

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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XAVIER BECERRA, SECRETARY OF )  
HEALTH AND HUMAN SERVICES, ET AL., )  
Petitioners, )  
v. ) No. 23-250  
SAN CARLOS APACHE TRIBE, )  
Respondent. )  
-----

XAVIER BECERRA, SECRETARY OF )  
HEALTH AND HUMAN SERVICES, ET AL., )  
Petitioners, )  
v. ) No. 23-253  
NORTHERN ARAPAHO TRIBE, )  
Respondent. )  
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Pages: 1 through 106  
Place: Washington, D.C.  
Date: March 25, 2024

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16   - - - - -

17  
18                                    Washington, D.C.  
19                                    Monday, March 25, 2024

20  
21           The above-entitled matter came on for oral  
22   argument before the Supreme Court of the United  
23   States at 10:03 a.m.

24  
25

1 APPEARANCES:  
2 CAROLINE A. FLYNN, Assistant to the Solicitor General,  
3 Department of Justice, Washington, D.C.; on behalf  
4 of the Petitioners.  
5 ADAM G. UNIKOWSKY, ESQUIRE, Washington, D.C.; on  
6 behalf of the Respondent in 23-253.  
7 LLOYD B. MILLER, ESQUIRE, Washington, D.C.; on behalf  
8 of the Respondent in 23-250.  
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-250, *Becerra versus the Apache Tribe*.

Ms. Flynn.

ORAL ARGUMENT OF CAROLINE A. FLYNN

ON BEHALF OF THE PETITIONERS

MS. FLYNN: Mr. Chief Justice, and may it please the Court:

The Indian Self-Determination Act requires the Indian Health Service to enter into contracts with tribes to transfer federal health programs that IHS previously carried out for the tribes' benefit. ISDA's basic design is simple. IHS takes the appropriated funds it would have otherwise spent on the federal program and transfers those funds to the tribe in exchange for the tribe's promise to use them to provide the same level of services, and ISDA obligates IHS to add to that core secretarial amount contract support costs to plug specific gaps the secretarial amount does not cover.

What the tribes are arguing here is that ISDA also obligates IHS to subsidize the

1 tribes' expenditures of funds that they don't  
2 receive from IHS under the contract but, rather,  
3 collect from third parties as supplemental  
4 revenue.

5           The statutory text and context refute  
6 that theory, which would upend how the statute  
7 has been administered for 35 years. ISDA's  
8 provisions addressing contract support costs say  
9 anything about third-party revenue a tribe may  
10 earn. ISDA deals with that separate income  
11 stream in other provisions, including one  
12 instructing that such income shall be treated as  
13 supplemental funding to that in the contract.

14           The tribes' argument that Congress  
15 actually intended for such income to determine  
16 what IHS pays under the contract would work a  
17 sea change in ISDA's scheme by potentially  
18 tripling the federal government's contract  
19 support cost obligation and eventually  
20 transforming what the statute designates as mere  
21 support costs into the primary component of  
22 contract funding.

23           But there is an even more  
24 straightforward reason why the tribes' theory  
25 here is wrong. It violates Congress's express

1 command that IHS only reimburse costs that are  
2 directly attributable to the tribes' ISDA  
3 contract. That prohibition applies  
4 notwithstanding any other provision of law and  
5 would independently bar the agency from paying  
6 the costs at issue here even if they might  
7 otherwise qualify.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Are there limitations  
10 on how the tribe can use the outside income --

11 MS. FLYNN: There are --

12 JUSTICE THOMAS: -- the additional  
13 income?

14 MS. FLYNN: -- there are two statutory  
15 conditions that are applicable to how tribes can  
16 use these -- this third-party reimbursement  
17 income. Those are in 5325(m)(1). That's a  
18 provision --

19 JUSTICE THOMAS: And what's that  
20 limitation?

21 MS. FLYNN: So, there, it says they  
22 have to use it to further the general purposes  
23 of the contract. And --

24 JUSTICE THOMAS: Well, if that's the  
25 case, I guess their argument is then it is a

1 part of the contract?

2 MS. FLYNN: They have an argument that  
3 because all of ISDA 20 -- Title I is  
4 incorporated via a cross-reference in the  
5 authority section of the model contract, that  
6 that provision, (m) (1), is incorporated.

7 But that provision also has to be read  
8 consistent with the provision of the Indian  
9 Health Care Improvement Act. That's 1641(d) (2).  
10 And that governs the same reimbursement income  
11 and says tribes just have to use it "for any  
12 healthcare-related purpose" or otherwise defer  
13 to the purposes of that law, which include  
14 things as varied as including the presence of  
15 tribal members in healthcare professions.

16 So it is a very open-ended limitation  
17 that is not limited to just providing additional  
18 contract services.

19 JUSTICE SOTOMAYOR: I'm sorry, but --

20 CHIEF JUSTICE ROBERTS: Well, under --  
21 under your approach, a tribe is worse off if --  
22 the more they undertake in -- in the direction  
23 of self-determination, right?

24 MS. FLYNN: I would --

25 CHIEF JUSTICE ROBERTS: In terms -- in



1 terms of funding, they are undertaking more  
2 healthcare responsibilities and getting a  
3 smaller percentage of the money back from the  
4 government.

5 MS. FLYNN: I would respectfully  
6 disagree with that, Your Honor. I believe  
7 you're referencing the -- the mathematical hypo  
8 that the tribes have offered in their brief  
9 saying that there is what they call a  
10 self-determination penalty because --

11 CHIEF JUSTICE ROBERTS: Right.

12 MS. FLYNN: -- for the same amount of  
13 third-party reimbursement income HHS brings in,  
14 the tribe won't be able to provide the same  
15 level of services. But that assumes that HHS,  
16 when it's -- or IHS, when it's running its own  
17 program, and the tribes are earning the same  
18 amount of third-party income.

19 And there are ways that statute has --  
20 or that Congress has built flexibilities into  
21 the statute to enable tribes to earn more  
22 third-party reimbursement income in the first  
23 instance and have greater flexibility to spend  
24 it so as to leverage it to build their programs  
25 in ways that IHS cannot.

1                   And so you don't -- there is --

2                   CHIEF JUSTICE ROBERTS: Well, how is  
3 that? I mean, they're getting more Medicare,  
4 Medicaid assets -- or financing that they can  
5 then use, but the -- under the interpretation of  
6 the government, they're not reimbursed for that.

7                   MS. FLYNN: Well, they're earning more  
8 in the first instance, for instance, because  
9 tribes running their own programs can  
10 unilaterally decide to serve non-Indians and  
11 other noneligible beneficiaries. IHS --

12                   JUSTICE KAGAN: But what about the  
13 tribes that don't want to do that? I mean, I  
14 think you said that maybe half the tribes serve  
15 non-Indians, but the other half don't and,  
16 presumably, have decided that they don't want  
17 to. And then the Chief Justice's question would  
18 apply in full force. They're getting less  
19 because they've gone the independent route.

20                   MS. FLYNN: Well, I -- I think that  
21 Congress gave them that flexibility so that they  
22 could grow their programs that way, but the  
23 other ways in which IHS is differently situated  
24 is that IHS can't use Medicaid and Medicare  
25 proceeds, which are the bulk of the proceeds

1 that we're talking about, to spend on new  
2 construction of new facilities. Tribes can.  
3 That can enable the tribes to grow their  
4 programs and bring in more third-party income.

5 And there's -- the other distinction  
6 is that because tribes are able to use their  
7 income on any healthcare-related purpose,  
8 whereas IHS is subject to a first use  
9 requirement where they have to specifically  
10 reinvest that money in Medicaid and Medicare  
11 program compliance, there's also just a  
12 limitation on how IHS can build the program,  
13 even aside from the decision to serve --

14 JUSTICE KAGAN: Well, is that really  
15 --

16 MS. FLYNN: -- non-Medicare  
17 beneficiaries.

18 JUSTICE KAGAN: -- so different? I  
19 mean, presumably, the tribes also have to make  
20 sure they're compliant with Medicare and  
21 Medicaid, so, presumably, they're having to put  
22 money into the same things.

23 MS. FLYNN: So I believe Congress  
24 thought it was a difference when they  
25 deliberately exempted the tribes from that

1 requirement and said that they can prioritize  
2 other uses of these funds, including program  
3 expansion, rather than having to ensure complete  
4 compliance with Medicaid and Medicare in the  
5 first instance.

6 JUSTICE KAGAN: Well, I mean --

7 MS. FLYNN: But I would --

8 JUSTICE KAGAN: -- they have to make  
9 sure that the Medicare and the Medicaid monies  
10 keep flowing in, and for them to -- for those  
11 monies to keep flowing in, they have to be  
12 compliant with the program terms.

13 MS. FLYNN: Right, but they have a  
14 sort of accounting and prioritization  
15 flexibility that IHS does not have.

16 But the other thing is -- I would say  
17 about all this is this is -- we're talking now  
18 about the tribes' argument that there is some  
19 kind of a contractual condition having to do  
20 with spending the money that shows that Congress  
21 would have wanted this to be considered -- to  
22 help determine contract support costs, but I  
23 think, when you look at the contract support  
24 cost provisions themselves, they tie the  
25 obligation to pay these costs to the federal

1 program that is the subject of the contract.

2 And the federal program that is the  
3 subject of the contract is the program that the  
4 tribes agreed to carry out in exchange for the  
5 secretarial amount to the same extent as those  
6 -- that secretarial amount funding will allow  
7 them to perform.

8 JUSTICE GORSUCH: Counsel --

9 MS. FLYNN: And --

10 JUSTICE GORSUCH: -- I had thought  
11 that a lot changed after 2010 and the tribes  
12 became payer of last resort and -- under  
13 Obamacare, and -- and so they've taken on a lot  
14 more obligations here. Is that right?

15 MS. FLYNN: The payer of last resort  
16 provision means that when there are different  
17 available sources of funds, that the tribes or  
18 the IHS program is --

19 JUSTICE GORSUCH: Is the payer of last  
20 resort?

21 MS. FLYNN: -- among the available  
22 sources of funds. We don't interpret that  
23 provision to require tribes to enroll in --

24 JUSTICE GORSUCH: No, but --

25 MS. FLYNN: -- Medicare and Medicaid,

1 for instance.

2 JUSTICE GORSUCH: -- the ones that  
3 have, it's -- it's -- it's -- it's -- that's  
4 what's changed. That's why we're here, I think,  
5 in part. And so they have to collect -- and  
6 they have to collect from Medicare and Medicaid,  
7 right? That's that --

8 MS. FLYNN: Again, I don't think that  
9 provision requires them to enroll in --

10 JUSTICE GORSUCH: No, but, once --  
11 once they -- once they take on this obligation,  
12 they have -- they have a duty to collect the  
13 funds from third parties?

14 MS. FLYNN: We have not disputed that  
15 reading of the payer of last resort provision in  
16 this case --

17 JUSTICE GORSUCH: Okay.

18 MS. FLYNN: -- but I'm not sure that  
19 IHS --

20 JUSTICE GORSUCH: Okay. So they have  
21 -- they have to collect it, and then the  
22 question is how they spend it. And -- and  
23 (m) (1) says it has to be consistent with the  
24 general purposes of the contract. You indicated  
25 that. And the contracts are specific about what

1 services they provide. EMS in some cases, other  
2 kinds of particular services, right?

3 MS. FLYNN: Yes.

4 JUSTICE GORSUCH: So the general  
5 purpose of the contract is Indian health, right?

6 MS. FLYNN: Yes, I agree with that.

7 JUSTICE GORSUCH: And Indian health,  
8 right?

9 MS. FLYNN: Yes.

10 JUSTICE GORSUCH: Not -- not -- not --  
11 not non-Indians?

12 MS. FLYNN: Yes.

13 JUSTICE GORSUCH: Okay. And -- and  
14 it's even more specifically limited by the  
15 particular services that tribes have contracted  
16 to provide, like, for example, in one of the  
17 cases, EMS services, right?

18 MS. FLYNN: I agree with that, but the  
19 services --

20 JUSTICE GORSUCH: So --

21 MS. FLYNN: -- that the tribe is -- I  
22 just --

23 JUSTICE GORSUCH: So, if you do agree  
24 with that, then what's the problem here? You  
25 raised the specter that they're going to expand

1 their programs to help non-Indians. Maybe  
2 they're free to do that -- you're right --  
3 statutorily.

4 But, in terms of the contract support  
5 services that would be required to be paid from  
6 the government, it would seem to be limited, A,  
7 as you agreed, by the general purpose of the  
8 contract, which is Indian health, not non-Indian  
9 health, and, two, more specifically, by the  
10 specific services that the government has  
11 contracted to allow the tribes to provide --

12 MS. FLYNN: I -- I don't under --

13 JUSTICE GORSUCH: -- particular  
14 services.

15 MS. FLYNN: -- I don't understand that  
16 to be the tribes' position in this case, is that  
17 the extra contract support costs they're asking  
18 for be limited to that tied to reimbursement  
19 income that came from serving only --

20 JUSTICE GORSUCH: Why isn't that -- it  
21 has to be consistent with the general purposes  
22 of the contract, (m) (1). So those -- those  
23 purposes are the specific services that have  
24 been provided -- contracted to be provided.

25 MS. FLYNN: So I -- I would not fight



1 Your Honor on imposing that limitation if you  
2 were to say that there is some additional  
3 contract support cost obligation tied to  
4 third-party reimbursement.

5 JUSTICE GORSUCH: Okay. So would that  
6 -- would that --

7 MS. FLYNN: I'm talking about the --

8 JUSTICE GORSUCH: -- would that take  
9 care of all the government's concerns about and  
10 -- and -- and the parade of horrors about the  
11 money being used for non-Indian healthcare?  
12 Because it would seem to.

13 MS. FLYNN: Well, again, that wasn't  
14 what the lower court found here, and I don't  
15 believe that's what the tribes are arguing, but,  
16 I mean, I think we would still have a situation  
17 where, because third-party reimbursement income  
18 has been increasing and because that would then  
19 directly, according to the tribes' theory,  
20 determine how much contract support cost the  
21 agency is paying and that amount would grow and  
22 snowball over time, it would overtake the  
23 secretarial amount of the primary --

24 JUSTICE GORSUCH: Well, it certainly  
25 has grown over time, but that's a function,

1 again, of them becoming payors of last resort  
2 the way his sometimes is. And -- and that is a  
3 big change. I grant you that.

4 But I think you just agreed that  
5 properly read, (m) (1) would limit it to Indian  
6 healthcare and the particular services the  
7 government is contracting for the tribes to  
8 supply.

9 MS. FLYNN: So I would agree that the  
10 -- the estimate we've provided about how, if the  
11 tribes' theory were adopted or imposed on the  
12 program nationwide, that would amount to about  
13 800 million to \$2 billion per year. That would  
14 be different, I assume, if that --

15 JUSTICE GORSUCH: It would be a lot  
16 smaller under what I've just described, wouldn't  
17 it?

18 MS. FLYNN: It would be smaller. I  
19 don't have the information to tell you how much.

20 JUSTICE KAVANAUGH: Is that -- is that  
21 issue -- is that issue before us?

22 MS. FLYNN: That wasn't what the lower  
23 courts decided here. I don't take the tribes to  
24 be excluding reimbursement revenue from  
25 non-Indian beneficiaries from the kind of

1 contract support costs they're asking for, and  
2 so I -- I, you know, would be open to this Court  
3 to --

4 JUSTICE KAGAN: I had thought --

5 MS. FLYNN: -- rule that way, but --

6 JUSTICE KAGAN: -- that -- maybe I'm  
7 wrong, but -- Mr. Unikowsky can say so, but I  
8 had thought that one of Mr. Unikowsky's  
9 arguments sounded in this vein, that -- you  
10 know, that to the extent that the government was  
11 saying, oh, there are all these possible abuses  
12 out there in the world, that there was a ready  
13 solution, which was to limit it to the services  
14 that the tribe is providing to Indians under the  
15 contract.

16 MS. FLYNN: To -- just to clarify, we  
17 don't think it's an abuse to, you know, take  
18 advantage of the flexibilities that Congress has  
19 allowed to decide to serve non-beneficiaries if  
20 it will not diminish the care available to  
21 eligible Indians, but --

22 JUSTICE KAGAN: I'll take that as a  
23 friendly amendment.

24 MS. FLYNN: But I understood my friend  
25 representing the Northern Arapaho to say that if

1 the tribe actually does spend third-party  
2 reimbursement income on program services, that  
3 that should lead to a different result.

4 I don't think that solves the -- the  
5 problem for his argument there, but I didn't  
6 take him to be saying that you limit the kind of  
7 third-party reimbursement income to just that  
8 provided to Indians. That is not something I  
9 have seen raised in this case.

10 JUSTICE KAVANAUGH: That's not raised  
11 at all --

12 MS. FLYNN: Perhaps they can clarify.

13 JUSTICE KAVANAUGH: -- is it? I mean,  
14 that's just not raised at all?

15 MS. FLYNN: No, I don't think so.

16 JUSTICE KAVANAUGH: I -- I didn't -- I  
17 didn't see it at least.

18 MS. FLYNN: No, I don't think so.

19 JUSTICE BARRETT: Counsel --

20 JUSTICE SOTOMAYOR: Counsel -- I'm  
21 sorry.

22 JUSTICE BARRETT: Go ahead.

23 JUSTICE SOTOMAYOR: Counsel, you've  
24 been talking about this costing a lot. It may  
25 well be. And -- and I'm interested in the other

1 side's response to the series of questions that  
2 are going on now about that limitation.

3 But I understand that in terms of  
4 tribal healthcare, it's about one-third of what  
5 is spent by the average American on their own  
6 healthcare. So it's not as if all of this money  
7 is bringing us a luxury healthcare spa. It's  
8 actually bringing us to a fairly minimal level  
9 of healthcare for tribal members.

10 I still don't understand how your  
11 interpretation makes any contract support system  
12 costs, or many of them, recoverable at all  
13 because you seem to be saying that if you're  
14 providing services with a -- you have services  
15 with a third party like Medicare or Medicaid,  
16 why would that then include contracts with a  
17 consultant who comes in to do the other services  
18 that the contract requires for the government?

19 There's always third-party contract --  
20 contract supports that are reimbursed by the  
21 government. Why is this any different? They're  
22 not providing the service because of Medicaid or  
23 Medicare. They're providing the service because  
24 of their agreement with the government. This is  
25 only a reimbursement. It's not a required

1 service agreement.

2 MS. FLYNN: So I do want to make sure  
3 to respond to the point that Your Honor raised  
4 in the beginning of your question about the  
5 underfunding of Indian health, and his, you  
6 know, agrees with that and is seeking additional  
7 appropriations from Congress but just doesn't  
8 believe that upending the funding scheme in this  
9 way in an open-ended way is what --

10 JUSTICE SOTOMAYOR: That -- that  
11 assumes the answer to the question, which is  
12 that it's upending, if it's clear by the text  
13 that if you provide services, you'll be  
14 reimbursed for them and for contract support.  
15 It's the contract doing that, not -- not  
16 upending it.

17 MS. FLYNN: Yes, but I -- to respond  
18 to Your Honor's question about 5326 and the two  
19 prohibitions there, so you were, I believe,  
20 referencing the second prohibition, which is  
21 that his funds cannot be spent to pay costs  
22 associated with any contract that's not with  
23 his.

24 We understand that prohibition to be  
25 limited to contracts by which the tribe receives

1 funds, which is consistent with Congress's --  
2 what we understand to be Congress's motivation  
3 to not have IHS's appropriated funds be used to  
4 subsidize other funding schemes.

5 But, even if you disagree with me  
6 about that, I would point you to the first  
7 prohibition in 5326. That is the one saying  
8 that IHS's appropriated funds cannot be used to  
9 spend on -- to reimburse costs that are not  
10 directly attributable to ISDA contracts. And we  
11 think that that language squarely applies here  
12 because attributable is asking for a causation  
13 --

14 JUSTICE SOTOMAYOR: The contract  
15 requires them to seek reimbursement. How can it  
16 not be attributable? As Justice Gorsuch pointed  
17 out, before, they didn't have to do it. Now  
18 they're forced to do it by contract.

19 MS. FLYNN: Because we think  
20 attributable is calling for -- I mean, the word  
21 means capable of being produced by or brought  
22 about by or caused by. And then you add  
23 directly, which is an adverb that doesn't appear  
24 the other times that ISDA -- the three other  
25 times that ISDA uses the word "attributable."

1 And that is --

2 JUSTICE SOTOMAYOR: Okay.

3 MS. FLYNN: -- there's an extended --

4 JUSTICE SOTOMAYOR: Thank you,  
5 counsel.

6 JUSTICE BARRETT: Counsel, can I --  
7 I -- I -- this is a complicated statute and so I  
8 have a question about how it actually works.

9 It seems to me there's an argument  
10 that these costs should be included in the  
11 secretarial amount. Am I right that you don't  
12 dispute that the costs of collecting the  
13 Medicare and Medicaid fall within the  
14 secretarial amount?

15 MS. FLYNN: That's correct.

16 JUSTICE BARRETT: Okay. When his  
17 collects the money, does his then spend it?

18 MS. FLYNN: Yes. It has to first  
19 dedicate it to the facility that earned it in  
20 compliance with Medicaid and Medicare, but yes.

21 JUSTICE BARRETT: Right. So, if the  
22 tribe is standing in IHS's shoes, why shouldn't  
23 the secretarial amount -- I -- I don't  
24 understand the tribes -- and Mr. Unikowsky can  
25 address this point -- I don't understand the



1 tribes to be saying it should be part of the  
2 secretarial amount, but if the secretarial  
3 amount includes the costs of collection, it's  
4 not apparent to me why it wouldn't cover the  
5 costs of expenditure in the same way that you're  
6 saying his spends that money.

7 MS. FLYNN: Because the -- well, there  
8 are some -- I'm not sure this is Your Honor's  
9 question. There are some overhead  
10 administrative functions that are included in  
11 the secretarial amount if they're the kind of  
12 thing that the Secretary could have allocated to  
13 that tribe.

14 But, no, the costs of spending income  
15 from third parties is not part of the  
16 secretarial amount because that is limited to  
17 the funds the Secretary otherwise would have  
18 provided for the operation of the -- the  
19 operation of the program. And then the contract  
20 support cost obligation is itself tied as funds  
21 to support that amount.

22 JUSTICE BARRETT: Except my confusion  
23 is you're saying that the secretarial amount  
24 does include the costs of collecting the  
25 third-party income, right?

1 MS. FLYNN: Yes, because -- yeah.

2 JUSTICE BARRETT: Yeah. And you --  
3 you incur overhead costs when you spend that  
4 third-party income as well, which I take to be  
5 the entire dispute here, is whether they get  
6 coverage for that, right?

7 MS. FLYNN: Right, but I guess I would  
8 say the -- the costs of collection and billing,  
9 that is associated with providing the services  
10 using the secretarial amount itself. These  
11 later costs of deciding how to spend those  
12 funds, which may not even be -- happen during  
13 the same contract period, that is not tied up  
14 with the services being provided in the first  
15 instance.

16 So the billing function, we think,  
17 comes over with the secretarial amount because  
18 it's tied up with providing the services and  
19 getting the funds in -- in return but not with  
20 the later decisions about how to spend this  
21 money, which could be spent on building a new  
22 facility, starting a new kind of healthcare  
23 program the Secretary didn't previously run on  
24 the tribes' behalf, that kind of thing.

25 JUSTICE GORSUCH: I think the answer,

1     though, if I understood it correctly, to Justice  
2     Barrett is that when his does collect  
3     third-party payments, it spends that money to  
4     advance Indian health, and that includes some  
5     overhead costs?

6             MS. FLYNN: Yes, that is correct. But  
7     what the statute is telling us to look to for  
8     purposes of deciding what counts for contract  
9     support cost reimbursement is a federal program  
10    --

11            JUSTICE GORSUCH: No, I -- I  
12    understand. My question was his. And so, when  
13    his spends that money, it incurs some overhead  
14    costs, and those are obviously paid for by the  
15    federal government.

16            MS. FLYNN: Yes.

17            JUSTICE GORSUCH: Okay.

18            MS. FLYNN: But the -- the statute is  
19    telling --

20            JUSTICE GORSUCH: And then -- and then  
21    -- and then -- and then just back to where we  
22    were earlier, you said that Mr. Unikowsky didn't  
23    raise an argument. I've got page 27 of the  
24    brief in front of me. "At a minimum, contract  
25    support costs are recoverable when program

1 income is used to fund enumerated services  
2 within the contractual scope of work."

3 And he says on page 29 that the  
4 Northern Arapaho are prepared to prove that  
5 every penny of program income was, in fact,  
6 spent for activities enumerated in the  
7 contractual scope of work.

8 MS. FLYNN: So I don't understand that  
9 to be an argument along the lines Your Honor was  
10 suggesting about --

11 JUSTICE GORSUCH: Why not? My  
12 argument was -- my question was, aren't they  
13 obliged under (m) (1) to spend on general  
14 purposes, that's Indian health, and aren't they  
15 also obligated to spend in accordance with the  
16 contractual services that they've agreed to  
17 provide with -- for the government?

18 MS. FLYNN: So I --

19 JUSTICE GORSUCH: That is exactly  
20 what's laid out in those pages.

21 MS. FLYNN: I don't think they're  
22 distinguishing between serving eligible Indian  
23 beneficiaries and those that the tribe is  
24 eligible to serve once they make a determination  
25 that they can.

1                   But the other thing is I believe for  
2                   at least one of the contract years at issue --  
3                   we only have one set of contracts with the  
4                   Northern Arapaho -- in there, they refer to the  
5                   resolution that the tribe made to serve  
6                   non-beneficiaries and talk about that in the  
7                   course of, I think, the scope of work or  
8                   something like that.

9                   So I -- that's why I didn't understand  
10                  that to be an argument about distinguishing  
11                  between those two different kinds of  
12                  reimbursement schemes, but, of course, they can  
13                  --

14                  JUSTICE KAVANAUGH: Can -- can you --

15                  MS. FLYNN: -- clarify that.

16                  JUSTICE KAVANAUGH: -- can you finish  
17                  your answer to the first question that Justice  
18                  Gorsuch just asked?

19                  MS. FLYNN: Yes. So I took Justice  
20                  Gorsuch to be saying that shouldn't -- or  
21                  perhaps to be suggesting that shouldn't we think  
22                  of the federal program as that funded by the  
23                  secretarial amount, the appropriated funds, but  
24                  also third-party income because that's what his  
25                  would do when running these programs itself.

1           And I was pointing to the statutory  
2 phrase, "the federal program that is the subject  
3 of the contract." And that's in 5325(a)(3)(i).  
4 And the program that is the subject of the  
5 contract is the program that the tribe is  
6 agreeing to undertake in exchange for the  
7 secretarial amount, and you know that from model  
8 contract language that appears in the contract.  
9 For instance, in the Northern Arapaho -- or in  
10 the San Carlos Apache Tribe's contract, it's at  
11 JA 54, where it says, "The contractor shall not  
12 be obligated to continue performance that  
13 requires an expenditure of funds in excess of  
14 the amount of funds awarded under this  
15 contract." So that is tethering the obligation  
16 to perform to the secretarial amount.

17           There's also a provision which also  
18 comes from the model contract language that's  
19 enacted into the statute, and in the San Carlos  
20 Apache Tribe's contract at JA 51, it says, "The  
21 purpose of the contract is to transfer the  
22 funding and the following related functions,  
23 services, programs, and activities."

24           So we think the subject of the  
25 contract language in the contract support cost

1 provision, which the next sub-clause which also  
2 refers to the federal program, we think, is  
3 referring back up to, is the program that is  
4 delineated by the secretarial amount, the one  
5 that the contractor is promising to undertake in  
6 exchange for the secretarial amount, and not  
7 parts -- services funded by other funding  
8 streams.

9 JUSTICE JACKSON: How do you square  
10 that view and that interpretation with the rule  
11 of construction that the statute gives us, which  
12 says -- I'm looking at 532 -- 5321(g) -- that  
13 each provision shall be liberally construed for  
14 the benefit of the Indian tribe participating in  
15 self-determination?

16 So to the extent -- I don't know  
17 whether we need to think of this as ambiguous or  
18 not, but they make an argument about what those  
19 same provisions mean. Why aren't we bound by  
20 this statutory mandate to construe them in their  
21 favor?

22 MS. FLYNN: Because we believe that  
23 statutory language is calling for courts to  
24 apply the Indian canon, the common law Indian  
25 canon that has been applied in this Court's

1 cases. And as that Court --

2 JUSTICE JACKSON: It doesn't say that.  
3 It doesn't reference the -- can Congress not  
4 come up with its own liberal construction  
5 provision?

6 MS. FLYNN: It could, but it used the  
7 same buzz words that come from this Court's  
8 articulation of that canon, which is "liberally  
9 construed" and "ambiguities resolved to the  
10 benefit of the Indians." That comes from how  
11 this Court has phrased the canon in its cases  
12 like Chickasaw, Montana Blackfeet. So I think,  
13 if Congress was asking for something different,  
14 it wouldn't have used the exact same phrasing  
15 that calls up the common law canon and all of  
16 its roots. And those roots include --

17 CHIEF JUSTICE ROBERTS: You can finish  
18 your answer.

19 MS. FLYNN: Thank you. Those roots  
20 include looking at context, they include looking  
21 at statutory structure, they include thinking  
22 about things like common sense. And we've laid  
23 out some examples in our reply brief.

24 JUSTICE SOTOMAYOR: I'm sorry --

25 CHIEF JUSTICE ROBERTS: Thank you --



1 thank you, counsel.

2 Justice Thomas, anything further?

3 Justice Alito?

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: Just to be clear  
6 on that last point --

7 MS. FLYNN: Mm-hmm.

8 JUSTICE SOTOMAYOR: -- I know some of  
9 my colleagues believe that we shouldn't be  
10 making choices of who to favor in interpretive  
11 principles, but it's not us making that choice;  
12 it's the statute making that choice, correct?

13 MS. FLYNN: Yes. The statute calls  
14 for the application of the Indian canon.

15 JUSTICE SOTOMAYOR: All right. So, if  
16 there is an ambiguity, it should be -- we should  
17 follow the dictates of the choice specified by  
18 Congress, correct? You think there's none, but  
19 if we believe there is?

20 MS. FLYNN: Yes, but I believe you can  
21 --

22 JUSTICE SOTOMAYOR: All right. Thank  
23 you, counsel.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Gorsuch?

1 Justice Kavanaugh?

2 JUSTICE KAVANAUGH: Can you just, on  
3 the funding amount, 800 million to 2 billion,  
4 put that in context here? Because, you know,  
5 that number's not contextualized.

6 MS. FLYNN: Sure. So IHS's current  
7 contract support cost obligation is about 1  
8 billion per year. Its total funding is 8  
9 billion per year. And because contract support  
10 costs are discretionary funding, it falls under  
11 discretionary funding caps government-wide but  
12 also applicable to this committee.

13 And so it stands to reason that if all  
14 of a sudden contract support costs just explode,  
15 Congress is going to have to find the cuts  
16 elsewhere to keep the budget under the  
17 discretionary spending caps. And we believe  
18 there's a real danger that that funding is going  
19 to come from the other 40 percent of IHS's  
20 budget, which is providing direct services to  
21 tribes that decide not to enter into these  
22 contracts in contexts --

23 JUSTICE KAVANAUGH: Because Congress  
24 couldn't cut, without changing its rules,  
25 mandatory spending, correct, so it would have to

1       come out of the other discretionary funding?

2               MS. FLYNN: That's what the cap  
3       applies to, yes. And, you know, his has asked  
4       for this funding to be transferred to mandatory  
5       funding. It's asked for years. Congress has  
6       not done that. And so --

7               JUSTICE KAVANAUGH: When you say "this  
8       funding," which funding?

9               MS. FLYNN: Both just CSC or Contract  
10       Support Costs in particular and also all of  
11       IHS's --

12              JUSTICE KAVANAUGH: But, right now,  
13       it's still discretionary?

14              MS. FLYNN: Right now, it is still  
15       discretionary.

16              JUSTICE KAVANAUGH: So subject to the  
17       cap, okay.

18              MS. FLYNN: Yes.

19              JUSTICE KAVANAUGH: And that would --  
20       okay. I understand that.

21              On the 35 years point, Justice  
22       Gorsuch -- I'm just interested in your further  
23       response to things changed in 2010 after the  
24       Health Care Act was passed in 2010. What was  
25       your full response to that? Do you see that as

1 causing the change that prompted this issue, or  
2 where -- where else do you see it coming from,  
3 other than the overall underfunding problem that  
4 Justice Sotomayor raised?

5 MS. FLYNN: So I don't understand --  
6 Congress in the Affordable Care Act enacted this  
7 payor of last resort provision, but it's not  
8 part of ISDA, it's not part of the Indian  
9 Healthcare Improvement Act, and so I don't -- I  
10 don't understand Congress to have wanted to  
11 affect a sea change to ISDA funding by way of  
12 that provision. I'm not aware of anything in  
13 the legislative background suggesting that that  
14 was the case.

15 I would also say that I understood the  
16 tribes to be saying that there were changes made  
17 in 1994 that actually affected this change.  
18 They think that's by the addition of (m) and  
19 also the fact that the model contract now has  
20 the authority section that cross-references all  
21 of Title I.

22 I think that would be a very sort of  
23 triple bank shot way of getting across this  
24 meaning when Congress was otherwise addressing  
25 the relationship between contract funding and

1 the receipt of third-party income.

2 But also, if that is what Congress  
3 tried to accomplish in 1994, nobody noticed for  
4 decades. His has been administering this  
5 program the way we've been advocating for in  
6 this case since that time.

7 JUSTICE KAVANAUGH: Has anyone in  
8 Congress raised concerns about that that you're  
9 aware of?

10 MS. FLYNN: I'm not aware of this  
11 contract support cost dispute vis-à-vis  
12 third-party reimbursement income coming up in  
13 the background of these laws. I'm not aware of  
14 it ever being raised to the surface.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Barrett?

18 JUSTICE BARRETT: So the questions  
19 that I was asking you before really related to  
20 53 -- 5325(a)(1) and kind of asking you why this  
21 wouldn't have been included in the secretarial  
22 amount.

23 MS. FLYNN: Mm-hmm.

24 JUSTICE BARRETT: Just want to clarify  
25 something about 5325(a)(2).

1           So, as I understand it, (a) (2) (A), I  
2           mean, the example that kept coming up in the  
3           briefs was workers' comp.

4           MS. FLYNN: Mm-hmm.

5           JUSTICE BARRETT: And (a) (2) (B), the  
6           example would be legal services from DOJ, you  
7           know, something that his doesn't have to provide  
8           for itself or hire lawyers for itself because it  
9           has government lawyers outside the agency that  
10          it can rely on, correct?

11          MS. FLYNN: Yes.

12          JUSTICE BARRETT: Yes, okay. So, in  
13          arguing that these cannot count as contract  
14          support costs, does your argument really hinge  
15          on the definition of "the program" in (a) (2) (A)?

16                 Because it seems like these would not  
17          be expenses or -- or I -- I took some of your  
18          answers in your brief -- your answers today and  
19          your brief to be saying that these are expenses  
20          that the Secretary wouldn't normally incur in  
21          spending the money because the Secretary has  
22          constraints in the way it can spend third-party  
23          income that do not apply to the tribe.

24                 Do I have that right?

25          MS. FLYNN: Yes.

1 JUSTICE BARRETT: Okay. So why  
2 couldn't these then be contract support costs  
3 under 5325(a)(2)? Because they are not costs  
4 that are normally -- and I want you to ignore  
5 your argument about the threshold 5325(a)(2) for  
6 this point and just look at 5325(a)(2)(A).

7 Why can't they count as costs that the  
8 Secretary does not incur but the tribes do? Is  
9 your argument just because they're not incurred  
10 in operation of the program?

11 MS. FLYNN: Yes, that's correct. But,  
12 if I take Your Honor to be saying that these  
13 would qualify under (a)(2)(B) --

14 JUSTICE BARRETT: No.

15 MS. FLYNN: Or sorry.

16 JUSTICE BARRETT: I'm -- I'm asking if  
17 they could qualify -- or why can't they qualify  
18 under (a)(2)(A).

19 MS. FLYNN: So I think that what  
20 (a)(2)(A) is asking about is actually the  
21 expenses like the overhead expenses or the  
22 expenses like worker comp that comes along with  
23 spending, so not with the underlying activity of  
24 earning the money in the first instance if --

25 JUSTICE BARRETT: But aren't these

1 costs that tag along with spending, like  
2 spending the third-party funds to do whatever it  
3 is the tribes choose to do to further the  
4 general purposes of the contract?

5 MS. FLYNN: Right, but the same way  
6 that these costs tag along with providing the  
7 services when you're running the program in the  
8 first instance. So what -- the -- when we're  
9 talking about the expenses, we're saying the  
10 expense -- the added workers' compensation  
11 expense that comes along with providing a  
12 service, and so I take the tribes to be arguing  
13 that it's -- if the service is funded one way or  
14 another way, that that's why the expense would  
15 be eligible for contract support costs if it is  
16 part of the federal program that is eligible for  
17 funding.

18 JUSTICE BARRETT: And so the most  
19 important part for the government's purposes is  
20 that you define this to be outside of the  
21 program?

22 MS. FLYNN: Yes. I mean, that's part  
23 of our argument. We have the other statutory --  
24 yes, yeah, yes.

25 JUSTICE BARRETT: Okay, thanks.



1 CHIEF JUSTICE ROBERTS: Justice  
2 Jackson?

3 JUSTICE JACKSON: And you define it to  
4 be outside of the program despite the fact that  
5 Section 1623(b) requires for his or the tribes  
6 to be the payor of last resort?

7 MS. FLYNN: Yes, because -- for the  
8 reasons I was saying, the program defined for  
9 this funding provision, 23 -- or 5325(a), is the  
10 federal program that is the subject of the  
11 contract.

12 The payor of last resort provision,  
13 again, not part of ISDA, is just speaking to  
14 when there are eligible sources of funding,  
15 which payor has to pay that. But I'm not sure I  
16 see that as changing the meaning of the federal  
17 program that is the subject of the contract or  
18 makes the tribe acting -- act as a contractor  
19 when it spends third-party reimbursement income.

20 JUSTICE JACKSON: All right. And if  
21 the costs balloon, which seems to be a lot of  
22 your concern, you explored with Justice  
23 Kavanaugh where the cuts might have to come  
24 from, but I'm wondering if there's something  
25 that precludes renegotiation of the contracts in

1 light of potential cost escalations of the  
2 nature that you're talking about?

3 MS. FLYNN: So I take the tribes to be  
4 arguing that we don't have flexibility to change  
5 the model contract language that incorporates  
6 (m) (1) in the way that they think gives rise to  
7 this obligation to pay contract support costs.

8 I'm not sure --

9 JUSTICE JACKSON: There's no revisit  
10 -- I -- I just don't know as a matter of just  
11 interest here how -- how these contracts work.  
12 There's no opportunity for the government to  
13 renegotiate terms?

14 MS. FLYNN: We would have to see what  
15 a decision says and figure out if that hinges on  
16 particular contract language that's not required  
17 to be in the contract, but the --

18 JUSTICE JACKSON: What about an amend  
19 --

20 MS. FLYNN: -- authority section --

21 JUSTICE JACKSON: -- what been an  
22 amendment from Congress? I mean, you say  
23 Congress hasn't -- it isn't clear that Congress  
24 has really ever focused on this interpretation.  
25 So that's a possibility if there's a big

1 ballooning and a problem that arises from that.

2 MS. FLYNN: Sure. It's always the  
3 case that Congress could revisit the statutory  
4 scheme and take some action to address this  
5 problem, but we just don't think that Congress  
6 created this problem in how it set up the -- the  
7 funding scheme in the first instance.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Mr. Unikowsky.

12 ORAL ARGUMENT OF ADAM G. UNIKOWSKY  
13 ON BEHALF OF THE RESPONDENT IN 23-253

14 MR. UNIKOWSKY: Mr. Chief Justice, and  
15 may it please the Court:

16 The Self-Determination Act entitles  
17 the tribes to recover the disputed contract  
18 support costs in this case. The bulk of the  
19 disputed costs are indirect costs.

20 Under Section 5325(a)(3)(A)(ii), such  
21 costs are recoverable if they're incurred in  
22 connection with the operation of the federal  
23 program, function, service, or activity pursuant  
24 to the contract. The disputed costs in this  
25 case meet that description. If his was running

1 tribal healthcare, it would collect program  
2 income and spend it on healthcare services.

3 In the ISDA contract, his transferred  
4 to the tribe the responsibility both to collect  
5 and to spend the program income on healthcare.  
6 So, when the tribe carries out healthcare  
7 services using program income, it does so as a  
8 means of fulfilling its contractual obligation  
9 to further the general purposes of the contract.  
10 So it's acting pursuant to the contract.

11 And a similar analysis applies to the  
12 smaller amount of direct contract support  
13 costs sought by Northern Arapaho under Section  
14 5325(a) (3) (A) (i).

15 Section 5326 is no barrier for the  
16 tribes' recovery of costs in this case. The  
17 costs are directly attributable to the contract  
18 because they arise from the tribes' work  
19 pursuant to that contract, and they're not  
20 associated with any third-party Medicare or  
21 Medicaid provider agreements because the costs  
22 have nothing to do with the work under those  
23 agreements.

24 Finally, ruling in the tribes' favor  
25 would further the purposes of the ISDA by

1 promoting tribal self-determination and ensuring  
2 that adequate resources are available for  
3 healthcare in chronically underserved  
4 communities.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Mr. Unikowsky, what  
7 do you do with -- you went directly to  
8 (a) (3) (A). What do you do with (a) (2)?

9 MR. UNIKOWSKY: So, Your Honor, we  
10 don't think we need to independently satisfy  
11 (a) (2). But, if you don't agree with me on  
12 that, we do --

13 JUSTICE THOMAS: So you think it's  
14 just surplusage?

15 MR. UNIKOWSKY: No, it's not  
16 surplusage, Your Honor. So I think that the  
17 sequence -- I want to make clear I think we do  
18 satisfy it, but I just want to, as our  
19 first-line argument, in 1988, Congress enacted  
20 (a) (2), and there's lots of disputes after that  
21 over what was covered, what wasn't covered.

22 His was chronically not paying. And  
23 so, in '94, Congress added (a) (3) to clarify  
24 that those categories of costs are deemed to  
25 satisfy (a) (2). So it seems to me that if

1 Congress goes out of its way --

2 JUSTICE THOMAS: Where does it say  
3 that?

4 MR. UNIKOWSKY: Well, it says shall  
5 include. So, if you look at the ordering,  
6 (a)(3) says the contract support costs that are  
7 eligible costs for the purposes of receiving  
8 funding under this chapter shall include the  
9 enumerated categories. There's no  
10 cross-reference to (a)(2). There's no proviso.  
11 There is a proviso on (a)(1) but not (a)(2).

12 So it just seems to me in viewing this  
13 text literally, if you satisfy (a)(3), you  
14 prevail, and that's the point of adding this  
15 clarification.

16 But I just want to be clear, if you  
17 don't agree with anything I just said, that's  
18 not essential to our position. If you think  
19 that we have to satisfy (a)(2), emphatically we  
20 think that we do. You know, (a)(2) says that  
21 the costs shall consist of an amount for the  
22 reasonable cost of activities which must be  
23 carried out by a tribal organization as a  
24 contractor to ensure compliance with the terms  
25 of the contract. That is satisfied because

1 (m) (1) is a term of the contract.

2 When we are collecting and then  
3 spending the -- the program income, we are  
4 acting as a contractor. We must, under the  
5 contract, collect this money and spend it on  
6 healthcare services. So we're acting as a  
7 contractor just as much as we're acting as a  
8 contractor when we spend money on the  
9 secretarial amount.

10 So based on the first part of the  
11 argument, there's a number of questions that  
12 arose which I wanted to answer. I wanted to  
13 answer the questions about non-beneficiaries as  
14 well as some of Justice Barrett and some of  
15 Justice Kavanaugh's questions.

16 JUSTICE JACKSON: Can I ask you --

17 MR. UNIKOWSKY: Yes. I'm sorry.

18 JUSTICE JACKSON: -- before you do  
19 that, really quickly, so (m) (1) is a term of the  
20 contract, but what do you say about their  
21 argument that (m) -- the (m) (1) obligation is  
22 more open-ended than the scope of the work  
23 itself?

24 MR. UNIKOWSKY: Well, I mean, it does  
25 give the tribe a measure of discretion. It

1 talks about general purposes, but the -- I think  
2 that has to be read in conjunction with the  
3 contract itself, which doesn't say that the  
4 purpose is just generally promote healthcare or  
5 generally promote -- to promote, excuse me,  
6 self-determination. There's like a purpose  
7 provision that says that the purpose of the  
8 contract is to transfer an enumerated set --  
9 enumerated set of obligations from his to the  
10 tribe.

11 So it seems to me that furthering the  
12 general purpose of the contract requires  
13 slotting it in one of those enumerated purposes  
14 or at least something that's like really close  
15 to those purposes. I realize the word "purpose"  
16 has "general," the word "general," attached to  
17 it, but I don't think that that entitles the  
18 tribes to just do whatever it wants to or spend  
19 the money on healthcare in general. It's got to  
20 be tied to the purpose provision in the contract  
21 itself.

22 CHIEF JUSTICE ROBERTS: Well, but, I  
23 mean, if you add the direction to interpret the  
24 statutory language in favor of the tribes, that  
25 purpose provision doesn't seem to me to be a



1 very significant constraint. I mean, the -- the  
2 argument on the other side, or at least one of  
3 the concerns, is that the tribes would be able  
4 to expand the provision of healthcare to all  
5 sorts of areas that do not primarily benefit  
6 tribal members and yet still be entitled to  
7 reimbursement.

8 MR. UNIKOWSKY: All right. So let me  
9 address this issue of non-beneficiaries head-on  
10 because I understand it came up significantly in  
11 the first part of the argument.

12 Okay. So, first of all, for about  
13 half of tribes, including San Carlos, they don't  
14 serve non-beneficiaries at all. Even for the  
15 others, it's often very little. So let me just  
16 explain what Northern Arapaho does because a  
17 statement was made in the first half of the  
18 argument about Northern Arapaho's services to  
19 non-beneficiaries.

20 Non- -- Northern Arapaho does serve  
21 non-beneficiaries but only if they're employees  
22 of Northern Arapaho's healthcare program. And  
23 that's less than 3 percent of the total number  
24 of users of Northern Arapaho's program. So if  
25 there's a nurse who's non-Indian who lives on

1 the reservation and works at a Northern Arapaho  
2 clinic and then she wants to get her blood  
3 pressure checked, then as an employee benefit,  
4 she can do that in the same building. She  
5 doesn't have to drive potentially a long  
6 distance in central Wyoming to some other  
7 clinic.

8 But that is not -- that's not paid for  
9 by his. She has to pay out-of-pocket or,  
10 realistically, from her own insurance policy.  
11 Okay? So none of the Secretary's funding ever  
12 goes to the provision of healthcare to those  
13 non-beneficiaries.

14 JUSTICE KAGAN: That's not true for  
15 some tribes, is it?

16 MR. UNIKOWSKY: No, I think it's true  
17 for all tribes. The tribes can serve, but they  
18 can't spend the government's money because there  
19 can't be a diminution of healthcare services for  
20 Indians. So I think the way it works is the  
21 non-Indian has to pay out-of-pocket or from the  
22 person's own insurance policy, and the tribe  
23 collects that money. I will acknowledge the  
24 tribe does consider that to be program income.  
25 That's not a question raised in this case.

1                   But the tribe thinks that if it's  
2 actually collecting that money, that's program  
3 income, but it then spends every single penny of  
4 that money on services for Indians. We never,  
5 ever spend the program income that we obtain on  
6 services for --

7                   CHIEF JUSTICE ROBERTS: Well, but  
8 you're --

9                   JUSTICE KAGAN: That's true for all  
10 tribes?

11                  MR. UNIKOWSKY: Yes, I think it is  
12 true. Absolutely it's true, that non-Indians  
13 who use the services, they have to pay from  
14 their own insurance policy. The tribe may  
15 collect that money and spend it, but the tribe  
16 is not spending program income to fund services  
17 for non-Indians.

18                  CHIEF JUSTICE ROBERTS: Well, but  
19 you're talking about the principle, but we're  
20 talking about support services, and I assume  
21 they don't -- well maybe they do -- allocate  
22 support services differently depending upon  
23 which services go primarily to non- --  
24 non-tribal members and others to tribal members?

25                  MR. UNIKOWSKY: So, historically,

1 Northern Arapaho hasn't done that just because  
2 it's such a tiny percentage. That's a question  
3 that's not raised in this case.

4 I think that the government, if it  
5 wishes to, can argue, can defend the case on the  
6 ground that a portion of the services that are  
7 allocable to non-Indians shouldn't be included.  
8 And that's fine. That can -- that can be  
9 litigated.

10 I mean, there's -- the -- the argument  
11 on the other side is that there's this  
12 provision, Section 1680, that says -- 1680c,  
13 that says that services provided shall be -- to  
14 non-Indians shall be deemed to be provided under  
15 this agreement. But, like, that hasn't been  
16 construed. It's not an issue in this case. So  
17 we'd ask the Court to -- to reserve that  
18 question.

19 JUSTICE KAGAN: So if I can understand  
20 what your argument on page 27 refers to, what  
21 the limitation is in that argument and what it's  
22 not.

23 MR. UNIKOWSKY: Okay. So the  
24 argument -- the alternative argument we have  
25 made is that every single penny of program

1 income that we receive under these contract  
2 years, we spend it on services enumerated in the  
3 scope of work, for Indians only. Okay?

4 And that's really because the scope of  
5 work for Northern Arapaho is pretty broad. It's  
6 like all, you know, outpatient medical services,  
7 dental services, radiology. There's, you know,  
8 behavioral health. There's lots and lots of  
9 different services that are transferred in the  
10 scope of work. And so every -- all the dollars  
11 we spend are allocated towards programs in the  
12 scope of work.

13 But I just want to be clear, the --  
14 the broader argument, we're not saying you can  
15 use program income to give -- to -- to offer  
16 services to non-Indians. Okay? I think all  
17 those services have to go towards Indians.  
18 That's what the general purpose of the contract  
19 is. It's to serve Indians. And so --

20 JUSTICE ALITO: Put aside --

21 JUSTICE BARRETT: But the thing you  
22 should get --

23 JUSTICE ALITO: -- put aside the  
24 question of what you are doing and focus on the  
25 question of what the statutory language means.

1 So what exactly are the general purposes of the  
2 contract under 5325(m) (1)?

3 MR. UNIKOWSKY: Okay. So the purposes  
4 of the contract -- I'll get to "general" --  
5 modifier "general" in just one second. The  
6 purposes of the contract are laid out in the  
7 self-determination agreement -- contract itself.  
8 And that's part of the model agreement. It says  
9 the purposes are to transfer the enumerated set  
10 of services from his to the tribe. That's the  
11 purpose.

12 So in terms of what "general purpose"  
13 means, I think that gives the tribe a little bit  
14 of discretion. Just as one example, tribes have  
15 generally construed "general purposes" to open  
16 the door to building facilities at which the  
17 services will be offered. So, for instance, if,  
18 you know, the responsibility for dental services  
19 is transferred, tribes have construed that  
20 language to say you can build a clinic.

21 JUSTICE ALITO: Well, is -- are the --  
22 could you give me a simpler answer or maybe it  
23 doesn't lend itself to a simpler answer? Are  
24 the general purposes of the contract simply to  
25 further Indian health?

1 MR. UNIKOWSKY: No. I think it's  
2 narrower than that --

3 JUSTICE ALITO: No?

4 MR. UNIKOWSKY: -- Your Honor.

5 JUSTICE ALITO: Okay. In -- in what  
6 way is it narrower?

7 MR. UNIKOWSKY: I think it's -- the  
8 general purpose is you look at the purpose of  
9 the contract as laid out in the contract itself,  
10 and I think the word "general" modifier requires  
11 that at least it be related to those purposes,  
12 right? Not just anything to do with Indian  
13 health. I just want to make one other point  
14 about that.

15 JUSTICE KAGAN: So --

16 JUSTICE ALITO: I still don't  
17 understand the -- could you just tell me what it  
18 means?

19 MR. UNIKOWSKY: Yeah. So --

20 JUSTICE ALITO: What does it not mean?  
21 Suppose -- suppose the tribe wants to set up a  
22 scholarship program for tribal members or  
23 Indians to go to medical school. Does that fall  
24 within the general purposes of the contract?

25 MR. UNIKOWSKY: I probably would say

1 no. This question has never come up. It's  
2 never been litigated a single time, for a  
3 practical reason.

4 JUSTICE ALITO: Yeah, well, now it's  
5 being litigated.

6 MR. UNIKOWSKY: No, it's not, Your  
7 Honor, because there's no disputes in this case  
8 that we satisfy that general purposes provision.  
9 The reason that this generally has not --

10 JUSTICE ALITO: But we have to say  
11 what "general purposes" means.

12 MR. UNIKOWSKY: I don't think so, Your  
13 Honor. I think --

14 JUSTICE ALITO: No?

15 MR. UNIKOWSKY: -- that you should  
16 hold that, as long as that is satisfied, as long  
17 as the tribe are adhering to that contractual  
18 obligation, then it's -- it's acting pursuant to  
19 the contract.

20 The reason this has not -- never been  
21 litigated, what "general purposes" means, is  
22 that the amount of money that the tribe gets is  
23 the sum of these two funding streams and  
24 Congress understands that that sum is necessary  
25 just to serve the services under the contract.



1 Like --

2 JUSTICE GORSUCH: Mr. Unikowsky?

3 MR. UNIKOWSKY: Yes.

4 JUSTICE GORSUCH: There's not so much  
5 money here that the tribes are spending this on  
6 frolics and detours, right?

7 MR. UNIKOWSKY: That's correct, Your  
8 Honor. There's not even close to enough money.

9 JUSTICE GORSUCH: And there's not even  
10 enough money to provide healthcare to the  
11 Indians on the reservations, and you're --  
12 you're -- you're operating out of decrepit old  
13 buildings in many cases. And -- and that's what  
14 we're really talking about. Nor are Indian --  
15 Indian healthcare services providing massive  
16 benefits to non-Indians all across America.  
17 We're talking about a reservation in central  
18 Wyoming with an incredibly poor population of  
19 Native Americans.

20 And general purposes of the contract,  
21 you'd agree it has to be Indians?

22 MR. UNIKOWSKY: 100 percent, I agree,  
23 Your Honor.

24 JUSTICE GORSUCH: And in your  
25 contract, in terms of what is enumerated as the

1 general purposes, include outpatient ambulatory  
2 medical care and primary care, nursing, mental  
3 health, the clinical medical laboratory,  
4 radiology, physical therapy, the pharmacy,  
5 optometry, dental care, and community health.  
6 You'd agree it has to be limited to those things  
7 too?

8 MR. UNIKOWSKY: Yes, Your Honor,  
9 absolutely. 100 percent.

10 JUSTICE KAVANAUGH: And --

11 JUSTICE KAGAN: And if you were a  
12 tribe that had a -- you seem to provide pretty  
13 much the full gamut of healthcare services, but  
14 if there were a tribe that didn't, that said,  
15 you know, we're only providing emergency  
16 services, something like that, then it would  
17 have to go only to emergency services; is that  
18 correct?

19 MR. UNIKOWSKY: I agree. I mean,  
20 that's maybe more of a question for Mr. Miller,  
21 who -- his client had such a contract. But,  
22 yes, that is my understanding of -- of general  
23 purposes.

24 JUSTICE SOTOMAYOR: What do you do  
25 with their argument that there are expenses that

1 the government doesn't incur, like building  
2 buildings, that that's not included in their  
3 formula? Why should you get support service  
4 funds for that activity?

5 MR. UNIKOWSKY: So my primary answer  
6 to that is we actually don't. I mean, there's a  
7 -- there's back and forth in the briefs about  
8 this, but like, the cost methodology his  
9 actually requires us to deduct the construction  
10 cost from the cost base when we're calculating  
11 contract support costs.

12 So, translated into English, what that  
13 means is that if we're essentially hiring a  
14 subcontract to build a building, we just  
15 transfer a bunch of money to the subcontractor,  
16 that doesn't generate overhead costs. It's the  
17 subcontractor who has the overhead, not us.

18 So under the IHS's cost allocation  
19 methodology in the Indian Health Manual, we have  
20 to deduct those costs anyway. So as a practical  
21 matter, it -- it really doesn't come up.

22 The other thing is it's not like  
23 Congress doesn't like construction. It's just  
24 there's two separate appropriations provisions.  
25 Like there's one to the Indian Health Service

1 for services, and then there's a separate stream  
2 for -- for construction. And so Congress has  
3 just ensured that there's no mixing, that a  
4 certain amount of money is for services and a  
5 certain amount is for --

6 JUSTICE KAVANAUGH: On -- on --

7 JUSTICE SOTOMAYOR: So to -- to the  
8 extent that the government doesn't pay for  
9 certain things or they're not included in the  
10 program, you're not getting reimbursed contract  
11 --

12 MR. UNIKOWSKY: No, we don't -- we  
13 don't add, we don't seek contract support costs.

14 JUSTICE SOTOMAYOR: All right. Could  
15 I ask one -- I mean, the government, one of  
16 their biggest arguments is the practical  
17 consequences of this, that you're going to be  
18 depriving money from direct service tribes.

19 How do you respond to that?

20 MR. UNIKOWSKY: All right. If I can  
21 offer a couple responses. So, first of all, the  
22 liberal construction provision in the  
23 self-determination contract says that the  
24 provisions of the statute and contract will be  
25 construed liberally for the benefit of the

1 contractor. So that's the -- that's not all  
2 tribes in general. That's for the contractor in  
3 particular. So I think the Court should --  
4 should remain focused on the contractor's  
5 interests when applying that.

6 Second of all, I -- I think it's going  
7 --

8 JUSTICE SOTOMAYOR: It's a nice  
9 answer, but it doesn't answer --

10 MR. UNIKOWSKY: Well, no, but I  
11 have -- I have a different answer, okay?

12 (Laughter.)

13 MR. UNIKOWSKY: So I -- I think it's  
14 notable that two pantribal organizations, the  
15 National Indian Health Board and the National  
16 Congress of American Indians, both of which have  
17 members, both ISDA and non-ISDA members, have  
18 submitted amicus briefs in our support because I  
19 think the feeling is among tribal organizations  
20 that the Self-Determination Act is so important  
21 for Indian sovereignty that we're willing to  
22 accept the risk that Your Honor just identified.

23 JUSTICE KAVANAUGH: And the risk is  
24 if -- just so I understand it, if Congress  
25 doesn't change the discretionary funding cap

1 that applies to his generally and you prevail in  
2 this case, it necessarily will mean less funding  
3 for other tribes that his directly provides  
4 healthcare for? Is that the -- that's the  
5 issue?

6 MR. UNIKOWSKY: That's the -- that's  
7 the -- I mean, that's assuming that the  
8 appropriations amount will stay the same, and  
9 that's completely speculative. I mean, after  
10 the Salazar --

11 JUSTICE KAVANAUGH: Right. I -- I  
12 said if.

13 MR. UNIKOWSKY: Yeah, if.

14 JUSTICE KAVANAUGH: If it stays the  
15 same, your position will hurt the other tribes?

16 MR. UNIKOWSKY: Theoretically, there  
17 would -- you know, yes, if there's a limited pot  
18 of money and more goes to one thing, then less  
19 goes to the other. That's just simple  
20 mathematics.

21 JUSTICE KAVANAUGH: Exactly. That's  
22 why it's -- we've got to think about this more  
23 generally than just -- I mean, your first answer  
24 to Justice Sotomayor was a bit narrow. Thank  
25 you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas?

4 Justice Alito?

5 JUSTICE ALITO: It's my understanding  
6 that the tribes have been able to collect  
7 program income subject to 5325(m)(1) for many  
8 years. When was the first time a tribe made the  
9 type of challenge that is before us here?

10 MR. UNIKOWSKY: I think it was in the  
11 early 2010s, but I think there's a good  
12 explanation for that, Your Honor.

13 JUSTICE ALITO: So how is it that  
14 these tribes represented by excellent attorneys  
15 like you and Mr. Lloyd left all this money on  
16 the table for so many years?

17 MR. UNIKOWSKY: So there's two basic  
18 answers. One is that for many years there's  
19 these appropriations caps under which tribes  
20 couldn't even recover contract support costs on  
21 the secretarial amount. It took two cases from  
22 this Court, the Cherokee Nation case and then  
23 the Salazar versus Ramah Navajo Chapter case in  
24 2012, for this Court to hold that the tribes  
25 actually are entitled to all of the contract

1 support costs under the statute, and that's when  
2 these lawsuits started being brought.

3 And the second point is the payor of  
4 last resort provision that Justice Gorsuch  
5 raised. So, like, that's when tribes really  
6 started feeling like they had to go out and  
7 collect this money, they had no choice. And, by  
8 the way, it's not just the statute. Our  
9 contract, Northern Arapaho's contract, also  
10 requires us to collect it, and so we were  
11 encountering all of these support costs.

12 So this issue just didn't come up. I  
13 don't think that there's some kind of tradition  
14 here that's really relevant because the facts on  
15 the ground changed in the early 2010s. That's  
16 when the tribes started bringing these lawsuits.

17 JUSTICE ALITO: All right. So the  
18 statute of limitations for this is six years,  
19 right?

20 MR. UNIKOWSKY: Correct.

21 JUSTICE ALITO: And if the government  
22 is right that the annual costs of accepting your  
23 reading could be \$2 billion, then the first year  
24 bill could be more than \$12 billion?

25 MR. UNIKOWSKY: I don't think that's



1 the case. So, first of all, that 800 --

2 JUSTICE ALITO: Why not? Why would  
3 that not be the case?

4 MR. UNIKOWSKY: Well, first of all, we  
5 don't know where that estimate comes from.  
6 Like, that's not in the record. It's just a  
7 conversation between someone at his with the  
8 SG's office giving these numbers that come out  
9 of nowhere from our perspective.

10 JUSTICE ALITO: Well, what numbers do  
11 you have?

12 MR. UNIKOWSKY: We don't have any  
13 numbers. It's not -- I mean, having to talk to  
14 people in -- in this area, people are -- tend to  
15 be skeptical of these high numbers.

16 Like, the government takes the  
17 position, it represents that contract support  
18 costs will start exceeding the secretarial  
19 amount. I don't think that's ever happened.  
20 That's certainly not true in these cases. I  
21 think that's extremely speculative.

22 And also, the other thing is, I mean,  
23 it's true there's a six-year statute of  
24 limitations, but I don't think every single  
25 tribe in the country is going to necessarily

1 bring these suits. I mean, I can't -- I can't  
2 predict.

3 JUSTICE ALITO: Why would they not?

4 MR. UNIKOWSKY: I mean, maybe they --  
5 I mean, I can't predict the types of litigations  
6 that are going to happen, but, you know, I mean,  
7 this is what the statute requires, Your Honor.  
8 I mean, the government may --

9 JUSTICE ALITO: Well, what if it turns  
10 out that their estimate is right, it's \$2  
11 billion a year, so the bill for the first year  
12 is \$12 billion? I mean, maybe today \$12 billion  
13 is not very much money, but then what would we  
14 do? Would we say, well, gee, we made a mistake,  
15 we decided the case based on the wrong  
16 assumption?

17 MR. UNIKOWSKY: No, I don't think that  
18 the amount of money in hypothetical judgments  
19 from a number that is not in the record and it  
20 was just taken out of nowhere is a basis to  
21 decide this case against the tribe.

22 JUSTICE ALITO: Well, if it has such  
23 -- if your reading has such severe consequences,  
24 does that say something about the plausibility  
25 of the reading?

1                   MR. UNIKOWSKY: I don't think -- I  
2 just respectfully disagree.

3                   JUSTICE ALITO: Congress hid this --  
4 this -- this mastodon in an ant hill, in an ant  
5 hole or whatever it is, elephants in mouse  
6 holes? This is even bigger?

7                   MR. UNIKOWSKY: I don't think it's  
8 really an elephant in a mouse hole. I mean, the  
9 amount of program income we're -- we're already  
10 getting contract support costs in the  
11 secretarial amount. There's in some cases a  
12 smaller, occasionally a larger amount of program  
13 income, and we're just seeking the same  
14 reimbursement based on the same rate for that  
15 additional unit of income. So I -- I just -- I  
16 don't think it's -- it's that extreme of an  
17 outlier.

18                   JUSTICE ALITO: Thank you, thank you.

19                   CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

21                   Justice Kagan?

22                   Justice Gorsuch?

23                   JUSTICE GORSUCH: I just want to make  
24 sure I got it right with respect to why this  
25 happened. You brought suit in 2011, I think, is

1 that right, somewhere in there? One of you did.

2 MR. UNIKOWSKY: It was not my -- our  
3 case, ours is 2016 and 2017.

4 JUSTICE GORSUCH: 2017?

5 MR. UNIKOWSKY: That's ours, yeah.

6 JUSTICE GORSUCH: All right, all  
7 right. Okay. I think one was 2011.

8 MR. UNIKOWSKY: But we -- we weren't  
9 -- we didn't even enter into these contracts  
10 until then, so --

11 JUSTICE GORSUCH: Okay. So you  
12 couldn't have brought it before then anyway.

13 MR. UNIKOWSKY: No. No.

14 JUSTICE GORSUCH: And then 2010 you  
15 became the payor of last resort. You have a  
16 contractual obligation to collect these monies.

17 MR. UNIKOWSKY: Right.

18 JUSTICE GORSUCH: Obviously, that's  
19 why now it becomes what happens about spending  
20 it.

21 MR. UNIKOWSKY: Right. Plus, tribes  
22 weren't -- I mean, again, like before 2012,  
23 tribes were getting much less than they were  
24 entitled to under the statute because of these  
25 appropriations caps which have been lifted by

1 Congress after this Court's decision in Salazar  
2 versus Ramah Navajo Chapter. That's what got a  
3 lot of this litigation started.

4 JUSTICE GORSUCH: Do you know how much  
5 money your client is seeking in contract support  
6 costs roughly?

7 MR. UNIKOWSKY: In this case, we're  
8 seeking about \$1.5 million for '16 and '17.

9 JUSTICE GORSUCH: One point five  
10 million dollars?

11 MR. UNIKOWSKY: About that, yes.

12 JUSTICE GORSUCH: So this 800 million  
13 to 2 billion that's on page 44 of their brief,  
14 there's no cite?

15 MR. UNIKOWSKY: No, it's an  
16 unexplained estimate by his that's not in the  
17 record of how much something is going to cost.  
18 I have to say, like --

19 JUSTICE GORSUCH: And that's also  
20 premised perhaps on their understanding that  
21 general purposes can include creating --

22 MR. UNIKOWSKY: That it cycles, that's  
23 right.

24 JUSTICE GORSUCH: -- spas for  
25 non-Indians.

1           MR. UNIKOWSKY. Yeah, it's like  
2 there's this language in the brief about cycles  
3 of spending money, and we think that's  
4 completely implausible and that may have been  
5 baked into this unexplained number, Your Honor.

6           JUSTICE GORSUCH: We don't usually  
7 allow record evidence to be introduced for the  
8 first time in this Court without a citation to  
9 anything that might include services that would  
10 not be even covered under your interpretation of  
11 the agreement.

12           MR. UNIKOWSKY: I agree. I also think  
13 the Court can take judicial notice that  
14 unexplained government estimates about how much  
15 things will cost are not always perfectly  
16 accurate, so we'd ask the Court to apply that  
17 principle here.

18           JUSTICE GORSUCH: Thank you.

19           JUSTICE KAVANAUGH: They usually  
20 underestimate it, but anyway, that's a -- that's  
21 a separate issue.

22           Do I have it right that the question  
23 here is about the pot of money that comes in  
24 from third-party payors, from Medicare,  
25 insurers, tortfeasors and what have you, and

1 then you take that pot of money which is under a  
2 separate statute and you spend that for  
3 healthcare services, correct?

4 MR. UNIKOWSKY: Well, I would quibble  
5 with under a statute statute. It's 23 --  
6 5325(m) (1) and (m) (2). But, yes, we take the  
7 money from Medicare and Medicaid and we spend it  
8 on -- on healthcare.

9 JUSTICE KAVANAUGH: And if you were to  
10 lose this case, what you do as I understand it,  
11 what has happened previously is that you use  
12 that pot of money which is separate from the IS  
13 -- his appropriated money that comes to you, you  
14 use that pot of money to pay not only for the  
15 Indian healthcare services but for these  
16 overhead costs, right? It comes out of that pot  
17 of money?

18 MR. UNIKOWSKY: That's correct. We'd  
19 have to use that or maybe the tribe's general  
20 treasury, but we wouldn't get it from the  
21 Secretary.

22 JUSTICE KAVANAUGH: Okay. And what do  
23 you do with -- I don't know that we've mentioned  
24 it as much, 5325(m), the provision that says the  
25 third-party income is not a basis for reducing

1 the allocation that comes from his, which  
2 suggests that Congress was concerned about, oh,  
3 because you get this third-party money, maybe  
4 the his amount should be reduced and Congress  
5 wanted to say no, that's -- that's not correct,  
6 and from that, the implication would be surely  
7 they were not anticipating, oh, that it would  
8 increase. Just want to make sure you can  
9 respond to that.

10 MR. UNIKOWSKY: Yeah, I don't agree  
11 with that inference. I think that (m) should be  
12 construed literally. As you said, Congress was  
13 concerned that his would deduct because of the  
14 program income and it said don't deduct.

15 And in the exact same statutory  
16 amendment in which (m) was enacted, (A) (3) was  
17 enacted to specifically address contract support  
18 costs. So, instead of drawing a negative  
19 implication from (m), I think I would just look  
20 at the -- a provision just joined at the hip in  
21 the exact same enactment, (A) (3), that  
22 specifically addresses the issue of contract  
23 support costs and said that we can recover all  
24 costs that are in connection with the operation  
25 of the federal program, which I think includes



1 program income. It's the same word, "program,"  
2 in both provisions.

3 JUSTICE KAVANAUGH: Do you agree that  
4 to be an (A) (3) cost, it has to be an (A) (2)  
5 cost?

6 MR. UNIKOWSKY: So I don't agree, but  
7 even if I'm wrong on that, it doesn't affect our  
8 position one bit.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Barrett?

12 JUSTICE BARRETT: Okay. Tell me why  
13 it doesn't affect your position one bit, because  
14 it seems to me under (a) (2), you know, there are  
15 two qualifications in (A) and (B), and I think  
16 (B) doesn't seem to fit very well, so it would  
17 have to be (A), but that doesn't seem to fit  
18 very well either. So explain to me why that's  
19 wrong.

20 MR. UNIKOWSKY: Well, I don't agree,  
21 Your Honor. In fact, I don't even think it's  
22 disputed that we satisfy (A) and (B). I think  
23 the government is disputing the -- the earlier  
24 part of the statute talking about a contract to  
25 ensure compliance.

1                   So -- so, for example, (A) covers  
2 things like stuff that the -- that OPM would do,  
3 human resources or contracting services that GSA  
4 would do, things like that.

5                   JUSTICE BARRETT: You mean like  
6 everybody keeps talking about workers' comp?

7                   MR. UNIKOWSKY: Yeah. That's -- well,  
8 that's not -- that's another thing.

9                   JUSTICE BARRETT: That's another  
10 thing?

11                  MR. UNIKOWSKY: Yeah.

12                  JUSTICE BARRETT: Okay.

13                  MR. UNIKOWSKY: But -- so overhead --  
14 most of these costs are actually indirect costs,  
15 not direct costs.

16                  JUSTICE BARRETT: Okay.

17                  MR. UNIKOWSKY: -- which would be  
18 workers' comp. So, for example, you know, the  
19 tribe wants to hire someone, okay?

20                  JUSTICE BARRETT: Right.

21                  MR. UNIKOWSKY: There needs to be an  
22 HR person. So, if his is running healthcare,  
23 OPM, a separate branch of the government, is  
24 going to be doing all that HR stuff, putting  
25 them on the payroll, making sure they're paid,

1 handling their pensions. So that's an -- that's  
2 an (A) cost, okay?

3 JUSTICE BARRETT: Okay.

4 MR. UNIKOWSKY: And so the tribe gets  
5 that from the government because, you know, if  
6 -- if his isn't paying for it, nor should the  
7 tribe. So what we're seeking in this case are  
8 all costs that fall under (A) or (B). It's the  
9 exact same type of overhead that the Secretary  
10 wouldn't pay out of pocket. It's just with  
11 respect to the programs funded by the program  
12 income.

13 So, for example, you know, if there's  
14 contracting, GSA would do the work if his was  
15 handling the program. We're doing the work when  
16 we're handling the program. That's the money  
17 we're seeking, just (A) and (B) money. And --

18 JUSTICE BARRETT: Okay.

19 MR. UNIKOWSKY: -- again, the  
20 government does not dispute, as far as I can  
21 tell, that we satisfy (A) and (B). All they're  
22 disputing is whether we -- we're acting as a  
23 "contractor," which is the earlier part of (2).

24 JUSTICE BARRETT: Right.

25 MR. UNIKOWSKY: And I think we are

1 because we are carrying out our contractual  
2 obligations when we perform these services under  
3 (A) (i).

4 JUSTICE BARRETT: In the same way that  
5 the Secretary would?

6 MR. UNIKOWSKY: Yes.

7 JUSTICE BARRETT: In the same way that  
8 his would if his were spending the third-party  
9 income?

10 MR. UNIKOWSKY: One -- 100 percent.  
11 His is required to spend the third -- to collect  
12 the third-party money under 1623 and then spend  
13 it. So we're stepping into their shoes. We  
14 also are required to collect that money and  
15 spend it, and so we're just asking to be put  
16 into the same -- into their shoes for purposes  
17 of contract support costs.

18 JUSTICE BARRETT: And when you spend  
19 it when you're standing in their shoes, this  
20 back-and-forth about what furthers the general  
21 purposes of the contract, you would say or would  
22 you not say that you can only claim these  
23 contract support costs for expenditures that are  
24 of the sort that his would also make --

25 MR. UNIKOWSKY: Oh --

1 JUSTICE BARRETT: -- or is it a  
2 broader universe?

3 MR. UNIKOWSKY: No, I think, because  
4 his also has a lot of discretion. So we -- it  
5 says for us "further the general purposes of the  
6 contract." But his has a very, very broad  
7 discretion to spend the money on Indian  
8 healthcare as well. Like, it's true it's  
9 possible that we might spend a particular dollar  
10 differently from how his would.

11 JUSTICE BARRETT: Mm-hmm.

12 MR. UNIKOWSKY: But, first of all,  
13 that happens with the secretarial amount too  
14 because the whole point of this statute is to  
15 promote self-determination. It reflects the  
16 assumption that the tribes may spend a  
17 particular dollar differently from how his would  
18 do it, and Congress thought that was a good  
19 thing.

20 So both -- both the tribe and the his  
21 has a measure of flexibility in spending this  
22 money on healthcare. Individual dollars might  
23 be allocated differently, but the types of  
24 things we're doing, spending money on  
25 healthcare, are exactly the types of things that

1 his would be doing with the same money.

2 JUSTICE BARRETT: Which might be a  
3 reason why your concession is -- was that it  
4 can't be spent on non-Indian healthcare because  
5 his wouldn't spend it?

6 MR. UNIKOWSKY: Absolutely not.

7 JUSTICE BARRETT: So you couldn't  
8 stand in their shoes --

9 MR. UNIKOWSKY: No.

10 JUSTICE BARRETT: -- for that purpose.

11 MR. UNIKOWSKY: We -- we --  
12 100 percent, no, we cannot spend and we do not  
13 spend this money on non-Indian healthcare. If  
14 an employee of our program uses the blood  
15 pressure facilities or goes to the dentist at  
16 one of our clinics, they pay from their own  
17 insurance.

18 JUSTICE BARRETT: But you're -- you're  
19 collecting the overhead costs of that in  
20 contract support costs because you don't parse  
21 all that out, right?

22 MR. UNIKOWSKY: So that -- that -- so  
23 that's not an issue that's been raised in this  
24 case. Just because it's so de minimus, I think,  
25 we haven't done that. It's possible in a

1 different case the government can say you have  
2 to parse that out, and that -- that's an issue  
3 that can be litigated.

4 JUSTICE BARRETT: Is there anything  
5 that you spend these third-party funds on that  
6 his does not, or is it complete overlapping  
7 circles?

8 MR. UNIKOWSKY: In some of the years  
9 after the years in question, I think we spent  
10 some of the money on facility construction,  
11 which his doesn't under these riders. But,  
12 again, like, the -- the federal government  
13 spends money on facilities. They're just a  
14 separate stream of appropriations.

15 But, in general, when we do that --  
16 and, again, that's -- the representation in my  
17 brief is -- is accurate because these are years  
18 after the years in question.

19 JUSTICE BARRETT: Mm-hmm.

20 MR. UNIKOWSKY: Even when we've done  
21 that, we don't consider that to be included in  
22 the base.

23 JUSTICE BARRETT: Okay.

24 MR. UNIKOWSKY: As I said, we deduct  
25 the costs of construction.

1 JUSTICE BARRETT: Okay. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Jackson?

4 JUSTICE JACKSON: So I just want to be  
5 clear on the purposes of the contract because  
6 that's the most interesting thing that I think  
7 I've heard you say. In looking at the Joint  
8 Appendix, there are -- the contract agreements  
9 are here, and there are enumerated purposes.

10 MR. UNIKOWSKY: Yes.

11 JUSTICE JACKSON: I'm looking at JA  
12 51, 52. So it's your position that these  
13 third-party funds would have to be spent for one  
14 of these enumerated categories?

15 MR. UNIKOWSKY: Yes. So that --  
16 that's actually San Carlos's contract.

17 JUSTICE JACKSON: Oh, I'm sorry.  
18 That's not yours. Excuse me.

19 MR. UNIKOWSKY: Ours is at 124, 125.

20 JUSTICE JACKSON: Yes.

21 MR. UNIKOWSKY: So we spend -- so, I  
22 mean, it says "general purposes," which might  
23 modify "purposes" a little bit, but as a  
24 practical matter, we spend all the program  
25 income on the services on -- on 124 and 125.



1 JUSTICE JACKSON: Would you have to?

2 MR. UNIKOWSKY: Yeah, I think so. I  
3 think we do have to. I don't think "general  
4 purposes" modifies "purposes" to a sufficient  
5 degree that we can just go on a frolic and spend  
6 money on some completely different thing.

7 JUSTICE JACKSON: So that -- so that's  
8 also an answer to Justice Barrett's question?

9 MR. UNIKOWSKY: Yes.

10 JUSTICE JACKSON: That's a limitation  
11 on you?

12 MR. UNIKOWSKY: That's how we  
13 understand it, yes.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 MR. MILLER: Maybe I'll --

18 CHIEF JUSTICE ROBERTS: Mr. Miller.

19 ORAL ARGUMENT OF LLOYD B. MILLER  
20 ON BEHALF OF THE RESPONDENT IN 23-250

21 MR. MILLER: Mr. Chief Justice, may it  
22 please the Court:

23 Maybe I'll begin with Justice  
24 Jackson's question about page 51. We have six  
25 programs here, including the EMS program, which

1 is a major feature of the government's motion to  
2 dismiss that is the subject of this case. The  
3 third-party revenue spending has to be anchored  
4 to those six programs. It cannot be spent on a  
5 dental program. We don't see dental there. It  
6 cannot be spent just on general health. Even  
7 interpreting that term broadly and generously in  
8 light of the Indian canon, it still has to be  
9 anchored in these six programs.

10 With regard to these six programs,  
11 when the Indian Health Service awarded a  
12 contract to the San Carlos Apache Tribe, and  
13 just visualize this, we're talking about 1.8  
14 million acres, about 29,000 square miles, a  
15 thousand miles of roadless area, a couple hours  
16 east of Phoenix, the Emergency Medical Service  
17 program was severely underfunded.

18 So, on page 101, the Indian Health  
19 Service demands that the tribe agree to a clause  
20 that says, in running the EMS program, it will  
21 maintain an efficient billing system to maximize  
22 third-party revenues.

23 Why? Because his knew that there was  
24 no way this program could be run at even a  
25 moderate level without third-party revenues

1 coming into the program and going out into the  
2 program, coming in from program income and going  
3 out into services. So that's why this clause is  
4 such a pivotal element of the contract.

5 Now we rely on (m) -- (m) (1), and  
6 (m) (1) was enacted in 1994, but that was not the  
7 first time the concept that program income goes  
8 into the contract was invented.

9 First of all, it is a standard  
10 government contracting clause in the OMB  
11 regulations. You can go to 2 C.F.R. 200.307, I  
12 think it's (e) (2). But, more specifically, the  
13 Indian Health Service, in the sample contract  
14 that the Indian Health Service had in the 1980s,  
15 required that all program income be spent to  
16 provide additional services and benefits under  
17 the contract.

18 So this was an old concept, not a new  
19 concept, that Congress put in there in 1994.  
20 Well, why did Congress put it in 1994? I mean,  
21 there it was in the sample contract that his had  
22 because Congress decided that his could not be  
23 trusted to administer this program at all.

24 That was the positive provision, that  
25 program income comes into the contract, but

1 there were a lot of negative provisions in the  
2 old sample contract. There were a lot of  
3 negative provisions in regulations that his had  
4 adopted, proposed to adopt in January '94.

5 So Congress comes in, clears the  
6 decks, says we are declaring what the master  
7 contract is going to say, we are prohibiting a  
8 raft of things that the agency proposed in these  
9 regulations, but we are cementing the good  
10 things.

11 And one of the good things was (m) (1),  
12 that all program income had to go to further the  
13 general purposes of the contract. So too the  
14 question about (a) (2) and (a) (3) and how they  
15 relate. They require the administration -- the  
16 overhead has to be in connection with the  
17 expenditure of -- of -- of -- excuse me, with  
18 the administration of the contract.

19 And the contract, as we just saw,  
20 requires the spending of program income. So we  
21 satisfy (a) (3). It's, of course, part of the  
22 federal program that we discussed earlier. The  
23 federal program includes direct service spending  
24 from the secretarial amount and also program  
25 income spending. So -- and his spends both

1 tranches of money. The tribe spends both  
2 tranches of money.

3 CHIEF JUSTICE ROBERTS: You -- you've  
4 heard --

5 MR. MILLER: So it's indisputably part  
6 of the federal program.

7 CHIEF JUSTICE ROBERTS: You've heard  
8 questions about a situation where the tribe may  
9 be spending money on services that go primarily  
10 to non-tribal members. What is your principle  
11 for limiting that, if there is one?

12 MR. MILLER: Right. Well, of course,  
13 as Justice Kavanaugh pointed out, it's not  
14 presented in this case, but I will answer the  
15 question.

16 The issue of the government's  
17 obligation with respect to services to  
18 non-beneficiaries has been litigated in another  
19 setting. Contract support costs are not the  
20 only mandatory spending under the Act. There's  
21 also leasing that is mandatory spending. If a  
22 tribe uses a tribal facility to run the federal  
23 program, then the federal government needs to  
24 pay the leasing costs.

25 That issue has been litigated, and the

1 Court have held in the Jamestown case that  
2 there's a reasonableness limitation to the  
3 leasing costs. Incidentally, reasonableness  
4 comes up twice, once in (a)(2), once in (a)(3).  
5 So there's a reasonableness limitation on the  
6 overhead also. So that's just thing one.

7 CHIEF JUSTICE ROBERTS: Well, but that  
8 presumably doesn't have anything to do with the  
9 allocation between tribal members and non-tribal  
10 members.

11 MR. MILLER: Oh, no. With respect,  
12 Your Honor, it would mean in this situation that  
13 if there were substantial overhead costs  
14 associated with services to non-beneficiaries,  
15 then you would discount that element, and his  
16 would not be responsible for reimbursing it.

17 And I should note that his has a  
18 mechanism already for doing this. His does this  
19 in the leasing arena. If I go to his and ask  
20 for a lease to compensate for the use of a  
21 tribal facility, his will ask for data, how many  
22 non-beneficiaries do you serve? Zero. Then the  
23 they cover the whole lease. Fifty percent,  
24 which is unheard of, but 50 -- well, there are  
25 examples, I suppose, then his will whack off a

1 part of the leasing cost to be sure that they  
2 are only supporting services to Indians because  
3 this is an Indian healthcare program.

4 I also wanted to address the --

5 JUSTICE KAVANAUGH: Can I ask --

6 MR. MILLER: Yes?

7 JUSTICE KAVANAUGH: -- on the question  
8 of whether the tribe can use this money for  
9 something that his itself couldn't use the money  
10 for, I think Mr. Unikowsky to Justice Barrett in  
11 that last colloquy at the very end noted  
12 facility construction, and I wanted to follow up  
13 with you on that since you're here on facility  
14 construction.

15 If that happened with the use of these  
16 -- of the third-party income funds, overhead  
17 costs, your answer?

18 MR. MILLER: Right. Thank you, Your  
19 Honor. As Mr. Unikowsky indicated, we don't  
20 have a separate appropriation for construction.  
21 His does. That's how they get their  
22 construction money --

23 JUSTICE KAVANAUGH: But that --

24 MR. MILLER: -- a quarter of a billion  
25 dollars, but --

1 JUSTICE KAVANAUGH: -- that's not a --  
2 okay. I'm going to stop you there.

3 MR. MILLER: -- I'm going --

4 JUSTICE KAVANAUGH: I'm going to stop  
5 you there. That is not an answer --

6 MR. MILLER: Right.

7 JUSTICE KAVANAUGH: -- to the  
8 statutory question that Justice Barrett was  
9 posing. That's a -- that's a real-world answer,  
10 which is a good real-world answer, but it's not  
11 -- I don't think it's a great statutory answer.  
12 So keep going.

13 MR. MILLER: I -- I agree with Your  
14 Honor that if a -- if a construction activity  
15 serves the general purposes of, let's just take  
16 the EMS program, then it's under the umbrella.  
17 It's within. Let's consider it.

18 So building a garage to house the  
19 ambulances or to do maintenance work on the  
20 ambulances, Roger. To build a new facility  
21 where the ambulance crews were sleeping because  
22 they were decrepit and there were -- there were  
23 holes in the walls and it was not an acceptable  
24 place for ambulance crews to sleep in between  
25 calls, so, yes, reconstructing a new facility to



1 house the ambulance crews, absolutely.

2 Are those construction activities  
3 things that the tribe can do with the  
4 third-party revenue money but that his cannot do  
5 because it needs permission from Congress? Yes.  
6 That is a fact.

7 JUSTICE KAVANAUGH: Yes is the answer  
8 to that?

9 MR. MILLER: Yes is that -- is the  
10 answer to that question.

11 JUSTICE SOTOMAYOR: Would you ever --

12 JUSTICE KAVANAUGH: And the overhead  
13 -- the overhead for that, just to follow up on  
14 that, the overhead for that, or maybe you  
15 already answered this, I just want to --

16 MR. MILLER: No, but thank you for  
17 asking the question. So the overhead on that,  
18 just as if you and I hire a --

19 JUSTICE KAVANAUGH: That's what you're  
20 seeking, right?

21 MR. MILLER: Yes, but there would be  
22 no overhead on it, is what I was about to say,  
23 Your Honor. Unless I'm a general contractor  
24 building my own house, I hire a company to build  
25 a new house. And the tribe hires a company to

1 build that garage. It doesn't build it itself.

2 So the company that hires pays --  
3 charges you \$500,000, a million dollars to build  
4 that garage. You don't have any overhead. You  
5 just procure the contract, but you're not  
6 running the contract. So this is why my friend  
7 --

8 JUSTICE SOTOMAYOR: Counsel, you're  
9 taking a long time to answer the bottom line.

10 MR. MILLER: Yeah. Justice --

11 JUSTICE SOTOMAYOR: Are you going to  
12 include any overhead as contract support?

13 MR. MILLER: No.

14 JUSTICE SOTOMAYOR: Thank you.

15 JUSTICE KAVANAUGH: On the question of  
16 who's going to pay for this, and the reason I am  
17 looking at this is not some kind of fiscal  
18 responsibility canon or something, it's just  
19 trying to figure out how Congress would have  
20 been thinking about this.

21 But, if the discretionary cap stays  
22 the same, the money here -- and I asked Mr.  
23 Unikowsky this -- the money here will  
24 necessarily come from other tribes receiving --  
25 who don't provide the healthcare services

1 themselves, where his provides the healthcare  
2 services directly. That's almost logically  
3 necessary, right?

4 MR. MILLER: Well, it -- it --

5 JUSTICE KAVANAUGH: That's not -- that  
6 doesn't defeat your argument, but it does  
7 perhaps shade how we think about the overall  
8 structure of the statute a little bit.

9 MR. MILLER: I would incorporate by  
10 reference everything that my -- my friend said,  
11 except the answer to that question. CBO will  
12 advise the appropriations chairman and  
13 chairwoman in the Senate and the House what the  
14 man -- what the spending projections are for the  
15 next year. So, if Your Honors make a decision  
16 here in fiscal year '24 and we're looking at  
17 fiscal year '25 or '26, they will make that  
18 decision to the appropriate -- they will provide  
19 that information to the appropriators. The  
20 appropriators then have to divvy up the  
21 appropriation in 13 pieces, mindful of what they  
22 learned from CBO about all 13 of those.

23 This cost, let's say it goes up \$500  
24 million, I have no idea what it would be. There  
25 is no data on that. Then that is an element

1 that the appropriations committee decides in  
2 allocating the 13.

3 Then, when it gets to the environment  
4 and natural resources committee, that committee  
5 decides how to further divvy it up among the  
6 American Indian Museum and the BIA and the  
7 Interior Department and all of its agencies at  
8 the Interior Department. There is no way to  
9 predict what the ultimate impact would be on the  
10 funding of the Indian Health Service, none at  
11 all.

12 And to suggest that no, no, it's going  
13 to be a dollar for dollar impact on Indian  
14 services, it wasn't after the Ramah case.

15 JUSTICE KAVANAUGH: Right.

16 MR. MILLER: That's the best proof.

17 JUSTICE KAVANAUGH: So I think I -- I  
18 -- so that's -- a reasonable answer to that  
19 question would be, well, you're assuming the  
20 discretionary cap would stay the same, but  
21 you're wrong. I'm wrong in thinking that the  
22 discretionary cap will necessarily stay the same  
23 based on the process. That's a predictive  
24 judgment you're making.

25 MR. MILLER: Right. And part of it is

1 because the his appropriation was an 8 or \$9  
2 billion appropriation inside a \$55 billion  
3 appropriation which is inside a \$700 billion  
4 discretionary appropriation. So there's just no  
5 way really to predict that.

6 JUSTICE GORSUCH: How much money are  
7 you seeking in this case?

8 MR. MILLER: One million dollars a  
9 year, Your Honor, for three years, each of the  
10 three-year contract.

11 JUSTICE GORSUCH: For basically EMS  
12 services?

13 MR. MILLER: Basically EMS services  
14 and some of the suicide prevention and substance  
15 abuse programs the tribe has.

16 JUSTICE JACKSON: Did I hear you say  
17 that these were three-year contracts? Is that  
18 what you --

19 MR. MILLER: Contracts can be three  
20 years. These were three-year contracts.

21 JUSTICE JACKSON: With the government?

22 MR. MILLER: Yes.

23 JUSTICE JACKSON: With the his?

24 MR. MILLER: Yes. And they're  
25 recurring. So, after three years, you sign up

1 for another three years if you want to.

2 JUSTICE JACKSON: And they could be  
3 renegotiated at that time?

4 MR. MILLER: Absolutely, absolutely.

5 JUSTICE KAGAN: And what will you do  
6 with that \$1 million a year?

7 MR. MILLER: As a contract recovery  
8 under the Contract Disputes Act, Your Honor? If  
9 that's the question, then that --

10 JUSTICE KAGAN: What -- what services  
11 will you provide with that?

12 MR. MILLER: Oh, yes. Well, the --  
13 the EMS service -- let's take that again --  
14 suffers from being able to hire sufficient  
15 personnel. They pay excess overtime, so if they  
16 could hire another crew, then they wouldn't be  
17 paying that overtime.

18 They would upgrade, constant upgrade I  
19 must say, of the ambulances driving on country  
20 roads. So they would upgrade ambulances,  
21 upgrade equipment in the ambulances, and upgrade  
22 the training of the EMT crews. This is just the  
23 normal -- normal work of an EMS program. And,  
24 most importantly, reduce response times.

25 JUSTICE KAGAN: And do you provide any

1 services to non-Indians?

2 MR. MILLER: No, Your Honor.

3 JUSTICE BARRETT: Can I ask you what I  
4 hope is just a simplistic clarifying question.  
5 So am I right that both parties agree -- and the  
6 government can correct me if this is not the  
7 government's position -- that the costs of  
8 collecting third-party income fall under  
9 5325(a)(1) as part of the secretarial amount and  
10 what you're arguing is that the costs of  
11 spending the income are contract support costs  
12 covered by 5325(a)(2)?

13 MR. MILLER: The -- well, (a)(2), Your  
14 Honor, covers overhead. So, with respect to the  
15 first half of your question, the cost of  
16 providing the EMS program in the first instance  
17 --

18 JUSTICE BARRETT: No, no, I understood  
19 the third-party income question to be divided  
20 into collection and spending --

21 MR. MILLER: Yes.

22 JUSTICE BARRETT: -- and that there  
23 was no dispute that collection is covered and  
24 that the reason why collection is covered is  
25 that it falls under 5325(a)(1) in the

1 secretarial amount and so that what we're trying  
2 to find is a home for spending, and you say that  
3 home is not 5325(a)(1) but 5325(a)(2)?

4 MR. MILLER: Right. If I may, Your  
5 Honor, the -- the program collection activity is  
6 an (a)(1) activity.

7 JUSTICE BARRETT: Okay.

8 MR. MILLER: And we can find where the  
9 billing operations are spelled out in the  
10 contract. Overhead on the program collection  
11 activity is an (a)(2) cost. So, even as to the  
12 Secretary, there are two buckets funding the  
13 tribe.

14 JUSTICE BARRETT: Okay.

15 MR. MILLER: The -- the -- the  
16 program, the activity itself and the overhead  
17 associated. But (a)(2), like (a)(3), isn't  
18 limited to what comes to the tribe under (a)(1).

19 (a)(2) is limited by the terms of the  
20 contract, not by the terms of (a)(1). I know  
21 the government's brief on page 2, I think, dices  
22 and rearranges the words, but the costs are to  
23 support the contract and contract compliance  
24 costs. So the touchstone for (a)(2), like  
25 (a)(3), is what does the contract say?



1                   So the overhead that's covered by  
2           (a) (2) and (a) (3) is to support anything that's  
3           in the contract, and that contract includes  
4           spending program income.

5                   And with regard to breaking the bank,  
6           by the way, you're only talking about an average  
7           indirect cost rate around the United States is  
8           25 percent, although my client's rate was  
9           17 percent. So they lost out on about  
10          17 percent of the program income spending they  
11          should have had.

12                   That's important. But what's really  
13          important under the Indian Self-Determination  
14          Act is they couldn't do what his could have  
15          done. And if I could just take a moment, had  
16          his been in the situation that the tribe was in,  
17          running a \$10 million program a year, and his  
18          had 50 percent program revenue, program income  
19          to spend, and then -- and then its own  
20          appropriations to spend, 50/50, his wouldn't  
21          have to take one dime. All of that money would  
22          be locally spent to provide care.

23                   But when the tribe comes in, if it has  
24          a 25 percent indirect cost rate and we had 5  
25          million from one source, 5 million from another

1 source, 10 million total, 2 and a half billion  
2 dollars required for indirect costs, we have to  
3 fund some of that 2 and a half million out of  
4 the program revenue that came into the tribe.

5 His doesn't have that. They get the  
6 benefit of the whole 10 million. And the tribe  
7 would get the benefit of the whole 10 million if  
8 the overhead were reimbursed on top --

9 JUSTICE BARRETT: But is that part --

10 MR. MILLER: -- but it's not.

11 JUSTICE BARRETT: Is that partly  
12 explicable by the fact that, I mean, you know,  
13 the tribes aren't the only ones who get  
14 third-party payments, like from Medicare,  
15 Medicaid or private insurers. That overhead is  
16 partly built into that?

17 MR. MILLER: No, the overhead comes in  
18 when we -- when we spend the money. I mean, if  
19 we spend the money to increase salaries, if we  
20 spend the money to add another --

21 JUSTICE BARRETT: No, no, no, but if a  
22 hospital got paid, just say not a tribal --

23 MR. MILLER: Yes.

24 JUSTICE BARRETT: -- medical facility.  
25 Well, I'll -- I'll finish that you up during the

1 --

2 CHIEF JUSTICE ROBERTS: Thank you --

3 MR. MILLER: But if a hospital got --

4 CHIEF JUSTICE ROBERTS: -- counsel.

5 Go ahead.

6 MR. MILLER: If a hospital got paid  
7 Medicare and Medicaid money, the hospital can do  
8 anything it wants with it. It's not required --  
9 it's not limited by any federal statute in its  
10 use of the money. And a doctor the same. If  
11 the doctor receives money from Medicare and  
12 Medicaid, it can use it to pay the -- the  
13 scholarship of its son.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Justice Thomas?

17 Justice Alito?

18 JUSTICE ALITO: Well, just to follow  
19 up on a few questions that were asked earlier,  
20 in assessing what Congress thought this whole  
21 scheme would amount to, do you think it is  
22 illegitimate to consider how much it will cost?

23 MR. MILLER: I -- I don't -- I don't  
24 think anything is illegitimate in terms of  
25 considering what Congress might have expected,

1 but I -- I do think we have to look at what  
2 Congress did in 1994 --

3 JUSTICE ALITO: All right.

4 MR. MILLER: -- in that --

5 JUSTICE ALITO: So it's not  
6 illegitimate -- that wasn't an illegitimate line  
7 of inquiry. And the government has been accused  
8 of making up a number and trying to smuggle it  
9 into the case without record support.

10 I take it you disagree with their  
11 number?

12 MR. MILLER: Well, I disagree with  
13 their number, and today the government said that  
14 their number was concocted partially on the  
15 assumption that we were talking about overhead  
16 associated with services to non-beneficiaries,  
17 which we're not.

18 JUSTICE ALITO: Do you have a number?

19 MR. MILLER: We do not have a number.

20 JUSTICE ALITO: Thank you.

21 MR. MILLER: All I know is, for the  
22 San Carlos Apache Tribe, it's about a million  
23 dollars a year.

24 JUSTICE ALITO: Well, do you think in  
25 a case involving the interpretation of the

1 statute, the question is what the statute means  
2 and what it will mean as applied to -- in all  
3 the instances in which it will be invoked, or  
4 just what it would mean in the particular case  
5 that happens to come before the Court?

6 MR. MILLER: The question I asked  
7 myself is, what did -- what did Congress intend  
8 when it enacted the statute because we're bound  
9 by the text of the statute. And Congress in  
10 1994 said that program income was going to be  
11 part of the contract, and it knew that the  
12 agency had, for more than a decade, also --

13 JUSTICE ALITO: All right.

14 MR. MILLER: -- said that program  
15 income was part of the contract, and it wrote  
16 the contract support cost provision to be key to  
17 the contract.

18 JUSTICE ALITO: Thank you.

19 MR. MILLER: Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Sotomayor?

22 Justice Gorsuch?

23 Justice Kavanaugh?

24 Justice Barrett?

25 Justice Jackson?

1 Great. Thank you, counsel.

2 MR. MILLER: Thank you.

3 CHIEF JUSTICE ROBERTS: Rebuttal, Ms.  
4 Flynn.

5 REBUTTAL ARGUMENT OF CAROLINE A. FLYNN  
6 ON BEHALF OF THE PETITIONERS

7 MS. FLYNN: Thank you, Mr. Chief  
8 Justice. Just a few points.

9 So, first, I do want to emphasize at  
10 the outset that we have been talking a lot today  
11 about the funding provisions in 5325(a) and (m)  
12 and how those work together, but there is a  
13 separate prohibition that does apply,  
14 notwithstanding any other provision of law, and  
15 that says that his cannot pay costs that are not  
16 directly attributable to the ISDA contract.

17 Here there is an extended chain of  
18 causation. The tribe has to first perform  
19 services that are eligible for receiving  
20 reimbursements, it then has to collect that  
21 money, then decide how to spend that money,  
22 which may not even be during the same contract  
23 period. And then it has to be the kind of  
24 expenditure that generates what would otherwise  
25 be an eligible contract support cost. That is

1 too extended of a chain to fit within "directly  
2 attributable" and so payment of these funds is  
3 independently barred.

4           The second thing I want to address,  
5 this question of whether when we're talking  
6 about the kind of third-party reimbursement  
7 income that can trigger this corresponding  
8 contract support cost obligation from his, there  
9 were questions about whether that kind of income  
10 includes income from serving non-beneficiaries  
11 or just income from serving Indians.

12           And I took my friend from the Northern  
13 Arapaho to say that they do consider the program  
14 income they're talking about in this case to  
15 include both kinds of reimbursement revenue.  
16 That is how I understood the arguments to be in  
17 this case thus far.

18           But I also took my friends on the  
19 other side to say that you do not have to decide  
20 that question about whether the kind of  
21 reimbursement income that could potentially  
22 trigger CSC from his includes income from  
23 serving non-Indians. And I would encourage the  
24 Court at the very least to reserve that issue  
25 and not decide whether that amount of income can

1 include that kind of income stream.

2           There were also questions about our  
3 budget estimate in this case, about the  
4 repercussions of this case. I do want to  
5 clarify that, yes, our estimate is based on --  
6 if you base contract support costs on all kinds  
7 of third-party reimbursement income that can  
8 come in, so it is tied to that, but that  
9 estimate is tied to the available information we  
10 have.

11           We do not have reliable information  
12 about how much third-party reimbursement income  
13 tribes are bringing in per year, including  
14 whether it comes from serving non-beneficiaries  
15 or beneficiaries, because his doesn't have  
16 reason to collect that information in a  
17 comprehensive way. But we can look at the value  
18 of the claims that have been made so far, and we  
19 can look to how much third-party reimbursement  
20 income his comes -- brings in, to make  
21 estimates.

22           The value of the claims we're seeing  
23 so far, we are already facing a claim in the  
24 district of Arizona seeking nearly \$110 million  
25 in additional contract support costs for a



1 single contract year. We're seeing other claims  
2 for 40 million for a single contract year, and  
3 90 million for another contract year. In one of  
4 those cases, the Gila River case, there's a  
5 single fiscal year where the tribe -- what the  
6 tribe is saying that they are owed in contract  
7 support costs is about \$48 million, and that --  
8 that's the total including what they were  
9 already paid. And that comes close to what they  
10 received in the secretarial amount for that same  
11 year, which was \$51 million.

12 So our prediction that this will  
13 eventually overtake the secretarial amount we  
14 think is sound. And that's in part because of  
15 the allegations, like those in the San Carlos  
16 Apaches' complaint, that if they had received an  
17 additional \$3 million in contract support costs,  
18 they would have been able to produce another \$5  
19 million in third-party reimbursement income.  
20 And that is part of the damages claim that they  
21 are seeking against us in this case.

22 I would also say that our estimate  
23 about the forward-looking budget impact does not  
24 include the value of any of these retrospective  
25 judgments that do have a six-year statute of

1 limitations.

2           Finally, just one final point, there's  
3 been discussion about what falls within  
4 (m) (1) -- sorry -- 5325(m) (1) and what counts as  
5 being within the general purposes of the  
6 contract. I would -- I understood my friends to  
7 be saying it has to be very closely tied to  
8 contract services, although there seems to be  
9 some expenses like building facilities, which  
10 can be done under ISDA but has to be done under  
11 a separate ISDA contract if the tribe wants to  
12 fund it that way, but they think that they could  
13 fund that using third-party reimbursement  
14 income.

15           I would say also, though, that (m) (1)  
16 has to be read consistently with 1641(d) (2).  
17 This is the provision of the IHCIA that also  
18 governs the same reimbursement income. And that  
19 provision says that tribes can spend it on any  
20 healthcare-related purpose or otherwise to  
21 achieve the general objectives of the IHCIA.  
22 You have to read those consistently. It can't  
23 be that (m) (1) permits -- forbids uses that this  
24 other provision permits. And so that's why I do  
25 think that the -- the idea that tribes are

1 limited to spending this just on program  
2 services cannot be correct.

3 If there are no further questions, we  
4 ask that you reverse in both cases. Thank you,  
5 Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 The case is submitted.

9 (Whereupon, at 11:30 a.m., the case  
10 was submitted.)

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