medicare and Medicaid reimbursement, tribal providers enter into agreements with Medicare and Medicaid authorities" or "private insurers." Pet. Br. 27. According to the government, the contract support costs at issue here are "associated with" those agreements and hence not recoverable.

This argument similarly lacks merit. To begin, the Court should not view Section 5326's two clauses as "contain[ing] two prohibitions." Pet. Br. 25. Instead, as Judge Moritz explained below, they are "two different sides of the same limitation." Pet. App. 25a n.12. Section 5326 expresses a single idea: contract support costs may be paid if they are directly attributable to ISDA contracts *as opposed to* contracts with third parties. Congress regularly drafts statutes this way. *E.g.*, 38 U.S.C. § 1984(i) ("All such judgments shall constitute final settlement of the claim and no appeal therefrom shall be authorized.").

Even assuming Section 5326's second clause must be analyzed separately, the contract support costs at issue are not barred by that clause.

Section 5326 excludes "contract support costs … associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement" between a tribe and a third party. 25 U.S.C.

§ 5326. Under the natural meaning of Section 5326, contract support costs are "associated with" a "contract" if they are costs of supporting work under that contract.

The phrase "contract support costs" assumes that a contract exists; that the contract requires the tribe to do work; and that the work generates support costs. In ordinary English, then, "contract support costs" are "associated with" a "contract" if they are costs to support work under that contract. Or, put another way: "contract support costs" are "associated with" a "contract" if that contract is the one referred to in the phrase "*contract* support costs."

This interpretation fits the remaining enumerated types of contracts perfectly. Section 5326 refers to "any contract, grant, cooperative agreement, self-governance compact, or funding agreement." *Id.* All of these are agreements in which a tribe is given money and required to do work with that money in a manner that generates overhead costs.

This interpretation of "contract" and "associated with" also fits Section 5326's history perfectly. In *Lujan*, the tribe entered into a contract with New Mexico to provide on-reservation programs, and the disputed contract support costs arose from the tribe's work under that contract. 112 F.3d at 1458-59. Under this interpretation, the costs were unquestionably "associated with" the tribe's "contract" with New Mexico. Thus, Section 5326 would bar a tribe from recovering those costs, exactly as Congress intended.

Under that natural interpretation, the provider agreements with Medicare or Medicaid are not

"contracts" within the meaning of Section 5326. Rather than setting forth work requirements that will generate contract support costs, they set forth compliance requirements that allow the tribes to become eligible for Medicare and Medicaid.

Moreover, the contract support costs are not "associated with" those provider agreements. Those costs do not support any work done under those agreements. Instead, those agreements merely serve as the predicate for the tribe *collecting* program income, which it *then* spends on *additional services* that comply with the ISDA contract, in turn generating contract support costs. It is the work *under the ISDA contract* that is generating contract support costs. As such, the contract support costs are "associated with" the ISDA contract, not the Medicare and Medicaid provider agreements.

Even if the phrase "associated with" stretches more broadly than the interpretation just described, the government could not show that the disputed costs are "associated with" the third-party contracts in this case. The degree of association is extremely weak. The expenditures giving rise to the contract support costs have little to do with the provider agreements. Those agreements merely laid the groundwork for the Tribe to recover program income, which may have occurred long before the Tribe actually spends the money and incurs the contract support costs it seeks to recover.

In addition, the government's broad interpretation of "associated with" would carry absurd consequences. If Section 5326 really barred recovery of contract support costs that have a generalized "association" with *any type*

of contract, then the Tribe could not recover, for example, the cost of a consultant who provides administrative support, because the Tribe contracts with the consultant, and could not recover the cost of accounting software, because the Tribe purchases a license (a type of contract) from the software company.

Seeking to avoid these absurd consequences, the government limits its position to contracts that lead to the Tribe receiving money. Pet. Br. 42-43. This limitation is atextual. Indeed, the Tribe's contract support costs have a much closer "association" to the worker's compensation insurance agreement or software license—which are the very costs that the Tribe is seeking to recover—than they do to the asserted Medicare or Medicaid agreement that, at some prior time, allowed the Tribe to recover program income.

Finally, it bears noting that even under the government's position, not all program income is "associated with" third-party contracts. While tribes do enter into the basic provider agreements required for participation in Medicare and Medicaid programs, they are not required to have agreements with private insurers. They *may* enter into such agreements, but federal law authorizes tribes to bill private insurers even in the absence of a pre-existing contract with the insurer. 25 U.S.C. § 1621e(a). And, with respect to program income derived from other sources, such as tort claims, § 1621e(e)(3)(A), there is not even arguably any third-party "contract" at issue.

Thus, under the government's position, the recoverability of contract support costs would turn on the seemingly random question of whether, for example,

a tribe happened to have a provider agreement with Aetna when it billed Aetna for services to covered beneficiaries prior to using those collections for additional services giving rise to overhead costs. This could not be what Congress intended when it enacted Section 5326.

III. To the Extent the Contract and ISDA Are Ambiguous, the Tribe Prevails.

For the above reasons, the text unequivocally entitles the Tribe to contract support costs for those portions of its healthcare program funded by third-party revenues. But even if the text is ambiguous, the Tribe prevails.

A. Ambiguities Must Be Construed in Favor of the Tribe.

This Court has long held that "Indian treaties are to be interpreted liberally in favor of the Indians, and … any ambiguities are to be resolved in their favor." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999) (internal quotation marks omitted). Likewise, "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quotation marks omitted).

Here, the liberal-construction principle is not only rooted in the common law but is mandated by both the statute and the contract at issue. ISDA's mandatory "model agreement" provides: "Each provision of the [ISDA] and each provision of this Contract shall be

liberally construed for the benefit of the Contractor." 25 U.S.C. § 5329(c), sec. 1(a)(2). That language is incorporated into Northern Arapaho's contract. J.A. 124. Thus, *both* the statute *and* the contract expressly recite that *both* the statute *and* the contract are construed liberally in the Tribe's favor.

In a previous case addressing contract support costs, this Court interpreted that exact language to mean that "[t]he Government, in effect, must demonstrate that its reading is clearly required by the statutory language" and is "unambiguous[ly] correct." *Salazar*, 567 U.S. at 194, 197 (second alteration in original) (quotation marks omitted). The same standard governs this case.

Crucially, the liberal-construction provision requires that "each provision" of ISDA and the parties' contract be construed liberally in the Tribe's favor. The government emphasizes that ISDA's provisions must be viewed holistically rather than individually. Pet. Br. 46-47. But this case presents the Court with multiple analytically discrete interpretive disputes arising from multiple distinct ISDA provisions—whether Section 5325(a)(3)(A) stands independent of Section 5325(a)(2), the proper interpretation of "associated with" in Section 5326, and so forth. Under the contract's plain text, the liberal-construction canon is not applied as a tiebreaker at the end of the case; rather, "each provision" of the statute and contract is construed liberally in the Tribe's favor.

Finally, ISDA includes a separate provision stating that "each 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." 25 U.S.C. § 5321(g).

Section 5321(g) was enacted in 2020, after the parties entered into the contract at issue in this case. Because the contractual liberal-construction requirement unquestionably applies here, it is unnecessary to decide whether Section 5321(g) additionally applies.

If the Court reaches the issue, however, it should hold that Section 5321(g) does apply. Section 5321(g) codifies the pro-Indian canon of construction which appeared both in the common law and in all ISDA contracts. When a statute codifies a pre-existing principle, the court should apply the statute, even as applied to conduct predating the statute's enactment. *See Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 720-21 (1974) (applying fee statute retroactively because court had pre-existing equitable authority to award fees); *Landgraf v. USI Film Products*, 511 U.S. 244, 277-78 (1994) (explaining that under *Bradley*, retroactive application of statute was proper because fees "would be assessed under pre-existing theories" and new statute therefore "d[id] not impose an additional or unforeseeable obligation" (quotation marks omitted)). As such, applying Section 5321(g) would present no retroactivity concern.

B. Under the Liberal-Construction Canon, the Tribe Prevails.

The contract's liberal-construction provision requires a ruling in the Tribe's favor. The government's case founders for a basic reason: none of the

government's arguments are based on the unambiguous text of any particular provision of ISDA.

The primary interpretive dispute in this case concerns the phrases "Federal program that is the subject of the contract" and "Federal program … pursuant to the contract." 25 U.S.C. § 5325(a)(3)(A)(i), (ii). It is at least *reasonable* to construe these phrases to encompass healthcare services funded by program income when (1) IHS spends program income on healthcare and (2) the ISDA contract mandates that the Tribe spend program income on healthcare services. There is nothing resembling a clear statement in ISDA that the "Federal program" is limited to programs funded with the Secretarial amount. Indeed, the government's brief is not even clear on which provision it thinks is unambiguous in its favor: it merely gestures towards the "mutually reinforcing provisions of the statutory scheme." Pet. Br. 46.

The government's subsidiary arguments similarly do not work under the liberal-construction requirement. Consider, for example, the government's reliance on Section 5325(m)(2), which provides that program income "shall not be a basis for reducing the amount of funds otherwise obligated to the contract." § 5325(m)(2). On its face, this provision does not look helpful to the government: not only does it have nothing to do with contract support costs, it is a pro-tribal provision that bars IHS from reducing direct payments to tribes on account of program income. The government's argument rests on an oblique negative inference: "It would have been odd for Congress to see a need to clarify that a tribe's receipt of third-party income cannot *reduce*

contract funding if Congress understood third-party income to be a basis for *increasing* contract funding under Section 5325(a)(2) and (3)." Pet. Br. 23.

As explained above, the Tribe believes this inference is baseless. But even if this inference had some basis, it plainly would be impermissible under a liberal-construction canon. If the liberal-construction canon means anything, it prevents a court from drawing this type of negative inference from a provision that, on its face, is silent on contract support costs.

The same analysis applies to the remainder of the government's arguments. They are based on delicate inferences that cannot survive any liberal-construction canon, *e.g.*, Pet. Br. 23-24; highly contestable interpretations of words like "directly" *e.g.*, Pet. Br. 25-27; and raw policy concerns about excess spending, *e.g.*, Pet. Br. 44-46.

The very fact that the government must resort to arguing, for example, that the Court should draw a negative inference from a pro-tribal provision in a concededly inapplicable section of ISDA, Pet. Br. 24, is proof positive that the text is not unambiguous in its favor. "At minimum," the fact that the courts below "do not share the [government's] reading … is strong evidence that its reading is not, as it claims, 'unambiguous[ly]' correct." *Salazar*, 567 U.S. at 197 (second alteration in original). Because the government's interpretation is not "clearly required by the statutory language," *id.* at 194, the Tribe should prevail.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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