Nos. 23-250 & 23-253

IN THE

Supreme Court of the United States

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

SAN CARLOS APACHE TRIBE,
Respondent.

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

NORTHERN ARAPAHO TRIBE,
Respondent.

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

BRIEF OF LEGAL SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are scholars from across the country whose research and teaching focus on federal Indian law, contracts, and statutory interpretation. Their expertise is relevant to interpreting contracts between the United States and Indian tribes as well as statutes affecting tribes' interests. Amici also have a strong professional interest in the proper disposition of cases involving federal Indian law and policy. Amici agree with respondents about the plain meaning of the statute and contracts at issue. They write separately to address the rules of liberal construction that the parties agreed to, and Congress prescribed, and that may accordingly assist this Court's resolution of these cases.

Amici, listed below, submit this brief in their individual capacities and include their affiliations for identification purposes only:

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SUMMARY OF ARGUMENT

Congress has enacted into law thousands of statutory provisions containing rules of construction. These rules direct courts to the permissible interpretations of the statutes that Congress enacts.

With respect to the self-determination contracts between Indian tribes and the United States at issue in these cases, the Indian Self-Determination and

Education Assistance Act (ISDA) prescribes two interpretive rules that serve as congressional directives to this Court. First, each provision of the self-determination contract must be construed liberally for the benefit of the tribe. Second, the same is true of the statute itself: each provision of the ISDA must be construed liberally for the benefit of the tribe. The ISDA's interpretive rules were intended to ensure agency compliance with Congress's policy to promote tribal self-determination and are consistent with well-established rules guiding interpretation of treaties, agreements, and statutes that address Indian affairs and implement the United States' unique responsibilities to Indian tribes. Congress enacted these rules in response to the executive branch's repeated cramped readings of the relevant provisions of law and the resulting failures to ensure adequate federal financial support for tribes' self-determination contracts. The parties here agreed to these rules as part of their contracts, and Congress codified these rules in the ISDA, as it has codified substantially identical rules for other agreements between tribes and the United States under other parts of the ISDA.

Under ordinary principles of both contractual and statutory interpretation, these rules control in these breach-of-contract cases. The goal of interpretation—whether of a contract or statute—is to discern the authors' intent from the written text. The plain text of the contracts and statute makes clear the parties' and Congress's intent regarding how the terms of their agreement and the applicable provisions of law are to be construed.

As this Court has previously explained in a similar case, to prevail under these rules of construction, the government must demonstrate that its reading "is

clearly required by the statutory language." *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012). The government has made no such showing here. Instead, its arguments seek to bypass the ISDA's text and read into the statute and contracts restrictions on the government's financial-support obligations that are based solely on inferences drawn against Indian tribes. Congress gave no indication, much less a clear one, that any of the government's suggested inferences should be drawn. And adopting such inferences would require this Court to disregard Congress's unequivocal directives to construe each provision of the ISDA and self-determination contract liberally in the tribe's favor.

Applying the ISDA's rules of construction is consistent with longstanding principles of federal Indian law and congressional and judicial practice in other statutory contexts. In the context of federal Indian Law, the Indian canon already requires liberal construction of the ISDA and the agreements as a matter of the United States' trust responsibility and duty of protection to Indian tribes. The canon's well-settled application to agreements between the United States and tribes and to statutes affecting their interests further supports enforcement of these express congressional rules.

Congressionally mandated provisions telling courts to construe a provision liberally in favor of one party are a familiar feature of government contracting law. Federal courts have similarly applied Congress's rules of construction in cases concerning the Employee Retirement Income Security Act, the Federal Arbitration Act, the Religious Land Use and Institutionalized Persons Act, the Miller Act, and numerous other statutes. Moreover, these are breach-of-contract cases in which the Court is construing statutory provisions incorporated

into a contract. It is commonplace to enforce contractual provisions setting forth rules of interpretation, just like courts enforce any other provision of a contract. Indeed, that is precisely what this Court did in *Salazar*.

It is unexceptional thus that the ISDA—a law authorizing and governing a specific type of government contracting with tribes—directs a liberal construction of those contracts for tribes' benefit. The Court should enforce the ISDA's rules of construction and affirm the decisions below in respondents' favor.

ARGUMENT

I. THE CONTROLLING RULES OF LIBERAL CONSTRUCTION FORECLOSE THE GOVERNMENT'S ARGUMENTS FOR LIMITING CONTRACT SUPPORT COSTS

A. The Self-Determination Contracts And The ISDA Include Binding Rules Of Liberal Construction

Respondents—two Indian tribes—and the United States agreed that their contracts would be liberally construed in the tribe's favor. The ISDA, moreover, requires liberal construction as a matter of statutory command. These complementary rules of construction control the interpretation of the contract and the ISDA in these breach-of-contract actions. Here, they foreclose the government's arguments for limiting contract support costs.

The parties to these contracts agreed on a rule of liberal construction to resolve their disputes over the meaning of statutory and contractual terms. Specifically, in setting forth the "[p]urpose" of the self-determination contracts, the parties agreed that:

> 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] … from the Federal Government to the Contractor.

JA51; JA124.

Under the statutory scheme that overlays self-determination contracts, Congress has also instructed multiple times that these contracts—including the relevant ISDA provisions incorporated by reference—must be construed liberally in tribes' favor. It did so in 1994, in prescribing the model contract language above that is included in the parties' agreements. And it did so again in 2020, in codifying the rule of liberal construction as a standalone provision of the ISDA that applies not only to respondents' breach-of-contract claims, but also to disputes about statutory meaning that involve no breach-of-contract claim.

Congress enacted these liberal-construction directives in response to the executive branch's repeated interpretations of self-determination contracts that limited the scope of federal financial support for tribal services. Congress enacted the ISDA in 1975, amid a sea change in federal policy toward promoting strong tribal governments by "encouraging the development of Indian-controlled institutions." *Ramah Navajo Sch. Bd., Inc.* v. *Bureau of Revenue of N.M.*, 458 U.S. 832, 840 (1982); *see* 1 *Cohen's Handbook of Federal Indian Law* § 1.07 (2023). Congress expressly declared this policy in the ISDA, recognizing that the United States has an "obligation" to assure "maximum Indian participation in the direction of … Federal services to Indian

communities." Pub. L. No. 93-638, § 3(a), 88 Stat. 2203, 2203-2204 (1975) (codified at 25 U.S.C. § 5302(a)). At first, Congress gave agencies broad discretion to effectuate the ISDA, authorizing them "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out [the statute]." *Id.* § 107(a), 88 Stat. at 2212. In 1988, however, faced with agencies' "failure … to provide funding for the indirect costs associated with self-determination contracts," S. Rep. No. 100-274, at 8 (1987), Congress amended the statute to mandate payment of those costs and created a damages action to enforce it, *see* Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292, 2294-2295 (1988) (codified at 25 U.S.C. § 5325(a)(2), (g); *id.* § 5331). As Congress recognized, because "tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts," they "should not be forced to use their own financial resources to subsidize federal programs." S. Rep. No. 100-274, at 9.

In 1994—over "strong[] oppos[ition]" from the executive branch, S. Rep. No. 103-374, at 15-16 (1994)—Congress again amended the ISDA. Congress remained "very concerned" about federal agencies' "overall resistance to tribal efforts … under the authority of Tribal Self-Governance." H.R. Rep. No. 103-653, at 6 (1994); *see also* S. Rep. No. 103-374, at 11 (1994). In congressional oversight hearings leading up to those legislative amendments, Indian tribes underscored that agencies, in drafting ISDA regulations, "forgot that statutes passed for the benefit of Indians are to be liberally construed in their favor; and instead made the regulations as restrictive as possible and in the government's favor rather than that of the tribes." *ISDA: Oversight Hearing Before the H. Subcomm. of Native American*

Affairs, 103rd Cong. 26 (1994) (testimony of attorney Barbara Karshmer, on behalf of three tribal consortiums representing 30 California tribes). As one tribal official testified, agencies had "a psychological barrier or set of principles" that left them "constantly unwilling to interpret the law liberally in the interest of the tribes exercising their sovereign or governmental authority." *Proposed Regulations To Implement the 1988 Amendments to ISDA: Hearing Before the S. Comm. on Indian Affairs*, 103rd Cong. 3 (1993) (statement of Ron Allen, Chairman, Jamestown S'kallam Tribe).

In response, Congress legislated model ISDA contract provisions, including the liberal-construction provision. *See* Indian Self–Determination Act Amendments of 1994, Pub. L. No. 103-413, § 103, 108 Stat. 4250, 4260-4261 (codified at 25 U.S.C. § 5329(c)). Congress's "purpose" in mandating these model provisions was "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. In response to federal agencies' refusal to give full effect to the broader purposes of the ISDA, Congress specifically "incorporate[d] the longstanding canon of statutory interpretation that laws enacted for the benefit of Indians are to be liberally construed in their favor." *Id.* at 11.

Although this liberal-construction provision has been mandatory since 1994 and is in the contracts at issue, the executive branch has continued to interpret the ISDA narrowly—as evidenced by the disputes here and in *Cherokee Nation of Oklahoma* v. *Leavitt*, 543 U.S. 631 (2005), and *Salazar*, 567 U.S. 182, both of which likewise involved the scope of the government's obligation to pay contract support costs under the ISDA. In 2020,

Congress once again responded by amending the ISDA to add a standalone statutory rule of liberal construction. *See* PROGRESS for Indian Tribes Act, Pub. L. No. 116-180, § 202, 134 Stat. 857, 880 (codified at 25 U.S.C. § 5321(g)). Consistent with the mandatory rule of construction contained in the model contracts, Congress directed (with certain exceptions not relevant here) that "each provision of [the ISDA] 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).

These rules of liberal construction, which the parties agreed to, and Congress enacted into law, are binding under ordinary principles of both contractual and statutory interpretation.

1. The contractual rule of liberal construction controls under ordinary principles of contractual interpretation

Enforcing the parties' agreed-upon rule for how to interpret their own agreement is consistent with black-letter contract law. As this Court has explained, the ISDA reflects Congress's intent "to treat alike promises made under the Act and ordinary contractual promises." *Cherokee Nation*, 543 U.S. at 639. "[A]s a general rule, contracts should be liberally construed so as to give them effect and carry out the intention of the parties." 11 *Williston on Contracts* § 30:9 (4th ed. 2023). Accordingly, "a contract will be read as a whole and every part will be read with reference to the whole," so as "to give effect to its general purpose" and "to all of its provisions, if possible." *Id.* § 32:5. "Indeed, the cardinal principle of contract interpretation is that the intention of the parties must prevail unless it is inconsistent with some

established rule of law." *Id.* § 32:2. And "[t]he parties' intentions are, first and foremost, determined by the language used in their agreement." *Id.*

Under the model contract prescribed by Congress, and agreed to by the parties here, the "[p]urpose" of self-determination contracts is to transfer funding and services from the federal government to Indian tribes, and *every* provision of the contract "shall be liberally construed for the benefit of" the tribe in order to effectuate that purpose. 25 U.S.C. § 5329(c); JA51; JA124. The parties further agreed that IHS "shall act in good faith in cooperating with the [tribe] to achieve the goals set forth in the Indian Health Care Improvement Act." JA66; JA137. The contracts thereby incorporate the IHCIA's goals "to ensure the highest possible health status for Indians … and to provide all resources necessary to effect that policy." 25 U.S.C. § 1602(1).

When "the words of a contract … are clear and unambiguous," the meaning is determined by looking to "its plainly expressed intent." *M & G Polymers USA, LLC* v. *Tackett*, 574 U.S. 427, 435 (2015) (quoting 11 *Williston on Contracts* § 30:6). The parties' intent to bind themselves to a liberal construction of their self-determination contract is clear and should be given effect. Courts regularly respect parties' choices of law to "govern their contractual rights and duties." *Restatement (Second) of Conflict of Laws* § 187 (1971). There is no reason the parties' choice of interpretive rules should receive any less respect.

In *Salazar*, this Court construed the same language in other self-determination contracts to reject earlier arguments by the government for limiting contract support costs. *See* 567 U.S. at 194. There, the government argued that statutory language making funds for ISDA

contracts "subject to the availability of appropriations" capped contract support costs at levels set by Congress, and tribes bore the risk that appropriations would be insufficient to pay the full costs for all ISDA contracts. As the Court explained, the same "commonplace" language in ordinary procurement contracts has been construed to mean that, "so long as Congress appropriates adequate legally unrestricted funds to pay the contracts at issue," the government owes "the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends." *Id.* at 190 (citing *Cherokee Nation*, 543 U.S. at 637).

Although the government's interpretation thus conflicted with "well-established principles of Government contracting law," *Salazar*, 567 U.S. at 190, it was also, the Court reasoned, "particularly anomalous" given the contracts' own rule of liberal construction expressly favoring tribes, *id.* at 194. That rule, the Court held, required "[t]he Government … [to] demonstrate that its reading is clearly required by the statutory language." *Id.* The government lost in *Salazar* because it failed to make that showing.

The same binding contractual language governs and requires the same showing by the government here.

2. The statutory rule controls under ordinary principles of statutory interpretation

The ISDA compels the same result under traditional rules of statutory interpretation. In any case of statutory interpretation, the inquiry "begins … with the statutory text." *United States* v. *Gonzales*, 520 U.S. 1, 4 (1997). Where, as here, Congress's instruction is clear, "this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). "This Court's limited role is to read and

apply the law those policymakers have ordained." *Romag Fasteners, Inc* v. *Fossil, Inc.*, 140 S. Ct. 1492, 1497 (2020); *see also* 1A Singer & Singer, *Sutherland Statutes and Statutory Construction* § 27:2 (rev. 7th ed. 2023) ("The legislature is the primary law-making authority and should be able to declare the law in any form it chooses as long as it is clearly expressed."). As discussed, Congress explicitly directed that self-determination contracts be given a liberal construction not once, but twice—first, by prescribing a model liberal-construction provision to be included in all self-determination contracts and, second, by adding virtually identical language as a standalone statutory command in the PROGRESS Act, *see* 25 U.S.C. § 5321(g). Congress has enacted similar liberal-construction rules in separate parts of the ISDA dealing with tribal self-governance compacts and funding agreements. *See* 25 U.S.C. §§ 5366(i), 5392(f)).

Other ordinary interpretive principles confirm that the ISDA's rule of construction controls. For example, like statutory definitions, Congress's instructions about how to construe its words "furnish official and authoritative evidence of legislative intent and meaning." 1A *Sutherland Statutes and Statutory Construction* § 27.2. "Such internal legislative construction is of the highest value" and is thus "usually given controlling effect." *Id.* Moreover, it is "one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin* v. *Islamic Republic of Iran*, 583 U.S. 202, 213 (2018). The statutory rule of construction is a provision of the ISDA and, like any provision, must be given effect where possible for that reason alone.

The fact that § 5321(g) was added to the ISDA in 2020, after the parties executed the self-determination contracts at issue, does not raise retroactivity concerns. As the Northern Arapaho Tribe explains (Br. 53), § 5321(g) "codifies the pro-Indian canon of construction which appeared both in the common law and in all ISDA contracts." It was already the law under the parties' contracts. This Court's 2012 decision in *Salazar* confirms as much by applying a substantively indistinguishable rule even in the absence of § 5321(g). Moreover, as discussed below, under this Court's precedent, the Indian canon has long required the ISDA and self-determination contracts to be interpreted in favor of Indian tribes. *Infra* pp.20-23. Congress's 2020 amendments to the ISDA did not supersede or modify the Indian canon, but instead reinforced its operation in the face of a long history of agency resistance. *See supra* pp.6-9.

The presumption against retroactive application of new laws exists to protect "the individual citizen" against the government, *Lynce* v. *Mathis*, 519 U.S. 433, 439 (1997)—not to insulate parts of the government from the will of Congress with respect to federal law. The interpretive rule in § 5321(g) does not address any party's "rights," "liability," or "duties" under either the contract or the statute. *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 280 (1994). Indeed, "the relevant activity that [it] regulates" is not the parties' negotiation and execution of a self-determination contract, but subsequent judicial interpretation. *Id.* at 291 (Scalia, J., concurring in the judgments). Giving effect to the will of Congress about how the ISDA and self-determination contracts should be judicially enforced does not implicate either "elementary considerations of fairness" or respect for "settled expectations" underlying this Court's retroactivity jurisprudence. *Id.* at 265 (majority op.). The Court should

apply the ISDA "in effect at the time it renders its decision," *id.* at 273 (quoting *Bradley* v. *School Bd. of Richmond*, 416 U.S. 696, 711 (1974))—which includes § 5321(g) as well as the model contract codified at § 5329(c).

B. Liberal Construction Forecloses The Government's Arguments For Limiting Contract Support Costs

These cases involve self-determination contracts between Indian tribes and the Indian Health Service (IHS). Under these contracts, tribes agree to administer a healthcare program that IHS would otherwise operate for their benefit. In exchange, IHS provides the funding it would allocate to operate the program. IHS also agrees, and is required by the ISDA, to pay contract support costs such as overhead expenses in order to ensure that the tribes have the resources necessary to administer the program. After IHS refused to pay certain contract support costs, respondents—the San Carlos Apache and Northern Arapaho Tribes—filed these actions alleging that IHS breached its contractual agreements and violated the ISDA. *See* JA1-20; JA103-120.

For the reasons explained by respondents (San Carlos Apache Tribe Br. 21-45; Northern Arapaho Tribe Br. 19-51), amici agree that the ISDA and contracts are not ambiguous on the question presented and focus here on the applicable rules of liberal construction. As with the repeated failures of the executive branch to heed the original policy directives of the ISDA, the government's approach to interpreting the contracts and statutory language at issue here draws adverse inferences and construes terms *against* Indian tribes where other statutory readings are plainly possible. The ISDA's interpretive commands prohibit that approach. Instead, they

require taking Congress and the parties at their word that "each provision" of the statute and contracts "shall be liberally construed" in tribes' favor, 25 U.S.C. §§ 5321(g), 5329(c); JA51; JA124, "instead of being resolved in favor of the United States," *Antoine* v. *Washington*, 420 U.S. 194, 200 (1975). It is therefore not enough for the government to show that its reading is fairly possible; it must show that its reading is "clearly required by the statutory language." *Salazar*, 567 U.S. at 194. The government does not come close to making that showing.

The question in these cases is whether Indian tribes are entitled to contract support costs arising from program activities funded by program income, i.e., income tribes collect from third-party payers like Medicare, Medicaid, and private insurers while carrying out the contract with IHS. As relevant here, the ISDA mandates payment of contract support costs for "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)(ii). The terms "any" and "in connection with" are broad and all-encompassing on their face. The parties' "primary interpretive dispute" (Northern Arapaho Tribe Br. 54) centers on the meaning of "Federal program, function, service, or activity."

The plain-text reading of "Federal program, function, service, or activity" is that it refers to the program the contract transfers from IHS to a tribe to run. Under that reading, because IHS itself collects and spends program income from third-party payers on Indian health care when it administers the program in the absence of the contract, tribes are entitled to overhead expenses when they do the same "pursuant to the contract." And

that makes sense. The purpose of contract support costs is to put tribes on equal footing, so that they can assume responsibility for programs from IHS without diverting tribal resources to do so. No recourse to a liberal construction is necessary to reach this reading.

Even if this reading were not compelled by § 5325(a)(3)(A)(ii) and surrounding provisions—and it is for all the reasons respondents explain in their briefs—the arguments the government advances in support of its contrary interpretation are foreclosed by the ISDA's command to construe each provision of the statute and contracts in tribes' favor.

The government claims (Br. 21-22) that its obligation to pay contract support costs is limited to activities funded by the "Secretarial amount," i.e., the amount IHS would have spent had it operated the program, because that is "the primary contract-funding mechanism." But § 5325(a)(3)(A)(ii) does not limit contract support costs to "program activities funded by the primary contract-funding mechanism." Nor does that atextual limitation make sense. Respondents operate a program transferred from IHS, including activities funded by program income that they collect just as IHS would absent the contract. And they incur administrative and overhead expenses for all of these program activities, not just those funded by the Secretarial amount.

Because the ISDA does not define "Federal program, service, function, or activity," the government's central arguments for limiting that phrase to program activities funded by the Secretarial amount depend on reading other provisions to infer that limitation. In particular, the government relies (Br. 23-24) on § 5325(m), which provides that 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). On its face, this provision favors tribes. Instead of taking those words as written, however, the government reads it to disfavor tribes by claiming that "[i]t would have been odd for Congress 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." Gov't Br. 23. There is nothing "odd" about requiring IHS to pay contract support costs for program activities, including those funded by program income, while prohibiting IHS from using program income as a basis to offset its funding obligations. In contrast to the government's tortured logic, that is precisely what the ISDA commands. And reading both provisions consistent with their plain meaning favors tribes.

The government would instead have the Court read § 5325(m)(2)'s bar on offsetting to categorically exclude contract support costs under § 5325(a)(3)(A)(ii) for program activities just because they happen to be funded by program income rather than the Secretarial amount. If Congress intended § 5325(m) to restrict contract support costs available to support all program activities an Indian tribe administers under its contract with IHS, one would expect Congress to have said so. Even if such a reading were fairly possible, it is not "clearly required." *Salazar*, 567 U.S. at 194. And it turns on its head Congress's unequivocal mandate to construe "each provision" of the ISDA in tribes' favor to infer a limit on contract support costs from a separate provision that does not address those costs and, to the contrary, explicitly benefits tribes by barring any reduction in contract funding due to the collection of program income.

The government's other principal source for its asserted restriction is § 5326, which provides that ISDA

funds available to IHS "may be expended only for costs directly attributable to [ISDA] contracts" and that "no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract" between tribes and non-IHS entities. 25 U.S.C. § 5326. As the government acknowledges (Br. 7-8), Congress enacted this provision in 1998 to overturn the specific result in *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997), and to clarify that IHS must provide contract support costs only for ISDA contracts with IHS. Neither respondent suggests that it is entitled to support from IHS for other contracts with other federal agencies. The limited question here is whether respondents' entitlement to contract support costs for their ISDA contracts with IHS turns on how particular program activities are funded and, in particular, whether the activities are funded by the Secretarial amount as opposed to program income.

Section 5326 does not explicitly speak to this issue. The government argues otherwise (Br. 25-27) only by, again, stretching this provision to have a significance it lacks. On its face, § 5326 limits IHS's payment of contract support costs to support IHS contracts and bars payment of costs to support other contracts; it does not purport to differentiate allowable versus unallowable support costs with respect to the same contract. The government, however, contends (Br. 27) that because tribes enter into contracts with Medicare, Medicaid, and private insurers to receive program income under the ISDA contract, those third-party funds "cannot be deemed 'directly attributable'" to the ISDA contract and must be deemed "'associated' with 'contract[s]' with [non-IHS] entities." None of that follows.

As explained by respondents (San Carlos Apache Tribe Br. 42-44; Northern Arapaho Tribe Br. 48-51), provider agreements that are required in order for tribes to bill Medicare or Medicaid for services to federal beneficiaries are not the kinds of contracts contemplated by § 5326, and tribes can bill a private insurer for services to its members even without a contract. At a minimum, "provider agreements" are not referenced in § 5326, nor are they similar to the kinds of contracts that *are* referenced there—i.e., "grant, cooperative agreement, self-governance compact, or funding agreement." Even if Congress's intent with respect to provider agreements were unclear, stretching statutory terms to the tribe's detriment is precisely what the ISDA's rules of liberal construction prohibit.

In any event, because program income is collected and spent as part of the ISDA contract, it is most naturally treated as "directly attributable to" and "associated with" the ISDA contract, even if other contracts are incidentally involved. 25 U.S.C. § 5326. And that reading is consistent with Congress's definition of contract support costs to include "any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the [ISDA] contract." *Id.* § 5325(a)(3)(A)(ii). In contrast, the government's reading sets up a conflict between the breadth of this definition of contract support costs and Congress's subsequent clarification that IHS's obligation to provide such costs applies only to ISDA contracts with IHS.

Congress's use of flexible terms like "directly attributable" and "associated with" in § 5326 is a very thin reed on which to hang a wholesale rewriting of what Congress earlier said about the scope of contract

support costs to which Indian tribes are entitled under § 5325(a)(3)(A)(ii). But here, too, even if the government's reading were fairly possible, it is not "clearly required," *Salazar*, 567 U.S. at 194, and it is contrary to the ISDA's unequivocal command that each provision of the statute and contracts be "liberally construed" for tribes' benefit. 25 U.S.C. § 5321(g); JA51; JA124. If liberal construction means anything, it means that where terms are flexible, the choice among a range of possible meanings must be made in the tribe's favor.

II. ENFORCING THE CONTROLLING RULES OF LIBERAL CONSTRUCTION IS CONSISTENT WITH CONGRESSIONAL AND JUDICIAL PRACTICE IN FEDERAL INDIAN LAW AND NUMEROUS OTHER CONTEXTS

A. The Indian Canon Supports Application Of The ISDA's Rules Of Liberal Construction

Because the parties' contracts and the ISDA contain express rules of liberal construction, this Court need not reach the application of the Indian canon as an independent rule of statutory interpretation. The Court's precedents, however, leave no doubt that the Indian canon likewise compels liberal construction of the relevant contractual and statutory provisions. *See Washington* v. *Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (Indian canon applies to interpretation of "contract[s] between two sovereign nations"); *San Carlos Apache Tribe* v. *Becerra*, 53 F.4th 1236, 1240-1241 (9th Cir. 2022) (applying Indian canon in the proceeding below); *Northern Arapaho Tribe* v. *Becerra*, 61 F.4th 810, 823 (10th Cir. 2023) (opinion of Moritz, J.) (same).

Although frequently referred to in the singular, there are several interrelated principles of

interpretation that apply to treaties, agreements, statutes, and executive orders involving tribes or their interests. First, and most relevant here, treaties, agreements, and statutes about Indian affairs will be construed liberally in favor of Indians. *See Antoine*, 420 U.S. at 199-200 (applying this canon to statute ratifying agreement with Indian tribes); *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("Statutes are to be construed liberally in favor of the Indians[.]" (quoting *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766-768 (1985))). Second, ambiguities in agreements "must be interpreted in light of the parties' intentions, with any ambiguities resolved in [the tribe's] favor." *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999)). Third, the terms of treaties and agreements must be construed as the tribal sovereigns would have understood the language. *Mille Lacs*, 526 U.S. at 196; *see also, e.g.*, *Jones* v. *Meehan*, 175 U.S. 1, 10-12 (1899). Fourth, unless Congress has clearly expressed its intent otherwise, federal law is to be construed to preserve tribal property rights and tribal sovereignty. *See Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Coughlin*, 143 S. Ct. 1689, 1695 (2023) (applying this rule to tribal sovereign immunity); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-144 (1980) ("Ambiguities in federal law have been construed generously in order to comport with [the] traditional notions of sovereignty and the federal policy of encouraging tribal independence.").[2]

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[2] The Court first applied these canons of construction to treaties between Indian tribes and the United States. The subsequent

In each context, these rules "protect important structural features of our system of governance." 1 *Cohen's Handbook of Federal Indian Law* § 2.02[2]. Article I of the Constitution, which recognizes Indian tribes as sovereigns distinct from foreign nations and states, gives Congress power to regulate commerce with them. U.S. Const. art. I, § 8. Within our constitutional scheme, tribes occupy a unique political status as sovereigns incorporated within the United States, which owes a unique trust responsibility to them. *See Cherokee Nation* v. *Georgia*, 30 U.S. 1, 2 (1831). The canons of construction in federal Indian law are "rooted in [this] unique trust relationship between the United States and the Indians." *Oneida Cnty.* v. *Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985). For that reason, "the Indian canons have a constitutional lineage because the trust doctrine has constitutional roots." Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. Mich. J.L. Reform 267, 297 (2022); *see* 1 *Cohen's Handbook of Federal Indian Law* § 2.02[2] & n.27 (canons have "a quasi-constitutional status" (citing Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 416 (1993)). Rather than being a thumb on the scale in favor of politically disadvantaged groups, the Indian canon "provide[s] an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit

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application of the canons to statutes, regulations, and executive orders reflects the shift from treatymaking to other forms of government-to-government relations, including the use of treaty substitutes enacted as statutes. *See, e.g.*, *Antoine*, 420 U.S. at 201-202 (documenting 1871 shift away from "contract-by-treaty method of dealing with Indian tribes"); Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1815 (2019).

congressional derogation." 1 *Cohen's Handbook of Federal Indian Law* § 2.02[2]. It thereby serves "to promote the ongoing sovereign-to-sovereign relationship of the tribe and the federal government." Frickey, 107 Harv. L. Rev. at 428; *see also* Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 152 n.206 (2010) (citing Frickey, 107 Harv. L. Rev. at 420-421).

Accordingly, Congress's enactment of the contractual and statutory rules of interpretation that control in these cases was not the result of a newly developed legislative standard. Rather, Congress simply codified the rules of liberal construction required by the Indian canon as a matter of the United States' trust obligation and duty of protection toward tribes.

B. This Court And The Lower Federal Courts Have Applied Congressionally Enacted Rules Of Statutory Construction In Numerous Contexts, Including Government Contracting

Congress has enacted "thousands of rules of interpretation across nearly every title of the U.S. Code." Shobe, *Congressional Rules of Interpretation*, 63 Wm. & Mary L. Rev. 1997, 2001 (2022). Such provisions contain rules of statutory construction, including rules explicitly stating in the text of the statute how it is to be interpreted or implemented. Like judicial canons that have not been enacted, legislatively enacted interpretive rules "are simply the interpretive principles and sources that judges consult when resolving questions about statutory ambiguity." Gluck & Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 924 (2013). And courts have applied statute-specific rules of statutory construction regularly and consistently throughout history.

Such rules range from providing instruction to courts about how to construe legislation to rules to preserve state sovereignty or effectuate the purposes of remedial legislation. *See generally* Shobe, 63 Wm. & Mary L. Rev. 1997. For example, the Employee Retirement Income Security Act contains both an express "preemption clause" and a "savings clause" that have resulted in hundreds of cases where federal courts adhere to rules of construction in statutory cases. *See* Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 Wm. & Mary L. Rev. 753, 802 & nn.183-184 (2013) (collecting cases). ERISA's "savings clause" provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). "[F]ederal courts already routinely follow" ERISA's savings clause, which as of a decade ago "ha[d] been cited in at least twenty-six cases in [this] Court … and 352 cases in the courts of appeals." Gluck & Bressman, 65 Stan. L. Rev. at 1025 & n.469. Courts, including this one, likewise "routinely follow" ERISA's preemption clause. *Id.*

When Congress enacts rules of construction that mirror existing interpretive canons, this Court and others apply the enacted rules. Routine judicial enforcement of ERISA's savings clause is a good example, as the rule closely tracks the presumption against preemption that this Court has long applied across federal statutes on the ground that "the States are independent sovereigns in our federal system," and therefore "Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). ERISA's savings clause, moreover, is only one of "nearly one thousand examples … in which Congress [has] enacted a federalism rule of interpretation stating that a

statute should not be interpreted to preempt state laws," notwithstanding that "[t]hese rules of interpretation codify what judges already often do even in the absence of such a rule." Shobe, 63 Wm. & Mary L. Rev. at 2021.

Indeed, Congress's enactment of rules of construction in the ISDA and model contract is unremarkable in light of "the literally *thousands* of 'rules of construction' that already exist in the U.S. Code." Gluck & Bressman, 65 Stan. L. Rev. at 1024. Congress's codification of the Indian canon in the ISDA is itself unremarkable and consistent with widespread congressional practice. "[T]here is arguably little difference between many [legislative rules of construction] and the court-created canons." *Id.* One recent study found "an increasing number of enacted interpretive rules that accomplish the same purpose as the Indian Canons." Shobe, 63 Wm. & Mary L. Rev. at 2025. The fact that *Salazar* relied on the model contract language in the ISDA, instead of the Indian canon that would apply even in the absence of that language, comports with judicial enforcement of similar enacted rules under ERISA and other statutes.

The ISDA's rules of interpretation address a history of interbranch conflict over agencies' disregard for the Indian canon in government contracting with tribes and the resulting frustration of Congress's stated purposes in enacting the ISDA. Interpretive and policy disagreements over the enforcement of contracts, like the ones at issue, are a familiar backdrop for legislative rules. Congress enacted the Federal Arbitration Act "in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). And this Court has construed the FAA to mandate a "liberal federal policy favoring

arbitration." *Id.* The ISDA presents a much stronger case for applying the liberal-construction canon because it contains both a model contract and a standalone rule of liberal construction. The FAA does not. If the FAA said, "Each provision of an arbitration agreement and each provision of the FAA shall be construed in light of the liberal federal policy favoring arbitration," you would have this case.

A closer statutory analogue is the Religious Land Use and Institutionalized Persons Act, which expressly provides that it "shall be construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g). Relying on that provision, this Court has stressed RLUIPA's "expansive protection for religious liberty," *Holt* v. *Hobbs*, 574 U.S. 352, 358 (2015), and has extended that protection to for-profit corporations under the Religious Freedom Restoration Act, *see Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 714 (2014).

Liberal construction in favor of a specified group is in fact a familiar feature of government contracting, even outside the context of contracts with Indian tribes. For example, the Miller Act requires prime contractors in federal construction projects to pay a bond "for the protection of all persons supplying labor and material in carrying out the work provided for in the contract." 40 U.S.C. § 3131(b)(2). And it provides a cause of action on the payment bond in favor of "[e]very person that has furnished labor or material in carrying out work provided for in [the] contract" for any unpaid amount. *Id.* § 3133(b)(1). As a statute "designed to protect those persons who cannot take advantage of state lien laws because of United States government involvement in the transaction," 8 McBride & Touhey, *Government Contracts: Law, Administration & Procedure* § 49A.10[5][a]

(2023), the Miller Act is "entitled to a liberal construction." *F.D. Rich Co.* v. *United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 124 (1974). For the better part of a century, this Court and others have accordingly construed it liberally "to protect those whose labor and materials go into public projects." *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944); *see United States ex rel. Am. Civ. Constr., LLC* v. *Hirani Eng'g & Land Surveying, PC*, 58 F.4th 1250, 1252 (D.C. Cir. 2023).

As it has done in ERISA, the FAA, RLUIPA, the Miller Act, and countless other statutory contexts, this Court should give effect to the ISDA's legislative rules of liberal construction.

CONCLUSION

The decisions below should be affirmed.

Respectfully submitted.

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