Nos. 23-250 and 23-253

In the Supreme Court of the United States

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

v.

SAN CARLOS APACHE TRIBE

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

v.

NORTHERN ARAPAHO TRIBE

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

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AND VARIOUS TRIBES AND TRIBAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The National Congress of American Indians, founded in 1944, is the oldest and largest tribal government organization in the United States. NCAI serves as a forum for consensus-based policy development among its membership of over 250 tribal governments from every region of the country. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments. NCAI and its members worked with Congress to secure the enactment of the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 5302 – 5423, and the many subsequent amendments to it. They have considerable experience with the history and operation of self-determination contracts under the Act.

Amici Choctaw Nation of Oklahoma, Alaska Native Tribal Health Consortium, Citizen Potawatomi Nation, Coquille Indian Tribe, Forest County Potawatomi Community, Intertribal Association of Arizona, Inc., Mille Lacs Band of Ojibwe, Navajo Nation, Prairie Band Potawatomi Nation, Pueblo of Acoma, Pueblo of San Felipe,

[1] Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

Saint Regis Mohawk Tribe, Santee Sioux Nation, United South and Eastern Tribes are tribal governments or tribal organizations whose members have contracted or compacted with the U.S. Department of Health and Human Services (HHS) under ISDA to provide a Federal program of health care services to Indians that formerly were provided by the Indian Health Service (IHS).

IHS and tribes that contract or compact under ISDA to provide a Federal program of healthcare services to Indians must collect payment for these services from Medicare, Medicaid or insurers whenever possible. While IHS reimburses tribes for the "contract support costs" that they incur in providing services that are paid for by agency appropriations, it refuses to reimburse such costs when they are incurred in providing program services that are paid for with reimbursements from Medicare, Medicaid, or insurers. As a result, tribes are forced to limit or reduce services, or use tribal funds to cover these costs. Amici therefore have a vital interest in the outcome of these consolidated appeals.

SUMMARY OF ARGUMENT

This brief focuses on the history and evolution of the ISDA contract support costs provisions. To ensure that tribal contractors are fully reimbursed for all the costs they incur in operating a Federal program, Congress provided for reimbursement of all their contract support costs. Subsequently, it

amended this provision to clarify that such costs include any expense "related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program." 25 U.S.C. § 5325(a)(3)(A). The expenses at issue here clearly qualify under this broad standard.

ISDA is a revolutionary statute crafted by Congress to shift the administration of Federal programs for Indians from federal agencies to Indian tribes and tribal organizations (collectively "tribes").[2] Indian tribes that contract or compact with IHS to administer a federal health program for Indians pursuant to ISDA are required to provide services to all Indians eligible for services at their facilities.

Congress has amended ISDA multiple times to ensure that tribal contractors are not shortchanged and to counter the federal agencies' grudging resistance to transferring federal authority and funding to tribes. Originally, ISDA required the federal agencies to provide contracting tribes only with the amount of funds that the Secretary would have otherwise provided for the operation of the program. See 25 U.S.C. § 5325(a)(1). However, this "secretarial amount" failed to adequately reimburse tribes' indirect administrative costs. Thus, Congress amended ISDA in 1988 to reimburse such costs and again in 1994 to clarify that this covers all direct and

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[2] An "Indian tribe" and "tribal organization" are defined in 25 U.S.C. § 5304(e) and (l).

indirect costs a tribe incurs in operating the Federal program. *See* 25 U.S.C. § 5325(a)(3)(A) ("contract support costs … shall include … any … 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"). In 2020 Congress reiterated that contract support costs include any overhead expense connected with the operation of the Federal program at issue.

Federal Indian healthcare programs have been expanded by Congress over time to include not only appropriated funding for IHS but also payments from Medicare, Medicaid, and insurers. Congress requires both IHS and tribal contractors to bill as many Indian healthcare services as possible to these third parties. ISDA terms the payments received from these third parties "program income," 25 U.S.C. §§ 5325(m), 5388(j), because it is part of the Federal health program that a tribe operates under ISDA. And Congress requires program income to be spent by tribes to support the purposes of the contracted program.

Tribes incur the same indirect costs in providing services pursuant to an ISDA contract or compact regardless of whether those services themselves are ultimately paid for by IHS funding or, instead, by program income. ISDA entitles them to reimbursement for all of these indirect costs.

Tribal entitlement to these contract support costs is not affected by a funding limitation, 25 U.S.C. §

5326, which prohibits expenditure of IHS funds to pay indirect costs incurred by tribes in performing contracts with other federal and state agencies. That provision is inapplicable here because the costs at issue are incurred in performing the tribe's contract or compact with IHS.

ARGUMENT

I. ISDA COMPENSATES TRIBES FOR ALL CONTRACT SUPPORT COSTS THAT THEY INCUR IN OPERATING THE FEDERAL PROGRAM

In 1970, President Nixon resolved to make self-determination the official federal Indian policy and proposed a legislative package designed to transfer to Indian tribal governments the administration of Federal programs that benefit Indian people. *See* President Nixon's Message To Congress Transmitting Recommendations For Indian Policy, H.R. Doc. No. 91-363 (1970).[3] Five years later Congress enacted ISDA. Pub. L. No. 93-638, 88 Stat. 2203 (1975).

Congress enacted ISDA to further the goal of self-determination by assuring maximum Indian participation in the management of Federal

[3] The message noted that "[n]o tribe would risk economic disadvantage from managing its own programs; under the proposed legislation, locally-administered programs would be funded on equal terms with similar services still administered by Federal authorities."

programs and services for Indians. *See* Pub. L. 93-638, § 3, 88 Stat. 2204 (codified at 25 U.S.C. § 5302). The Act provides that tribes may enter into "self-determination contracts" with the Secretary of the Interior and the Secretary of Health and Human Services ("HHS") to administer programs or services that otherwise would have been administered by the federal government. *See id.*, §§ 102(a)(1), 103(a), 88 Stat. 2206-2207 (codified at 25 U.S.C. § 5321(a)(1)).

"As originally enacted, ISDA required the Government to provide contracting tribes with an amount of funds equivalent to those that the Secretary 'would have otherwise provided for his direct operation of the programs.'" *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 186 (2012) (citation omitted). However, "[i]t soon became apparent that this secretarial amount failed to … adequately … reimburse tribes' indirect administrative costs, [and so] Congress amended ISDA to require the Secretary to contract to pay the 'full amount' of 'contract support costs' related to each self-determination contract[.]" *Id.* (internal quotations and citations omitted).

A. THE 1988 AMENDMENTS TO ISDA

Congress first addressed contract support costs in 1988 when it enacted a series of amendments to ISDA. *See* Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100-472 (1988). It identified "the failure of the [Secretaries] to provide funding for the indirect costs associated with self-determination contracts" as

"[p]erhaps the single most serious problem with implementation of the Indian self-determination policy." S. Rep. No. 100-274, at 8 (1987). It explained that "[t]he 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." *Id.* Consequently, "[t]ribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility." *Id.* at 8-9.

The legislators concluded that "[t]he most relevant issue is the need to fully fund indirect costs associated with self-determination contracts." *Id.* at 12. Accordingly, the Secretaries "should request the full amount of funds from the Congress that are adequate to fully fund tribal indirect costs," and "must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." *Id.*

The Senate Committee emphasized that under self-determination contracts, tribes were "operating Federal programs and carrying out federal responsibilities." *Id.* at 9. They "should not be forced to use their own financial resources to subsidize Federal programs." *Id.* Moreover, to the extent that

contracting with tribes might entail additional administrative costs at the tribal level, such expenditures directly served a "fundamental objective of the federal policy of Indian self-determination," which is "to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members." *Id.* at 5.

Accordingly, Congress added a new section 106 to the Act [now 25 U.S.C. § 5325] "to clarify provisions for funding self-determination contracts, including indirect costs." S. Rep. 100-274 at 30 (1987). This section, entitled "Contract Funding and Indirect Costs," provided that:

> (2) There shall be added to the amount required by paragraph (1) [the secretarial amount] contract support costs which shall consist of 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.

Pub. L. 100-472, § 205, 102 Stat. 2292 (codified at 25 U.S.C. § 5325(a)(2)).

Congress noted, however, that the term "'contract support costs' … cannot be operationally defined"

and that it wanted to ensure "the payment of indirect costs associated with self-determination contracts." S. Rep. 100-274 at 18. Toward that end, it provided definitions for the terms "indirect costs" and "indirect cost rate," but did not define "contract support costs." It specified that:

> (f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;
>
> (g) "indirect costs rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

Pub. L. 100-472, § 103, 102 Stat. 2286 (codified at 25 U.S.C. §§ 5304(f) & (g)).

Another new provision, designated as section 106(g), provided that, upon tribal request, funds provided for contract support costs would become part of the recurring annual funding under the contract. *Id.*, 102 Stat. 2294 (codified as amended at 25 U.S.C. § 5325(g)).

"Most contract support costs are indirect costs generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 635 (2005). To ensure that this methodology does not overcompensate a tribe's actual expenses, Congress limited how indirect costs

are to be calculated with respect to construction contracts. It specified that "the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors." Pub. L. 100-472, § 205, 102 Stat. 2294 (codified at 25 U.S.C. § 5325(h)). The legislative history explains that "a tribe is entitled to the full amount of indirect costs based on the total amount of funding if the tribe conducts its own construction … [but] [i]f the tribe subcontracts the construction, the tribe will be able to collect indirect costs only on the amount of funds used by the tribe to oversee the construction subcontract(s)." S. Rep. 100-274 at 34. Congress tied indirect costs to the amount of funds actually used by the tribe to perform its responsibilities under the contract.

Finally, Congress added a new section 110 to ISDA which gave tribal contractors a sweeping right to judicial review of each agency's implementation of the Act. Tribes can sue for damages for breach of a self-determination contract in either a federal district court or the Court of Federal Claims. And they can seek injunctive relief or mandamus in a district court for any agency action contrary to the Act or the applicable regulations. Pub. L. 100-472, § 206, 102 Stat. 2295 (codified at 25 U.S.C. § 5331). These extraordinary remedies were necessary because "contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs" while "[e]xisting law affords

such contractors no effective remedy for redressing such violations." S. Rep. 100-274 at 37. In sum, "Congress intended the ISDA to limit the Secretary's discretion in funding matters and to provide for judicial review of all of the Secretary's actions." *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1347 (D.C. Cir. 1996).

B. THE 1994 AMENDMENTS TO ISDA

Just six years later, Congress made additional extensive revisions to ISDA. *See* Indian Self-Determination Contract Reform Act of 1994, Pub. L. 103-413, tit. I, 108 Stat. 4250 (1994). "[A] major impetus for this bill" was that the agencies had "fail[ed] … to respond promptly and appropriately to the comprehensive amendments developed by this Committee six years ago." *Id.* at 14. Congress acted to "limit the promulgation of regulations under the [ISDA] and to prescribe the terms and conditions which must be used in any self-determination contract." S. Rep. No. 103-374, at 1 (1994).

Congress ended its delegation to the Departments of general rulemaking authority with respect to ISDA and strictly limited it to certain areas (which did not include contract support costs). *See* Pub. L. 103-413, § 105, 108 Stat. 4269-4270 (amending ISDA § 107) (now codified at 25 U.S.C. § 5329). Congress also removed the Secretaries' authority to promulgate the terms and conditions for ISDA contracts, and instead mandated a statutory form of contract. *See id.*, § 103, 108 Stat. 4260-4268 (enacting ISDA § 108) (codified as later further

amended at 25 U.S.C. § 5329). Congress noted that the contract provisions would eliminate the need for regulations. S. Rep. No. 103-374, at 3. And Congress included in the statutory form of contract a rule of construction:

> Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the … related functions, services, activities, and programs (or portions thereof) [listed in the Contract], that are otherwise contractable under section 102(a) of such Act [25 U.S.C. § 5321(a)], including all related administrative functions, from the Federal Government to the Contractor[.]

25 U.S.C. § 5329(c) (model contract § 1(a)(2)). This rule "incorporated the longstanding canon of statutory interpretation that laws enacted for the benefit of Indians are to be liberally construed in their favor." S. Rep. No. 103-374, at 11.

Congress again addressed contract support costs, both in its revisions of the Act and in the newly prescribed form of contract, with the goal of ensuring that "there is no diminution in program resources when programs, services, functions, or activities are transferred to tribal operation," and that tribes are not "compelled to divert program funds to prudently manage the contract." *Id.* at 9.

It amended section 25 U.S.C. § 5325(a) to "more fully define the meaning of the term 'contract

support costs' as presently used in the Act, defining it to include both funds required for administrative and other overhead expenses and 'direct' type expenses of program operation." *Id.* at 8-9. A new paragraph (3)(A) provided:

> The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—
>
> (i) direct program expenses for the operation of the Federal program that is the subject of the contract, and
>
> (ii) any additional administrative or other expense 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,
>
> except that such funding shall not duplicate any funding provided under section 106(a)(1).

Pub. L. 103-413 § 102(14), 108 Stat. 4257-4258 (codified at 25 U.S.C. § 5325(a)(3)).[4]

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[4] On the floor of the House, Rep. Richardson emphasized that "[t]he Committee wishes to make clear that by adding a new paragraph (3), the Congress is not creating a third funding category in addition to direct and contract support costs." 140 Cong. Rec. H11142 (daily ed. Oct. 6, 1994).

A new subsection (3)(B) [now codified at 25 U.S.C. § 5325(a)(3)(C)] gave tribes the option to negotiate funding for contract support costs annually. Congress noted, however, that this amendment "does not alter the process employed by many tribal contractors for negotiating indirect cost agreements with the appropriate cognizant agency for purposes of cost-recovery accounting under the Act." S. Rep. No. 103-374, at 9.

Congress also amended 25 U.S.C. § 5325(g) to eliminate the need for a tribal request in order for contract support costs to become part of the recurring annual funding under the contract. Instead, it mandated that "the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under section 106(a)," which includes support costs. Pub. L. 103-413 § 102(17), 108 Stat. 4259.

Congress repeated this requirement in the statutory form of contract, which provides that "the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement …. Such amount shall be no less than the applicable amount determined pursuant to Section 106(a)" – which includes both the secretarial amount and contract support costs. 25 U.S.C. § 5329(c) (model contract § 1(b)(4)); *see also id.* (model contract §§ 1(b)(6)(B)(i), 1(c)(2)). The statutory contract thus expressly incorporates contract support costs into funding agreements, which was the intent of Congress. *See* S. Rep. No. 103-374, at 11 ("Section 1(b)(3) of the model contract … references the

funding amounts provided in Section 106(a) of the Act. That section provides that the Contractor shall receive no less than [the secretarial amount], plus funding for contract support cost needs.").

In addition to amending the provisions of section 106 addressing indirect costs, Congress also removed agency barriers to certain allowable uses that a tribe can make of its direct funding under a self-determination contract. It explicitly authorized tribal contractors to expend funds for twelve different purposes "to the extent that the expenditure of the funds is supportive of a contracted program," including depreciation, building and facilities costs, and costs for capital assets and repairs. Pub. L. 103-413 § 102(19), 108 Stat. 4259-4260 (now codified at 25 U.S.C. § 5325(k)). Because allowable direct costs form the base from which indirect costs are calculated, this amendment also expanded the indirect costs tribes are entitled to receive.

C. THE 1998 SPENDING LIMITATION

In 1998 Congress added a provision to override a Tenth Circuit decision that had construed ISDA to require the Bureau of Indian Affairs ("BIA") to pay indirect costs incurred by a tribe in performing contracts with state agencies when those agencies failed to do so. *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). The Tenth Circuit reasoned that the phrases "reasonable costs" in section 106(a)(2) [25 U.S.C. § 5325(a)(2)] and "associated with" in section 106(d)(2) [§ 5325(d)(2)]

were ambiguous and must be construed liberally in favor of tribal contractors. The court concluded that it was "reasonable and consistent with the legislative history accompanying the 1988 amendments" to require the Interior Department to fund all of the contractor's indirect costs without reduction if other agencies failed to pay their full share of indirect costs. *See* 112 F.3d at 1462-63.[5]

Congress disagreed with this "erroneous decision." H.R. Rep. No. 105–609 at 57 (1998). The House Appropriations Committee recommended the inclusion of language in an appropriations bill "specifying that IHS funding may not be used to pay for non-IHS contract support costs." *Id.* at 108; *see also id.* at 110 (same). Congress adopted this recommendation and provided that:

> [H]eretofore and hereafter and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian

[5] Because the Tenth Circuit was addressing the 1988 version of ISDA, it did not consider the 1994 amendments which had tied contract support costs to the contract at issue, i.e., "the overhead 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).

> Self-Determination Act 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.

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105–277, Div. A, § 101(e), 112 Stat. 2681, 2681–280–2681–281 (1998) (codified at 25 U.S.C. § 5326). The following year, Congress enacted the same limitation with respect to ISDA contracts and compacts entered into by the Interior Department. Pub. L. 106–113, div. B, § 1000(a)(3) [title I, § 113], 113 Stat. 1535, 1501A–157 (1999) (codified at 25 U.S.C. § 5327).

D. THE 2000 AMENDMENTS TO ISDA

In 2000, Congress added provisions which enable tribes to negotiate self-governance compacts, rather than standard contracts, with IHS. Congress had initially created a demonstration project in 1988 that authorized a small group of tribes to negotiate such compacts. *See* Pub. L. 100-472, 102 Stat. 2289 (1988), repealed by Pub. L. 106-260, 114 Stat. 711 (2000). "The hallmark of these agreements was the unprecedented flexibility of tribal contractors to redesign programs and reallocate funding to suit local needs. In effect, these tribes would receive funds in the contractual equivalent of block grants

from the Secretary." Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 32 (2014). The 1988 demonstration project authority addressed both BIA and IHS Federal programs.

In 1994, Congress created a permanent compacting program for BIA by adding a new Title IV to ISDA. *See* Pub. L. 103-413, 108 Stat. 4270 *et seq*. (2000) (codified as amended at 25 U.S.C. § 5361 *et seq*.). In 2000, Congress expanded permanent compacting authority to IHS by adding a new Title V. *See* Tribal Self-Governance Amendments of 2000, Pub. L. 106-260, 114 Stat. 713-731 (2000) (codified at 25 U.S.C. § 5381 *et seq*.).

Title V entitles a tribe to receive no less than the amount of funding, including contract support costs, under a compact as under a Title I contract: "The Secretary shall provide funds … in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) and amounts for contract support costs specified under section 106(a) (2), (3), (5), and (6), including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members …." *Id.* § 508(c), 114 Stat. at 722-723 (codified at 25 U.S.C. § 5388(c)).

Consequently, a tribe may contract or compact with IHS under Title I or Title V, respectively, and may contract or compact with BIA under Title I or Title IV, respectively. A tribe is entitled to the same amount of contract support costs regardless of whether it chooses to contract or compact a Federal program.

E. THE 2020 AMENDMENTS TO ISDA

In 2020 Congress amended the ISDA contract support costs provisions to cover, in addition to overhead expenses, any expenses incurred by the governing body of a tribe in overseeing a self-determination contract. *See* PROGRESS for Indian Tribes Act, Pub. L. 116-180 § 204, 134 Stat. 880-881 (2020). Section 5325(a)(3) was expanded to include "any additional administrative or other expense incurred by the governing body of the Indian Tribe or Tribal organization … in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." Pub. L. 116-180 § 204, 134 Stat. 881 (codified at 25 U.S.C. § 5325(a)(3)(A)(ii)). Congress further provided that not less than 50 percent of such additional expenses "relating to a Federal program, function, service, or activity carried out pursuant to the contract shall be considered to be reasonable and allowable." *Id.*[6]

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[6] Note that this 50 percent floor applies only to the additional expenses incurred by the tribe's governing body, not to overhead (indirect) expenses.

F. The Scope Of Indirect Contract Support Costs Is Broad

The history of ISDA makes clear that Congress has provided for reimbursement of all indirect costs incurred by a tribe in connection with the Federal program that it undertakes pursuant to an ISDA contract or compact. Congress has repeatedly amended the Act to underscore the breadth of the contract support costs provisions.

When Congress initially addressed contract support costs in 1988, it defined them simply as "the reasonable costs for activities which must be carried on by a tribal … contractor to ensure compliance with the terms of the contract and prudent management." *Id.* § 205, 102 Stat. 2292 (codified at 25 U.S.C. § 5325(a)(2)).

Congress "more fully define[d] the meaning of the term 'contract support costs'" in 1994, S. Rep. No. 103-374, at 8, by providing in broad terms that indirect contract support costs are "any additional administrative or other expense related to the overhead incurred by the tribal contractor <u>in connection with the operation of the Federal program, function, service, or activity pursuant to the contract</u>." Pub. L. 103-413, § 102(14), 108 Stat. 4258 (codified as amended at 25 U.S.C. § 5325(a)(3)(A)(ii)) (emphasis added). The focal point was the Federal program that the tribe was operating. Congress reaffirmed this focus in 2020 when it mandated that at least 50 percent of the oversight expenses incurred by a tribe's governing

body "relating to a Federal program, function, service, or activity carried out pursuant to the contract shall be considered to be reasonable and allowable." Pub. L. 116-180 § 204, 134 Stat. 881 (codified at 25 U.S.C. § 5325(a)(3)(A)(ii)) (emphasis added).

Accordingly, the resolution of these cases turns on an examination of the Federal program that tribes carry out pursuant to their self-determination contracts and compacts with IHS. Specifically, the issue is whether tribes are carrying out the transferred Federal program IHS previously operated when they provide services that are ultimately paid for by Medicare, Medicaid, or insurer reimbursements, and use those reimbursements for healthcare expenditures. If so, they are entitled to receive contract support costs under ISDA.

II. OBTAINING AND SPENDING THIRD-PARTY REIMBURSEMENTS ARE PART OF THE FEDERAL PROGRAM TRIBES UNDERTAKE PURSUANT TO ISDA

Federal Indian health programs provide healthcare services to all eligible Indians belonging to the community served by the local facilities and program. *See* 42 C.F.R. § 136.12. Services are provided directly by IHS and by tribes pursuant to ISDA. The federal system consists of 26 hospitals, 59 health centers, and 32 health stations, while tribes administer 19 hospitals, 284 health centers, 79 health stations, and 163 Alaska village clinics. *See* IHS Fact Sheet (April 2017), available at

https://www.ihs.gov/newsroom/factsheets/quicklook/#:~:text=The%20foundation%20of%20the%20IHS,inherent%20sovereign%20rights%20of%20Tribes.

Congress intends the Federal program of healthcare for Indians to be funded, in part, through payments from Medicare, Medicaid, and insurers. IHS acknowledges that "[t]he revenue generated from third-party billing and collections plays a major role in augmenting and enhancing the health care services that are provided to the [Indian] community. Safeguarding this revenue stream and related assets is vital to IHS health care programs." *Indian Health Manual*, Ch. 1, Pt. 5-1.1(B), available at https://www.ihs.gov/ihm/pc/part-5/chapter-1-third-party-revenue-accounts-management-and-internal-controls/.

A. CONGRESS REQUIRES IHS AND TRIBES TO BILL THIRD-PARTY PAYORS TO ENHANCE INDIAN HEALTH SERVICES

The cornerstone law governing federal healthcare for Indians is the Indian Health Care Improvement Act (IHCIA), which has evolved in tandem with ISDA. The year after enacting ISDA, Congress enacted IHCIA in 1976. It amended the Social Security Act to make IHS facilities, whether operated by IHS or by a tribal contractor, eligible to receive reimbursement under Medicare and Medicaid, and to stipulate that such reimbursements would not be considered in determining future appropriations for the agency. *See* Pub. L. No. 94-

437, §§ 401, 402, 90 Stat. 1408-1410 (codified at 42 U.S.C. §§ 1395qq, 1396j).

In 1988 Congress amended both ISDA and IHCIA. It designated additional IHS-operated and tribally-operated facilities as eligible providers under the Medicare and Medicaid programs. Indian Health Care Amendments of 1988, Pub. L. No. 100-713, § 401, 102 Stat. 4818 (1988). Its purpose was "to enable the Indian Health Service to fully utilize all third party resources in the provision of health care to Indian people." S. Rep. No. 100-508 at 22 & 23 (1988) (emphasis added). Congress emphasized that "the authority to collect reimbursements from the Medicare and Medicaid programs is conditioned upon such funds being used only for the purposes authorized in the Act, that is to achieve and maintain compliance with accreditation standards," and "for the purpose of allowing the Indian Health Service to increase the number of Indian patients served through the use of third party resources to which they are entitled, and not as an offset for new budget authority." *Id.* at 22-23.

Congress also authorized a demonstration program enabling tribes to directly bill, and receive payments from, Medicare, Medicaid, or any other third-party payor, rather than submitting bills through IHS. Congress stipulated how such payments must be used: (1) to achieve or maintain compliance with requirements applicable to facilities under Medicare or Medicaid; and then (2) to improve the health resources of the tribe in accordance with IHS regulations applicable to secretarial funding

provided under an ISDA contract. Pub. L. No. 100-713, § 402, 102 Stat. 4818-4819. It explained that this "demonstration program is designed to provide tribal [ISDA] contractors with a greater incentive to maximize their Medicare and Medicaid collections." S. Rep. No. 100-508 at 24.

Subsequently, in 2000, Congress made the direct-billing demonstration program permanent and expanded eligibility under the program to other tribes. *See* Alaska Native and American Indian Direct Reimbursement Act of 2000, Pub. L. No. 106-417, 114 Stat. 1812 (2000) (codified at 25 U.S.C. § 1645 note). In so doing, Congress required that all funds obtained by tribes through direct billing shall be used to achieve or maintain compliance with applicable Medicare or Medicaid requirements for the tribal facility or else for improving the health resources deficiency level of the tribe. *See id.*, § 3, 114 Stat. 1813-1814 (codified as amended at 25 U.S.C. § 1641(d)(2)(A)).

In 2010, Congress added a payor of last resort provision which mandates that health programs operated by IHS or by tribes "shall be the payer of last resort for services provided by such Service, tribes, or organizations to individuals eligible for services through such programs, notwithstanding any Federal, State, or local law to the contrary." The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2901(b), 124 Stat. 333 (2010) (codified at 25 U.S.C. § 1623(b)). Thus, IHCIA enables tribes to bill Medicare, Medicaid and insurers for health services, and <u>requires</u> that they do so where possible.

B. ISDA RECOGNIZES THAT THIRD-PARTY PAYMENTS ARE PART OF THE CONTRACTED FEDERAL PROGRAM

ISDA makes clear that tribes that provide healthcare services to Indian patients are performing a federal function, regardless of whether the funding for those services comes from IHS or a third party payor. For example, it provides that tribes and their employees who are "carrying out" a contract or agreement for the provision of healthcare services are deemed to be part of the Public Health Service. *See* Pub. L. 100–446, title II, § 201, 102 Stat. 1817 (1988) (codified at 25 U.S.C. § 5321(d)). This places tribes in the same position as IHS with respect to liability for medical malpractice, i.e., they are covered by the Federal Tort Claims Act (FTCA). Congress reasoned that "[i]t is clear that tribal contractors are carrying out federal responsibilities." S. Rep. 100-274 at 26.

Moreover, ISDA explicitly recognizes that health-care services covered by Medicare, Medicaid, or insurance are part of the Federal program that is contracted or compacted – it terms reimbursements from those sources "program income." And it regulates how program income can be spent by tribes. A 1994 amendment to ISDA provides that "[t]he program income earned by a tribal organization in the course of carrying out a self-determination contract" "shall be used by the tribal organization to further the general purposes of the

contract." Pub. L. 103-413, § 102(m), 108 Stat. 4260 (codified at 25 U.S.C. 5325(m)).[7] This spending limitation applies to all Title I contracts with IHS, including the contracts at issue here.

Likewise, when Congress added Title V to ISDA in 2000 to permanently authorize compact authority for IHS programs, it designated program income as "supplemental funding" for those compacts:

> PROGRAM INCOME.—All Medicare, Medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement. The Indian tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 et

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[7] In January 1994, HHS and the Interior Department proposed a joint rule to implement ISDA which defined "program income" as "income received by the contractor directly generated by an activity supported by the contract, and earned only as a result of the contract during the term of the contract." 59 Fed. Reg. 3179 (Jan. 20, 1994) (proposed 25 C.F.R. § 900.102). It defined program income as "[i]ncome received by or accruing to the contractor from third party payers, e.g., insurance carriers, Medicare and Medicaid …." *Id.* at 3194 (proposed 25 C.F.R. § 900.409(a)(1)). This definition of "program income" aligned with the definition of that term in OMB Circular A-110. The amendments to ISDA later that year eliminated the agencies' authority to promulgate these regulations. Nonetheless, they illuminate the concept of "program income" as understood by the agencies and Congress.

> seq.) provides otherwise for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

Pub. L. 106-260, § 508(j), 114 Stat. 724 (codified at 25 U.S.C. § 5388(j)).

Three months later, when Congress amended IHCIA to enable all tribes to directly bill Medicare and Medicaid, it required that this program income must be used to achieve or maintain compliance with Medicare and Medicaid requirements or to improve the health resources deficiency of the tribe "in accordance with the regulations of [IHS] applicable to funds provided by [IHS] under any contract entered into under [ISDA]." Pub. L. 106-417, 114 Stat. 1813-1814 (codified as subsequently amended at 25 U.S.C. § 1641(d)(2)(A)). Thus, Congress made program income from Medicare and Medicaid subject to the same regulations as secretarial funding.

Congress tweaked this requirement when it amended 25 U.S.C. § 1641 into its current form as part of the Affordable Care Act. Pub. L. No. 111-148, § 10221(a), 124 Stat. 935 (2010) (enacting § 151 of S. 1790 as reported by the Senate Committee on Indian Affairs in December 2009). It provided that Medicare and Medicaid reimbursements received by IHS must be spent to achieve or maintain compliance with Medicare and Medicaid

requirements or to improve the health resources deficiency of the relevant tribes in consultation with those tribes. *Id.* § 1641(c)(1)(B). For tribes that directly bill Medicare and Medicaid, Congress provided that the reimbursements must be used to make needed improvements in healthcare facilities, or to provide additional healthcare services or improvements in healthcare facilities, or for any healthcare-related purpose consistent with the objectives of the IHCIA set forth in 25 U.S.C. § 1602. To foster its goal of Indian self-determination, Congress gave more leeway to tribes than to IHS in deciding how to spend program income to achieve the purposes of the Federal program.

These IHCIA provisions correlate with ISDA, which specifies that program income earned from operating a Title I contract must be spent to "further the general purposes of the contract," 25 U.S.C. § 5325(m)(1), and that program income is "supplemental funding" for all Title V compacts with IHS. 25 U.S.C. § 5388(j).

In practice, IHS direct funding and third-party payments are used interchangeably by tribes to finance the Indian healthcare programs they administer under ISDA. Tribes typically use a single operational account into which both IHS and third-party funds are deposited. The only material distinction between these two funding sources is when the funds are received by the tribe. IHS transfers appropriated funds to tribes in lump sums at the start of the program year (or thereafter when funds are appropriated) to pay prospectively for the

delivery of health services. Tribes use these funds to cover the costs of treating all Indians whom they serve under the ISDA contract or compact. Tribes then bill third parties for reimbursement after services are provided to eligible patients. When those reimbursements are received, they are added to the tribe's operational account as program income and then subsequently expended.

IHS likewise transfers contract support cost funding in lump sums to tribes at the start of their program years. The amount of this funding is determined by using a negotiated indirect cost rate or agreement based on each tribe's past experience. This advance funding is subsequently adjusted after the end of the program year based on the tribe's actual experience to cover all contract support costs that were incurred.

C. TRIBES USE PROGRAM INCOME TO OPERATE THE HEALTHCARE PROGRAM AND ARE ENTITLED TO RECOVER THE INDIRECT COSTS THEY INCUR IN DOING SO

When a tribe enters into an ISDA contract or compact with IHS, it steps into the agency's shoes and is obliged to provide healthcare services to all eligible Indians. Like IHS, each tribal provider is required to bill as many of those services as possible to Medicare, Medicaid, or insurers. And, like IHS, each tribal provider is required to use the program income it receives to support the Indian healthcare program it operates.

Earning and spending program income are components of the Federal program that a tribe operates pursuant to its contract or compact with IHS. Indeed, as in these two cases, ISDA contracts typically require tribes to set up third-party billing systems to collect program income. IHS concedes that ISDA funding should cover the cost of a tribe collecting these payments because that is part of the contracted Federal program. (Pet. Br. 38). But the agency clings to the untenable position that, once earned, program income somehow is no longer part of the contracted or compacted program when it is spent on the program.

A tribe is entitled, under ISDA, to recover all indirect costs it incurs in connection with operating a Federal program. *See* 25 U.S.C. § 5325(a)(3)(A) ("contract support costs … shall include … any … 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") (emphasis added). Program income is "connected to" the operation of the contracted program in two different ways: both by the manner in which it is earned and by the manner in which it is spent. Either way, the statutory test is satisfied.

Program income differs from direct IHS funding (the secretarial amount) because a tribe must first provide services – thereby incurring both direct and indirect costs – in order to receive program income whereas IHS funds are provided to the tribe in advance to pay for services that the tribe

subsequently provides. In calculating the indirect costs to which a tribe is entitled on its secretarial funding, the focus is on how the funds are spent because that is when the services are provided. In contrast, a tribe incurs reimbursable indirect costs both when it provides the services that generate program income and when it subsequently spends that income in support of the Federal program.

Tribes use program income interchangeably with IHS funding to operate a contracted program. They use the program income they earn in Period 1 to fund the program in Period 2. The question presented here is whether IHS must pay contract support costs on expenditures of program income. The answer is yes.

The indirect costs that tribes incur in spending program income are "in connection with" operating the contracted program and so must be reimbursed. ISDA specifies that program income earned from operating a Title I contract must be spent to "further the general purposes of the contract." 25 U.S.C. § 5325(m)(1). Likewise, it specifies that program income is "supplemental funding" for all Title V compacts with IHS. 25 U.S.C. § 5388(j). ISDA itself links the expenditure of program income to the contracted or compacted program. Furthermore, IHCIA requires both IHS and tribal contractors to spend all program income to advance the purpose of the Indian healthcare program that is contracted. Congress gave tribes more leeway to determine exactly how to spend these funds, consonant with its goal of fostering Indian self-determination. But

tribal expenditures of program income must still be connected to the operation of the Federal healthcare program.

In sum, earning and spending program income are integral parts of the Indian healthcare program that is contracted or compacted under ISDA. Accordingly, IHS must reimburse a tribal contractor for the overhead expenses it incurs when it spends program income.

III. THE AGENCY CANNOT AVOID PAYING CONTRACT SUPPORT COSTS ON PROGRAM INCOME

A. ISDA'S TEXT DOES NOT SUPPORT IHS

The agency argues that its obligation to pay contract support costs is "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. 22) (emphasis added). But this is not what the statute says. The Secretarial amount is defined in subsection (a)(1) of 25 U.S.C. § 5325, while contract support costs are defined in subsections (a)(2) and (a)(3). The latter two subsections do not tie contract support costs to the Secretarial amount specified in subsection (a)(1). Their only reference to the Secretarial amount is in the last sentence of subsection (a)(3), which provides that contract support funding "shall not duplicate any funding provided under subsection (a)(1) of this section." The statute covers all indirect costs "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) (emphasis added).

The direct costs of Indian healthcare programs – whether operated by IHS or by a tribe -- are financed through a combination of appropriated funds and program income. But ISDA covers all indirect costs incurred by a tribe regardless of whether the direct costs are paid for by IHS or by program income.

Congress knows how to limit indirect costs payable under ISDA when it chooses to do so. Thus, it has always excluded funds passed through to construction subcontractors from a tribe's cost base used to calculate its indirect costs. *See* 25 U.S.C. § 5325(h). Tellingly, Congress has not enacted any other limitations on the calculation of indirect costs payable under ISDA contracts and compacts. It has not limited the tribal cost base to the Secretarial amount. Nor has it excluded "program income" from that cost base.

IHS claims to find support for its position in the statutory structure because the "program income" provisions in sections 5325(m) and 5388(j) are separate from the contract support costs provisions, and because they provide that program income shall not result in a reduction of the existing funding, including both direct costs and contract support costs. However, those provisions simply ensure that all program income is used to supplement, not replace, federal funding. Congress had already addressed a tribal contractor's entitlement to

contract support costs in section 5325(a). There was no reason for Congress to revisit that issue in the program income provisions, and it did not purport to do so.

B. SECTION 5326 IS INAPPLICABLE HERE

Alternatively, the agency contends that the funding limitation in 25 U.S.C. § 5326 relieves it of any obligation to pay contract support costs based on program income. That provision specifies that IHS funds "may be expended only for costs directly attributable to contracts, grants and compacts pursuant to [ISDA] and no funds appropriated … shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement … between an Indian tribe … and any entity other than [IHS]." It prohibits the use of IHS funds to pay indirect costs incurred by a tribe when it provides a service or benefit pursuant to a contract, compact, or funding agreement with some other agency.

Section 5326 is inapplicable here because the obligation to earn and spend program income is "directly attributable" to an IHS contract or compact, rather than to an agreement with another agency. IHS argues that program income is instead "associated with" tribes' "separate agreements with Medicare and Medicaid authorities" rather than "their ISDA contracts with IHS." (Pet. Br. 42). But tribes have no agreements with Medicare, Medicaid or private insurers that oblige them to provide

healthcare services to any patient; they simply submit claims for reimbursement after services are provided. It is the tribes' ISDA contracts or compacts which require them to provide healthcare services and to bill the third-party payers for those services. Likewise, tribes have no agreements with Medicare, Medicaid or private insurers which regulate how the tribe can spend the reimbursements it receives from them. Once again, the source of this regulation is the IHS contract or compact. Thus, section 5326 doesn't come into play because the contract support costs at issue here are directly attributable to the contract or compact with IHS, not to any agreement with a third-party payor.

CONCLUSION

When a tribe operates a healthcare program pursuant to an ISDA contract or compact with IHS, it is obliged to provide services to all eligible Indians and to earn as much program income as possible in the process. It must then spend that program income to pay for, or enhance, the health services it provides. Accordingly, the tribe is entitled to recover, under ISDA, the indirect costs it incurs in spending program income. The judgments of the Ninth and Tenth Circuits should be affirmed.

Respectfully submitted,

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