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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulation:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

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The San Carlos Apache and Northern Arapaho Tribes maintain that the Indian Self-Determination and Education Assistance Act (ISDA) obligates the Indian Health Service (IHS) to pay contract support costs not only to support the funding the Tribes receive under their contracts with IHS, but also to subsidize tribal expenditures of income they earn from third-party payors. That surprising result runs counter to the statute's text and structure, is not justified as a necessary means of ensuring parity between IHS and tribal health care programs, and would upend 35 years of practice

between the agency and contracting tribes. The Court should reverse.

A. ISDA Does Not Obligate IHS To Pay Contract Support Costs To Support Tribal Expenditures Of Third-Party Income

1. ISDA's contract-funding provisions work together as a comprehensive scheme to (1) transfer IHS's appropriated funding for a federal health care program (the Secretarial amount) to the tribal contractor, and (2) fill specified gaps in that funding so that the contractor can replicate the program that IHS would have carried out with the Secretarial amount. ISDA's primary funding provision—which reflects its basic self-determination rationale—is 25 U.S.C. 5325(a)(1), which instructs the Secretary of Health and Human Services to provide to a tribal contractor "[t]he amount of funds" the Secretary "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." There is no dispute in this case that the funds the Secretary "would have otherwise provided" refers only to funds appropriated by Congress. The next paragraph, 25 U.S.C. 5325(a)(2), requires the Secretary to "add[]" funds in "support" of "the amount required by paragraph (1)." Those "contract support costs" are added to address specific shortfalls that the "resources * * * under contract"—*i.e.*, the Secretarial amount"—does not cover. *Ibid.*

Sections (a)(1) and (a)(2) thus link IHS's contract-support-cost obligation directly and only to the Secretarial amount. They do not refer to income from third parties at all. ISDA addresses third-party income in a separate provision, 25 U.S.C. 5325(m)—which, correspondingly, makes no reference to contract support costs. And that third-party income provision states that

"program income earned" by a tribe should not *lower* contract funding—an anomalous instruction if such income were meant to *increase* contract funding due under Sections (a)(2) and (a)(3). 25 U.S.C. 5325(m)(2); see Gov't Br. 23-24. An analogous provision applicable to Title V compacting tribes, 25 U.S.C. 5388(j), includes the same instruction and additionally reinforces that "program income" does not affect contract funding at all: "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*." 25 U.S.C. 5388(j) (emphasis added). Contract support costs are negotiated in a funding agreement. Gov't Br. 24.

The Tribes argue that this interpretation "reads into the statute a limitation" that "Congress did not write." SCA Br. 18; see NA Br. 34. But the payments at issue are expressly specified to be *contract* support costs, not just support costs. And the function of an ISDA contract, like many contracts, is for a contractor to provide services in exchange for money from the contractee. See *Cherokee Nation of Okla.* v. *Leavitt*, 543 U.S. 631, 634 (2005) (ISDA "authorizes the Government and Indian tribes to enter into contracts in which the tribes promise to supply federally funded services * * * that a Government agency would otherwise provide"); 25 U.S.C. 5321(a)(1). It makes little sense to say that a tribe is acting "as a contractor" for IHS, 25 U.S.C. 5325(a)(2), in providing third-party-funded services to beneficiaries when IHS's contract did not pay for those services.

The Tribes also encourage the Court not to draw any inferences from Section 5325(m)(2) (quoted above), arguing that the provision is intended to work to tribes'

benefit. SCA Br. 30-31; NA Br. 36-37. That is true as far as it goes. But the provision also demonstrates Congress's recognition that the receipt of third-party income might otherwise be reasonably understood to lower the amount the federal government has to pay. It would be strange for Congress to identify and explicitly speak only to that prospect if the Tribes were correct that the opposite understanding—that a tribe's receipt of third-party income increases contract funding—underlies Sections 5325(a)(2) and (a)(3). If that were true, one would have expected Congress to expressly address both matters, rather than just one.

As for Section 5388(j), the Northern Arapaho Tribe (Br. 36-37) urges this Court to ignore it because these cases happen to involve Title I tribes, not Title V tribes. But the Tribe does not dispute that funding for Title I contracts and Title V compacts is designed to be the same, see Gov't Br. 24, and it offers no reason why Congress would have mandated different treatment of program income when it comes to Title V compacts. For its part, the San Carlos Apache Tribe argues that the word "'supplemental'" in Section 5388(j) could mean "'in addition to'" but not "apart from." SCA Br. 31 (citations omitted). But it would be discordant for Congress to describe third-party revenue as "supplemental * * * to that negotiated in the funding agreement" if that revenue in fact determined the amount in the funding agreement. 25 U.S.C. 5388(j).

2. The Tribes' theories for how their costs of spending third-party income nevertheless qualify as reimbursable contract support costs under Sections 5325(a)(2) and (a)(3) do not withstand scrutiny.

a. Section 5325(a)(2) defines contract support costs as "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," but which are not activities IHS would undertake in operating the program itself or else are activities that IHS would cover with resources other than the Secretarial amount. 25 U.S.C. 5325(a)(2)(A) and (B). The Tribes agree that, per this provision, they must be able to point to a contractual requirement obligating them to carry on the activities in question. See SCA Br. 27; NA Br. 32-33. The contractual provision they cite as creating this obligation, however, is a line in the "Authority" section of each Tribe's respective contract, which merely states—after noting that the Secretary has the authority to enter into the agreement "pursuant to title I of [ISDA]"—that "[t]he provisions of title I of [ISDA] are incorporated in this agreement." J.A. 51, 123-124 (capitalization altered); see SCA Br. 24; NA Br. 21. That language does not specify any obligation regarding the expenditure of third-party income, let alone direct the Tribes to spend such income in particular ways to fulfill its role as a contractor.

But even assuming that this undifferentiated reference to all of ISDA Title I—seemingly offered for the unremarkable purpose of justifying the contract's existence—was intended to turn every ISDA provision into a contractual requirement, the Tribes' theory still fails. The only ISDA provision they point to is 25 U.S.C. 5325(m)(1), which states that "program income earned" by a tribe "shall be used by the tribal organization to further the general purposes of the contract." Even the Ninth Circuit did not rely on Section 5325(m)(1) as the source of any relevant contractual obligation. See SCA Pet. App. 8a; Gov't Br. 34. And for good reason. Section 5325(m)(1) does not require a tribe to use its earned

income in the same manner as the Secretarial amount—so activities the tribe undertakes in spending third-party income are not required to be "carried on * * * as a contractor to ensure compliance with the terms of the contract." 25 U.S.C. 5325(a)(2).

Unlike 25 U.S.C. 5325(a)(4)—which requires tribal contractors to use leftover Secretarial-amount funds "to provide additional services or benefits under the contract"—Section 5325(m)(1) contains a more permissive standard that leaves tribes with significant discretion about how to spend the income they have earned. Section 5325(m)(1) is thus consistent with how ISDA treats other kinds of outside income that tribes may receive—for instance, "funds or contributions from non-Federal sources," which must be used to "further[] the goals and objectives of the self-determination contract" if the funds were raised using the Secretarial amount. 25 U.S.C. 5325(k)(9); see Gov't Br. 34. Notably, the Tribes do not claim that expenditures of such outside funds trigger IHS's contract-support-cost obligation (cf. SCA Br. 23)—even though Section 5325(k)(9) is also located in Title I of ISDA and therefore is incorporated into the contract to the same extent Section 5325(m)(1) is.

The Tribes nonetheless appear to take the position that Section 5325(m)(1) requires them to spend third-party income the same way they spend the Secretarial amount. NA Br. 23-24; SCA Br. 24. Specifically, they argue that because the "Purpose" section of the ISDA model agreement states that the contract should be construed "to transfer the funding and [a list of] related functions, services, activities, and programs," 25 U.S.C. 5329(c) (model agreement § 1(a)(2)) (capitalization altered), Section 5325(m)(1) obligates the Tribes to channel third-party income to the same functions and

activities so transferred. NA Br. 23-24; SCA Br. 24. But again, Section 5325(m)(1) says that the income shall be used to "*further*" the contract's "*general* purposes" —a more expansive phrase. 25 U.S.C. 5325(m)(1) (emphasis added); see *Webster's Third New International Dictionary* 944 (1993) (*Webster's Third*) (defining "general" as "concerned or dealing with universal rather than particular aspects" and "marked by broad overall character rather than being limited, modified, or checked by narrow precise considerations"). That latitude undercuts the proposition that the Tribes act "as a contractor" for IHS when they decide how to use their third-party income—expenditures that need not even occur during the contract period.[1]

b. Although the analysis of the issue in this case should properly focus on the basic definition of contract support costs in Section 5325(a)(2), the Tribes largely skip past that provision—contending instead that a tribal expenditure need only meet one of the descriptions in the succeeding provisions, Sections 5325(a)(3)(A)(i) and (ii), standing alone. SCA Br. 26; NA Br. 30-32. That

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[1] The San Carlos Apache Tribe invokes an HHS Office of Inspector General bulletin stating that "reimbursements must be reinvested in health care services or facilities." Office of Inspector Gen., U.S. Dep't of Health & Human Servs., *OIG Alerts Tribes and Tribal Organizations To Exercise Caution in Using Indian Self-Determination and Education Assistance Act Funds* (Nov. 24, 2014) (emphasis omitted); SCA Br. 25. That sentence in the bulletin is discussing Medicare, Medicaid, and Children's Health Insurance Program reimbursements specifically, and it cites 25 U.S.C. 1641(d)(2) as the source of the obligation it describes—not Section 5325(m), which the bulletin does not cite. Neither Tribe relies on Section 1641(d)(2) as the source of any contractual obligation to spend third-party income—likely because that provision is not in ISDA. Gov't Br. 34.

is wrong. Gov't Br. 35-36. Section 5325(a)(2) defines what "contract support costs * * * shall consist of." 25 U.S.C. 5325(a)(2); see *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 186 n.1 (2012) (explaining that, "[a]s defined by ISDA, contract support costs" are the costs in (a)(2)). Section 5325(a)(3)(A) then incorporates that baseline definition in explaining that "[t]he *contract support costs* that are eligible costs for the purposes of receiving funding under this chapter shall include" the two subcategories in its clauses (i) and (ii). 25 U.S.C. 5325(a)(3)(A) (emphasis added). Put differently, "[a]n expense can be neither a direct contract support cost nor an indirect contract support cost [under § (a)(3)] if it is not, as defined by § (a)(2), a contract support cost." *Cook Inlet Tribal Council, Inc.* v. *Dotomain*, 10 F.4th 892, 896 (D.C. Cir. 2021).

Contrary to the Northern Arapaho Tribe's contention (Br. 31-32), Section 5325(a)(3)(A) serves a purpose under that reading. Congress added it to clarify that both subcategories of contract support costs referred to in that provision must be funded—likely because, at the time, agencies had taken inconsistent positions on whether direct expenses qualified. See H.R. Rep. No. 551, 103d Cong., 2d Sess. 57 (1994) (noting concern that the Bureau of Indian Affairs "has limited payment [of contract support costs] to tribal indirect costs alone" and "[n]o allowance has been made for direct contract support costs such as workers' compensation and unemployment taxes"); 140 Cong. Rec. 28,629, 28,631 (1994) (statement of Rep. Richardson quoting committee report) (explaining that the amendment "more fully define[s] the meaning of the term 'contract support costs'" to include "both" indirect and "'direct' type expenses," but "Congress is not creating a third funding category in

addition to direct [program costs] and contract support costs").[2]

c. In any event, that interpretive issue regarding the application of Section 5325(a)(2) is not determinative here because costs associated with spending third-party revenue do not qualify under Section 5325(a)(3)(A) either. The Tribes primarily argue that such expenses qualify as indirect contract support costs under clause (ii), which includes "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); see SCA Br. 21-26; NA Br. 20-22. But both Tribes agree that, to qualify under that clause, the expenditure must be one that fulfills a contractual requirement. SCA Br. 18, 25-26; NA Br. 16, 20-22. And for the reasons explained above, the Tribes' ISDA contracts do not give rise to the kind of contractual obligation that would in turn obligate IHS to furnish additional funds to support it. See pp. 5-7, *supra*.

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[2] A ruling that tribes are entitled to contract support costs for expenditures that do not meet the terms of Section 5325(a)(2) could have broad ramifications beyond the funding dispute at issue here. It could mean, for instance, that a tribal contractor could choose to incur programmatic costs in excess of the Secretarial amount provided for those activities, and then seek to obligate IHS to cover those added costs as contract support costs in the form of "direct program expenses." 25 U.S.C. 5325(a)(3)(A)(i); see *Cook Inlet*, 10 F.4th at 896. As previously explained (Gov't Br. 36), the fact that the Tribes' reading could render the Secretarial amount irrelevant in this way is further evidence that it cannot be correct. At minimum, that consequence counsels against resolving such a significant interpretive dispute in the Tribes' favor in a case where the question is not front and center.

In addition, the disputed costs are not incurred in "the operation of the Federal program." 25 U.S.C. 5325(a)(3)(A)(ii). The Tribes acknowledge that "the Federal program" refers to the program the Secretary previously operated and is now contracting out to the tribe. See SCA Br. 23; NA Br. 21. But they assert that the contracted program necessarily encompasses the expenditure of third-party reimbursement income, because IHS would have earned and spent such income too. *Ibid.* In the context of Section 5325(a), however, the "Federal program" is most naturally read to refer to the program the Secretary previously carried out with federal funding from congressional appropriations, because such funding is the very subject of the contract and the basis for the Tribe's corresponding agreement to perform. See 25 U.S.C. 5325(a)(1); see also *Swinomish Indian Tribal Cmty.* v. *Becerra*, 993 F.3d 917, 921 (D.C. Cir. 2021) ("[I]n the context of [ISDA], 'the Federal program' does not encompass spending insurance payments."). The language in ISDA's model contract—which states that the contract is meant "to transfer the *funding* and the following *related* functions, services, activities, and programs" to the tribe—reinforces that reading. 25 U.S.C. 5329(c) (model agreement § 1(a)(2)) (emphasis added).

The Tribes' assertion that "the Federal program" encompasses the expenditure of third-party income also elides the significant statutory differences between how IHS may spend such income and how a tribe may do so. When IHS receives such income, it must first dedicate those funds to ensuring the receiving facility's compliance with Medicaid and Medicare requirements. See 25 U.S.C. 1621f, 1641(c)(1)(B). Congress exempted contracting tribes from this first-use requirement, instead

allowing them the flexibility to allocate the funds to, *inter alia*, "any health care-related purpose." 25 U.S.C. 1641(d)(2)(A). The fact that tribal facilities remain subject to Medicare and Medicaid conditions (NA Br. 43) does not negate Congress's choice to give tribes more flexibility in deciding how to prioritize their resources. In addition, for nearly as long as ISDA has been on the books, Congress has prohibited IHS from spending Medicare and Medicaid proceeds on the construction of new facilities, but has not subjected tribes to the same restriction. Gov't Br. 30; cf. SCA Br. 28 (noting that tribes may spend third-party revenue to "build healthcare facilities"). The San Carlos Apache Tribe protests that this distinction is the product of appropriations riders, not "ISDA or [the Indian Health Care Improvement Act]." SCA Br. 35-36. But it is a significant distinction all the same, and one illustrating that tribal contractors do not simply stand in IHS's shoes when spending third-party income.

The Tribes offer various other reasons why their expenditures of third-party income count as part of the "the Federal program" for contract-support-cost purposes, but none is persuasive. For example, Section 5325(m) describes third-party revenue as "program income" (SCA Br. 25)—but in a provision that differentiates such income from contract funding. See 25 U.S.C. 5325(m)(2).

The San Carlos Apache Tribe also notes (Br. 32) that IHS, when newly transferring a program to a contracting tribe, has sometimes transferred third-party income that IHS previously earned in the program. That IHS may make a one-time transfer of previously collected amounts—because IHS may no longer be able to fulfill the statutory conditions on spending the proceeds

itself, see 25 U.S.C. 1641(c)(1)(A) and (B)—hardly shows that IHS preserves "no clear distinction between program income and contract funding" in practice. SCA Br. 32. To the contrary, IHS has maintained that it is not obligated to include in the Secretarial amount the value of third-party income it previously earned. See *Fort McDermitt Paiute & Shoshone Tribe* v. *Becerra*, 6 F.4th 6, 13-14 (D.C. Cir. 2021) (agreeing).

The Tribes invoke a line in the "Attachments" section of ISDA's model contract stating that the parties may include in the annual funding agreement "a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary)." 25 U.S.C. 5329(c) (model agreement § 1(f)(2)(A)(ii)); see SCA Br. 23; NA Br. 35. But the Tribes (now) take the position that expenditures of *other* kinds of non-IHS "financial resources"—such as funds from the Tribes' general treasuries—do *not* count as part of the "Federal program," even if the Tribes spend those non-IHS funds on services described in their ISDA contracts. SCA Br. 23, 26; NA Br. 25-26; but see Gov't Br. 37-38. So under their own position, this model contract language is not instructive.

Finally, the San Carlos Apache Tribe (though not the Northern Arapaho) relies on the reference in Section 5325(a)(3)(A)(ii) to costs "incurred * * * *in connection with* the operation of the Federal program," 25 U.S.C. 5325(a)(3)(A)(ii) (emphasis added), embracing the Ninth Circuit's belief that this formulation sweeps in some expenditures that are "*outside* of the Federal program itself," SCA Br. 24-25 (quoting SCA Pet. App. 11a). As this Court has recognized, however, the "phrase 'in connection with' is essentially 'indeterminat[e]' because

connections, like relations, 'stop nowhere.'" *Maracich* v. *Spears*, 570 U.S. 48, 59 (2013) (citation omitted; brackets in original). And here, San Carlos Apache offers no yardstick for determining what kind of "outside" costs Congress might have intended to sweep in, aside from the costs in this case. See SCA Br. 25. There is no basis for concluding that Congress used "in connection with" to expand the agency's contract-support-cost obligation on an undefined basis; instead, the phrase merely serves to signal that the ISDA program's share of administrative and overhead costs may be covered even if a cost also benefits non-ISDA programs (and thus is not best described as "for" the ISDA program exclusively, cf. 25 U.S.C. 5325(a)(3)(A)(i)).[3]

B. Section 5326 Confirms That Section 5325(a) Does Not Compel Payment Of The Disputed Costs And Independently Precludes Payment

1. Section 5326 instructs that IHS funds "may be expended only for costs *directly attributable* to [ISDA] contracts, grants and compacts," and are not available "for any contract support costs or indirect costs *associated with any contract*, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than [IHS]." 25 U.S.C. 5326 (emphasis added). That text confirms that Section 5325(a) itself does not mandate the payment of costs that are directly attributable to a tribe's expenditure of funds it

[3] The Northern Arapaho Tribe contends (Br. 22) that some of its expenses qualify as direct contract support costs under Section 5325(a)(3)(A)(i). For the same reasons that costs associated with spending third-party income are not part of "the Federal program" under clause (ii), they are not part of "the Federal program that is the subject of the contract" under clause (i). See pp. 10-12, *supra*.

receives from third parties (and not from IHS under an ISDA contract) or that are "associated with" third-party contracts. In any event, Section 5326's two prohibitions—which apply "notwithstanding any other provision of law," 25 U.S.C. 5326—independently preclude IHS from paying the costs at issue even if those expenses were thought to otherwise qualify as eligible contract support costs. Gov't Br. 25-27; see NA Pet. App. 39a (Baldock, J., dissenting in part).

The Tribes' counterarguments are not persuasive. The Tribes assert that their costs of spending third-party income are "directly attributable" to their ISDA contracts within the meaning of Section 5326's first prohibition because (in their view) the ISDA contracts obligate them to spend that income in certain ways. SCA Br. 38; NA Br. 45. Even putting aside whether that view is correct—and the fact that any such obligation arises only by way of an oblique cross-reference to a *statutory* provision, see p. 5, *supra*—the Tribes' argument saps the qualifying adverb "directly" of all meaningful import. See *Webster's Third* 641 (defining "directly" in the sense of "directly traceable" as "in close relational proximity"). Any downstream expenses a tribe incurs when it spends third-party income do not arise as an "*immediate* consequence of" the ISDA contract. *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992) (emphasis added; citation omitted); see Gov't Br. 26-27.

As for Section 5326's second prohibition, the Tribes do not dispute that, at least with respect to their participation in the Medicare and Medicaid programs, they enter into separate contracts with non-IHS entities that enable the Tribes to receive those funds. SCA Br. 42; NA Br. 50. Instead, the Tribes argue that Section

5326's second prohibition refers only to contracts that "requir[e] [the Tribe] to do something with the money received." SCA Br. 43; see NA Br. 48 (similar). But Section 5326 says "*any* contract." We agree with the Tribes that the prohibition applies only to contracts whereby the Tribe receives money, because that is the statutory context for contract support costs. But there is no basis in text or context for limiting the prohibition to contracts that further require the tribe "to do something with the money received."

2. The Tribes primarily urge this Court to read Section 5326 to do no more than address the specific dispute in *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997): a tribe's request for a contracting agency (the Department of the Interior) to fully fund overhead costs benefitting ISDA programs when those overhead costs also benefitted other tribal programs (state programs funded by the Department of Justice). SCA Br. 13, 40-41; NA Br. 18, 46, 48-49; see *Ramah*, 112 F.3d at 1458-1459, 1463. But this Court has repeatedly rejected invitations to "rewrite" statutory text so that it goes no further than the law's catalyst. *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 402-403 (2010); see *DePierre* v. *United States*, 564 U.S. 70, 85 (2011). That is because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

It would be especially inappropriate to narrow the text of Section 5326, because the provision's drafting history shows that Congress deliberately used broad language. The provision derived from an Interior

Department proposal, in response to *Ramah*, designed "to reduce [the Department's] liability" for contract support costs. *Department of the Interior and Related Agencies Appropriations for Fiscal Year 1999: Hearings before Subcomm. of Senate Comm. on Appropriations*, 105th Cong., 2d Sess. 282 (1999); see *Department of the Interior and Related Agencies Appropriations for 1999*: *Hearings before Subcomm. of House Comm. on Appropriations*, 105th Cong., 2d Sess. pt. 2 1566 (1998) (1998 House Hearing). But Interior's proposal included only the second prohibition (the bar on paying costs "associated with" non-ISDA contracts). 1998 House Hearing 1552. The House Appropriations Committee then added the "only for costs directly attributable to [ISDA] contracts" language and expanded both prohibitions to IHS. See H.R. 4193, Tit. I, § 114, Tit. II, pp. 80-81, 105th Cong., 2d Sess. (as reported July 8, 1998); H.R. Rep. No. 609, 105th Cong., 2d Sess. 52, 108, 110 (1998); see also Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, Tit. I, § 114, Tit. II, 112 Stat. 2681-255, 2681-280 (1998).

Thus, even assuming the "associated with" prohibition could be read to forbid IHS only from paying another contracting government entity's share of a tribe's overhead costs (SCA Br. 40), Congress's addition of the "directly attributable" prohibition must be given effect. See *Department of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 144 S. Ct. 457, 468 (2024) ("Proper respect for Congress cautions courts against lightly assuming that any of the statutory terms it has chosen to employ are 'superfluous' or 'void' of significance.") (citation omitted). Moreover, the problems on display in the Tenth Circuit's *Ramah* ruling are present here too.

Gov't Br. 40-41. In *Ramah*, the court of appeals obligated Interior to pay contract support costs in amounts disproportionate to the Secretarial amounts in Interior's ISDA contracts, on the rationale that the relevant statutory provisions did not speak to the dispute with sufficient clarity and the tribe's overhead expenses might otherwise go partially unfunded. See 112 F.3d at 1458-1459, 1461-1463. The courts below erred in adopting a strained reading of ISDA's funding provisions and Section 5326 based on similar reasoning.

C. The Indian Canon Of Construction Does Not Support The Tribes' Interpretation

Both Tribes, like the opinions below, rely on the Indian canon of construction and its incorporation into ISDA and their contracts. SCA Br. 45-48; NA Br. 51-55. But when Sections 5325(a), 5325(m), 5326, and 5388(j) are given a "fair appraisal," *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (citation omitted), the statutory text and framework foreclose the Tribes' theory—a theory at odds with 35 years of practice between IHS and contracting tribes.

The Tribes emphasize this Court's statement in *Salazar* that the liberal-construction principle means that the government "in effect, must demonstrate that its reading is clearly required by [ISDA's] statutory language." 567 U.S. at 194 (considering ISDA's model-agreement provision); see SCA Br. 47-48; NA Br. 52. The Court offered that observation to reject what it characterized as the government's "invitation to ascribe 'special, rather than ordinary,' meaning" to another ISDA provision making contracts subject to the availability of appropriations. *Salazar*, 567 U.S. at 193 (citation omitted). Here, by contrast, the government relies

on the ordinary, not a "special," meaning of ISDA's funding provisions, using the standard tools of statutory interpretation.

Contrary to the Northern Arapaho Tribe's arguments (Br. 52, 54-55), those tools include statutory context and structure. In *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986), this Court rejected a tribe's attempt to create ambiguity through a "contorted construction" that "divorce[d]" a statute's clauses from one another and was misaligned with "the central purpose and philosophy" of the statutory scheme. *Id.* at 506-507. In *Chickasaw Nation* v. *United States*, 534 U.S. 84 (2001), this Court rejected a tribe's interpretation that was "literally permit[ted]" and "comprehensible" but "too convoluted to believe Congress intended it," instead adopting the government's "more plausible" interpretation. *Id.* at 90; see *id.* at 91 (relying on what "common sense suggests" about Congress's intention "in context").

To the extent the Tribes suggest that *Salazar* was recasting the Indian canon as a clear-statement rule (*e.g.*, NA Br. 54), that is incorrect. This Court has required a clear and unequivocal statement from Congress before concluding that a statute has accomplished certain discrete objectives—like abrogating sovereign immunity or designating a provision as jurisdictional. See *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Coughlin*, 599 U.S. 382, 387-388 (2023); *Boechler, P.C.* v. *Commissioner*, 596 U.S. 199, 203 (2022). But it would be inadministrable to insist that Congress provide an "unequivocal declaration," *Biden* v. *Nebraska*, 600 U.S. 477, 511 (2023) (Barrett, J., concurring) (citation omitted), whenever it intends a multifaceted statutory scheme like ISDA to operate to the

possible detriment of a tribe in some respect. *Salazar* should not be taken as an instruction to "depart from the best interpretation of the text," *ibid.*, when it comes to statutes and contracts affecting tribal interests.

D. The Tribes' Interpretation Would Upend The Statutory Scheme

1. The Tribes argue that IHS's payment of these additional costs "is necessary to maintain congressionally-mandated parity between IHS and Tribes." SCA Br. 19; see NA Br. 38 (arguing that IHS "owe[s] all contract support costs needed to put the Tribe in the same position as IHS"). And the Northern Arapaho Tribe presents a simplified mathematical comparison to argue that the government's position creates a situation where tribal contractors will not be able to fully replicate the program that IHS previously operated. NA Br. 38-39. But the Tribe's hypothetical comparison—which assumes that IHS and tribes will earn the same amount of third-party income in the course of their respective programs—does not take account of the ways in which tribes may earn more income than IHS and more effectively leverage that income afterward. Gov't Br. 29-30; cf. *Swinomish*, 993 F.3d at 922 (observing that "it is not at all clear that [a similar mathematical] hypothetical reflects the reality"). IHS cannot provide services to persons who are not Indians or otherwise eligible under ISDA (*i.e.*, to "non-beneficiaries") without first receiving a request from the beneficiary tribe; tribal contractors, by contrast, can decide to serve non-beneficiaries without consulting IHS. Gov't Br. 29; see 25 U.S.C. 1680c(c)(1)(A)-(B) and (c)(2). And as discussed, tribes are subject to fewer restrictions in how they spend reimbursement income, enabling them to more readily

expand their programs and earn yet additional amounts going forward. See pp. 10-11, *supra*.

The available evidence indicates that these distinctions have real-world impact. See, *e.g.*, U.S. Gov't Accountability Office, *Indian Health Service: Facilities Reported Expanding Services Following Increases in Health Insurance Coverage and Collections* 18 (Sept. 2019), https://perma.cc/M2AP-63XW (2019 GAO Report) (noting that "one tribally operated facility said they recently began allowing non-tribal members to receive care at their facility—an option available to tribally operated facilities but not to federally operated IHS facilities—as a way to increase third-party collections"); *Jamestown S'Klallam Tribe* v. *Azar*, 486 F. Supp. 3d 83, 84 (D.D.C. 2020) (noting that the patient base for the tribally operated facility in that case was 97% non-Indian). Tribes' ability to unilaterally decide to serve non-beneficiaries "has led to construction of new facilities, joint ventures with other practitioners, expanded scope of services, and options for new or collaborative care, such as urgent care centers, drug rehabilitation facilities, long-term care facilities, and specialty clinics." Starla Kay Roels et al., *New Opportunities for Innovative Healthcare Partnerships with Indian Tribes and Tribal Organizations*, 28 The Health Law. 25, 27 (Oct. 29, 2015), https://perma.cc/43FP-FYCB; see *id.* at 27 n.40 (noting that there are "many such programs being carried out in Indian country today").

Similarly, experience shows that the Tribes' prediction that the government's position will incentivize tribes to retrocede their ISDA programs (*e.g.*, SCA Br. 32) lacks force. In the 35 years since Congress added ISDA's contract-support-cost requirement, IHS has

never had a policy of paying for costs associated with tribes' expenditures of third-party income. And yet the number of tribes entering into self-determination contracts and compacts has only increased, even as third-party collections have increased too. See Office of Tribal Self-Governance, IHS, *Indian Health Service Tribal Self-Governance Program* 2 (Oct. 2022), https://perma.cc/K8CB-GRLP; U.S. Government Accountability Office, *Indian Health Service: Considerations Related to Providing Advance Appropriation Authority* 7-8 (Sept. 2018), https://perma.cc/9MVH-Z99X; 2019 GAO Report 15, 18.

The Tribes fail to grapple with the expansive nature of the obligation they would have this Court recognize. They do not deny, for instance, that under their interpretation, what IHS pays in contract support costs could overtake the Secretarial amount—a highly counterintuitive result, given the design of these "added" costs as "support" for that core funding. 25 U.S.C. 5325(a)(2); see Gov't Br. 30-31.[4]

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[4] The Tribes suggest that if they spend third-party income on construction of new facilities, other legal constraints may prevent them from collecting contract support costs on those expenditures. NA Br. 44; SCA Br. 36. Their citations do not bear that out. To begin, 2 C.F.R. Pt. 200, App. VII, ¶ C.3.e only instructs that capital expenditures and other distorting expenditures may be excluded from a total direct cost base for purposes of calculating a grantee's indirect cost rate (not at issue here, see J.A. 10, 112). And by its terms, 25 U.S.C. 5325(h) is applicable when a tribe enters into an ISDA contract to fund a construction project (which it would not need to do if using third-party resources). Regardless, the more significant point about tribes' ability to spend third-party income on construction projects (Gov't Br. 31) is to flag the potential for significant program expansion, which would in turn result in more third-party income—and in the Tribes' view, more contract-support-cost liability for IHS.

2. The Tribes rightfully emphasize the significant challenges facing the delivery of health care to American Indians and Alaska Natives around the country and argue that such programs, including ISDA-contracted programs, are underfunded. IHS shares those concerns, which is why the agency has fought to obtain a 68% increase in appropriated funding over the past decade. *Fiscal Year 2025, Indian Health Service: Justification of Estimates for Appropriations Committees* CJ-2 to CJ-3 (Mar. 5, 2024), https://perma.cc/L4X6-PBRB. And it is why IHS most recently asked Congress for over a billion dollars more for ISDA contracts (to which over half of IHS's resources are dedicated) and IHS's direct programs. *Id.* at CJ-1 to CJ-3, CJ-8.

But the solution is not to create a new, open-ended funding mandate that Congress did not legislate to provide. Such an expansion of IHS's contract-support-cost obligation—which could increase by close to 200% under the Tribes' theory, with that amount expected to grow over time—threatens IHS's ability to adequately fund the direct services it provides to tribes who elect not to enter into ISDA contracts. Gov't Br. 44-45. Even the Tribes' amici warn that if this Court affirms, "Congress will need to appropriate additional funds * * * through mandatory appropriations * * * so that increases in contract support costs will not result in a decrease of funds for direct healthcare services, including those services provided to sovereign tribal nations that choose to receive their healthcare directly from IHS." National Indian Health Board et al. Br. 25-26. ISDA does not demand that result, and the Court should not require it.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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