SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT	OF	THE	UNITED	STATES
	_			
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.)			
	-			
Pages: 1 through 106				
Place: Washington, D.C.				

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15	Respondent.)
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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 behal
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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1	PROCEEDINGS
2	(10:03 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear
4	argument first this morning in Case 23-250,
5	Becerra versus the Apache Tribe.
6	Ms. Flynn.
7	ORAL ARGUMENT OF CAROLINE A. FLYNN
8	ON BEHALF OF THE PETITIONERS
9	MS. FLYNN: Mr. Chief Justice, and may
10	it please the Court:
11	The Indian Self-Determination Act
12	requires the Indian Health Service to enter into
13	contracts with tribes to transfer federal health
14	programs that IHS previously carried out for the
15	tribes' benefit. ISDA's basic design is simple.
16	IHS takes the appropriated funds it would have
17	otherwise spent on the federal program and
18	transfers those funds to the tribe in exchange
19	for the tribe's promise to use them to provide
20	the same level of services, and ISDA obligates
21	IHS to add to that core secretarial amount
22	contract support costs to plug specific gaps the
23	secretarial amount does not cover.
24	What the tribes are arguing here is
25	that ISDA also obligates IHS to subsidize the

1 tribes' expenditures of funds that they don't 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 provisions addressing contract support costs say 8 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 supplemental funding to that in the contract. 13 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 support cost obligation and eventually 19 20 transforming what the statute designates as mere 21 support costs into the primary component of 22 contract funding. But there is an even more 23 straightforward reason why the tribes' theory 24

here is wrong. It violates Congress's express

2.5

- 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.
- I welcome the Court's questions.
- 9 JUSTICE THOMAS: Are there limitations
- on how the tribe can use the outside income --
- MS. FLYNN: There are --
- 12 JUSTICE THOMAS: -- the additional
- 13 income?
- MS. FLYNN: -- there are two statutory
- conditions that are applicable to how tribes can
- 16 use these -- this third-party reimbursement
- income. Those are in 5325(m)(1). That's a
- 18 provision --
- 19 JUSTICE THOMAS: And what's that
- 20 limitation?
- MS. FLYNN: So, there, it says they
- have to use it to further the general purposes
- 23 of the contract. And --
- 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
- and says tribes just have to use it "for any
- 12 healthcare-related purpose" or otherwise defer
- to the purposes of that law, which include
- 14 things as varied as including the presence of
- tribal members in healthcare professions.
- So it is a very open-ended limitation
- 17 that is not limited to just providing additional
- 18 contract services.
- 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
- of self-determination, right?
- 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
- 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,
- 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 --
- or that Congress has built flexibilities into
- 21 the statute to enable tribes to earn more
- third-party reimbursement income in the first
- instance and have greater flexibility to spend
- 24 it so as to leverage it to build their programs
- 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
2.5	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
- 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 --
- JUSTICE KAGAN: Well, is that really
- 15 --
- MS. FLYNN: -- non-Medicare
- 17 beneficiaries.
- JUSTICE KAGAN: -- so different? I
- 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.
- MS. FLYNN: So I believe Congress
- 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.
- MS. FLYNN: Right, but they have a
- 14 sort of accounting and prioritization
- 15 flexibility that IHS does not have.
- But the other thing is -- I would say
- 17 about all this is this is -- we're talking now
- 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
- think, when you look at the contract support
- 24 cost provisions themselves, they tie the
- 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 tribes agreed to carry out in exchange for the 4 5 secretarial amount to the same extent as those -- that secretarial amount funding will allow 6 7 them to perform. JUSTICE GORSUCH: Counsel --8 MS. FLYNN: And --9 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 --2.5 MS. FLYNN: -- Medicare and Medicaid,

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1 for instance.
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- 2 JUSTICE GORSUCH: -- the ones that
- 3 have, 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 --
- JUSTICE GORSUCH: No, but, once --
- once they -- once they take on this obligation,
- 12 they have -- they have a duty to collect the
- 13 funds from third parties?
- MS. FLYNN: We have not disputed that
- 15 reading of the payer of last resort provision in
- 16 this case --
- 17 JUSTICE GORSUCH: Okay.
- MS. FLYNN: -- but I'm not sure that
- 19 IHS --
- 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.
- JUSTICE GORSUCH: And Indian health,
- 8 right?
- 9 MS. FLYNN: Yes.
- JUSTICE GORSUCH: Not -- not -- not --
- 11 not non-Indians?
- MS. FLYNN: Yes.
- JUSTICE GORSUCH: Okay. And -- and
- 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?
- MS. FLYNN: I agree with that, but the
- 19 services --
- JUSTICE GORSUCH: So --
- MS. FLYNN: -- that the tribe is -- I
- 22 just --
- 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

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1 their programs to help non-Indians. Maybe
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- 2 they're free to do that -- you're right --
- 3 statutorily.
- 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 --
- MS. FLYNN: I -- I don't under --
- 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
- income that came from serving only --
- JUSTICE GORSUCH: Why isn't that -- it
- 21 has to be consistent with the general purposes
- of the contract, (m)(1). So those -- those
- 23 purposes are the specific services that have
- been provided -- contracted to be provided.
- 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 horribles about the
- money being used for non-Indian healthcare?
- 12 Because it would seem to.
- MS. FLYNN: Well, again, that wasn't
- 14 what the lower court found here, and I don't
- believe that's what the tribes are arguing, but,
- 16 I mean, I think we would still have a situation
- where, because third-party reimbursement income
- has been increasing and because that would then
- 19 directly, according to the tribes' theory,
- 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 --
- 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
- don't have the information to tell you how much.
- 20 JUSTICE KAVANAUGH: Is that -- is that
- 21 issue -- is that issue before us?
- MS. FLYNN: That wasn't what the lower
- 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 --
- 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
- saying, oh, there are all these possible abuses
- out there in the world, that there was a ready
- solution, which was to limit it to the services
- 14 that the tribe is providing to Indians under the
- 15 contract.
- MS. FLYNN: To -- just to clarify, we
- don't think it's an abuse to, you know, take
- 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 --
- 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.
- 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 --
- MS. FLYNN: Perhaps they can clarify.
- JUSTICE KAVANAUGH: -- is it? I mean,
- that's just not raised at all?
- MS. FLYNN: No, I don't think so.
- 16 JUSTICE KAVANAUGH: I -- I didn't -- I
- 17 didn't see it at least.
- MS. FLYNN: No, I don't think so.
- 19 JUSTICE BARRETT: Counsel --
- JUSTICE SOTOMAYOR: Counsel -- I'm
- 21 sorry.
- JUSTICE BARRETT: Go ahead.
- 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.
- 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.
- I still don't understand how your
- 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
- 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
- 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
- of their agreement with the government. This is
- only a reimbursement. It's not a required

2.1

- 1 service agreement.
- 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
- that it's upending, if it's clear by the text
- that if you provide services, you'll be
- reimbursed for them and for contract support.
- 15 It's the contract doing that, not -- not
- 16 upending it.
- MS. FLYNN: Yes, but I -- to respond
- 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.
- We understand that prohibition to be
- 25 limited to contracts by which the tribe receives

- 1 funds, which is consistent with Congress's --
- 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
- 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
- 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
- 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.
                MS. FLYNN: -- there's an extended --
 3
                JUSTICE SOTOMAYOR: Thank you,
 4
 5
      counsel.
                JUSTICE BARRETT: Counsel, can I --
 6
 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
      understand the tribes -- and Mr. Unikowsky can
24
25
      address this point -- I don't understand the
```

2.4

- 1 tribes to be saying it should be part of the
- 2 secretarial amount, but if the secretarial
- 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
- thing that the Secretary could have allocated to
- 13 that tribe.
- But, no, the costs of spending income
- 15 from third parties is not part of the
- 16 secretarial amount because that is limited to
- the funds the Secretary otherwise would have
- 18 provided for the operation of the -- the
- operation of the program. And then the contract
- 20 support cost obligation is itself tied as funds
- 21 to support that amount.
- JUSTICE BARRETT: Except my confusion
- is you're saying that the secretarial amount
- 24 does include the costs of collecting the
- 25 third-party income, right?

```
MS. FLYNN: Yes, because -- yeah.
1
 2
                JUSTICE BARRETT: Yeah. And you --
 3
      you incur overhead costs when you spend that
      third-party income as well, which I take to be
 4
 5
      the entire dispute here, is whether they get
 6
      coverage for that, right?
 7
                MS. FLYNN: Right, but I guess I would
      say the -- the costs of collection and billing,
 8
 9
      that is associated with providing the services
10
      using the secretarial amount itself.
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
      the tribes' behalf, that kind of thing.
24
2.5
                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.
- 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
- were earlier, you said that Mr. Unikowsky didn't
- 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
- within the contractual scope of work."
- 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 --
- JUSTICE GORSUCH: Why not? My
- 12 argument was -- my question was, aren't they
- obliged under (m)(1) to spend on general
- 14 purposes, that's Indian health, and aren't they
- 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
- what's laid out in those pages.
- MS. FLYNN: I don't think they're
- 22 distinguishing between serving eligible Indian
- 23 beneficiaries and those that the tribe is
- 24 eliqible 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 Northern Arapaho -- in there, they refer to the 4 5 resolution that the tribe made to serve non-beneficiaries and talk about that in the 6 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.

т_	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
- of construction that the statute gives us, which
- 12 says -- I'm looking at 532 -- 5321(g) -- that
- each provision shall be liberally construed for
- the benefit of the Indian tribe participating in
- 15 self-determination?
- So to the extent -- I don't know
- 17 whether we need to think of this as ambiguous or
- not, but they make an argument about what those
- same provisions mean. Why aren't we bound by
- 20 this statutory mandate to construe them in their
- 21 favor?
- MS. FLYNN: Because we believe that
- 23 statutory language is calling for courts to
- 24 apply the Indian canon, the common law Indian
- 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,
- if Congress was asking for something different,
- it wouldn't have used the exact same phrasing
- 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.
- 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
- out some examples in our reply brief.
- JUSTICE SOTOMAYOR: I'm sorry --
- 25 CHIEF JUSTICE ROBERTS: Thank you --

1 thank you, counsel. 2 Justice Thomas, anything further? Justice Alito? 3 Justice Sotomayor? 4 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?

_	ouscice havailaugii:
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,
2.5	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 --
- 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?
- MS. FLYNN: Right now, it is still
- 15 discretionary.
- JUSTICE KAVANAUGH: So subject to the
- 17 cap, okay.
- 18 MS. FLYNN: Yes.
- 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
- response to things changed in 2010 after the
- 24 Health Care Act was passed in 2010. What was
- 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
- 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
- the legislative background suggesting that that
- 14 was the case.
- I would also say that I understood the
- tribes to be saying that there were changes made
- 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.
- 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
- third-party reimbursement income coming up in
- 13 the background of these laws. I'm not aware of
- it ever being raised to the surface.
- 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
- 53 5325(a)(1) and kind of asking you why this
- 21 wouldn't have been included in the secretarial
- amount.
- MS. FLYNN: Mm-hmm.
- JUSTICE BARRETT: Just want to clarify
- 25 something about 5325(a)(2).

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1
                So, as I understand it, (a)(2)(A), I
 2
      mean, the example that kept coming up in the
      briefs was workers' comp.
 3
 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
      your brief to be saying that these are expenses
19
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?
2.5
                MS. FLYNN: Yes.
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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
      Secretary does not incur but the tribes do?
8
 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 --
2.5
                JUSTICE BARRETT: But aren't these
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- 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
- service, and so I take the tribes to be arguing
- 13 that it's -- if the service is funded one way or
- another way, that that's why the expense would
- be eligible for contract support costs if it is
- part of the federal program that is eligible for
- 17 funding.
- 18 JUSTICE BARRETT: And so the most
- important part for the government's purposes is
- 20 that you define this to be outside of the
- 21 program?
- MS. FLYNN: Yes. I mean, that's part
- of our argument. We have the other statutory --
- 24 yes, yeah, yes.
- 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
) E	that amoralises represent at ion 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
- interest here how -- how these contracts work.
- 12 There's no opportunity for the government to
- 13 renegotiate terms?
- MS. FLYNN: We would have to see what
- 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 --
- JUSTICE JACKSON: What about an amend
- 19 --
- 20 MS. FLYNN: -- authority section --
- JUSTICE JACKSON: -- what been an
- 22 amendment from Congress? I mean, you say
- 23 Congress hasn't -- it isn't clear that Congress
- 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 scheme and take some action to address this 4 problem, but we just don't think that Congress 5 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

case meet that description. If his was running

4.3

- 1 tribal healthcare, it would collect program
- 2 income and spend it on healthcare services.
- 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
- 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
- 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
- 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
- just surplusage?
- 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
- over what was covered, what wasn't covered.
- His was chronically not paying. And
- 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

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1 Congress goes out of its way --
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- 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.
- There is a proviso on (a)(1) but not (a)(2).
- So it just seems to me in viewing this
- text literally, if you satisfy (a)(3), you
- 14 prevail, and that's the point of adding this
- 15 clarification.
- But I just want to be clear, if you
- don't agree with anything I just said, that's
- 18 not essential to our position. If you think
- that we have to satisfy (a) (2), emphatically we
- 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.
- 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
- answer the questions about non-beneficiaries as
- 14 well as some of Justice Barrett and some of
- 15 Justice Kavanaugh's questions.
- 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?
- 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.
- So it seems to me that furthering the
- 12 general purpose of the contract requires
- 13 slotting it in one of those enumerated purposes
- or at least something that's like really close
- to those purposes. I realize the word "purpose"
- has "general," the word "general," attached to
- 17 it, but I don't think that that entitles the
- 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.
- Okay. So, first of all, for about
- half of tribes, including San Carlos, they don't
- serve non-beneficiaries at all. Even for the
- 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
- of Northern Arapaho's healthcare program. And
- that's less than 3 percent of the total number
- 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.
- Okay? So none of the Secretary's funding ever
- goes to the provision of healthcare to those
- 13 non-beneficiaries.
- 14 JUSTICE KAGAN: That's not true for
- 15 some tribes, is it?
- MR. UNIKOWSKY: No, I think it's true
- 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
- 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 services for --6 7 CHIEF JUSTICE ROBERTS: Well, but 8 you're --9 JUSTICE KAGAN: That's true for all 10 tribes? MR. UNIKOWSKY: Yes, I think it is 11 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 you're talking about the principle, but we're 19 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- -non-tribal members and others to tribal members? 24 2.5 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.
- 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.
- I mean, there's -- the -- the argument
- on the other side is that there's this
- 12 provision, Section 1680, that says -- 1680c,
- that says that services provided shall be -- to
- non-Indians shall be deemed to be provided under
- 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.
- 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?
- 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,
- 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
- we spend are allocated towards programs in the
- 12 scope of work.
- But I just want to be clear, the --
- 14 the broader argument, we're not saying you can
- use program income to give -- to -- to offer
- 16 services to non-Indians. Okay? I think all
- 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 --
- JUSTICE BARRETT: But the thing you
- 22 should get --
- 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
- of services from his to the tribe. That's the
- 11 purpose.
- So in terms of what "general purpose"
- means, I think that gives the tribe a little bit
- of discretion. Just as one example, tribes have
- 15 generally construed "general purposes" to open
- 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
- is transferred, tribes have construed that
- 20 language to say you can build a clinic.
- JUSTICE ALITO: Well, is -- are the --
- 22 could you give me a simpler answer or maybe it
- doesn't lend itself to a simpler answer? Are
- 24 the general purposes of the contract simply to
- 25 further Indian health?

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1
               MR. UNIKOWSKY: No. I think it's
 2
      narrower than that --
               JUSTICE ALITO: No?
 3
 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
      general purpose is you look at the purpose of
8
 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
      Indians to go to medical school. Does that fall
23
24
     within the general purposes of the contract?
2.5
               MR. UNIKOWSKY: I probably would say
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- 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.
- MR. UNIKOWSKY: I don't think so, Your
- 13 Honor. I think --
- 14 JUSTICE ALITO: No?
- MR. UNIKOWSKY: -- that you should
- hold that, as long as that is satisfied, as long
- as the tribe are adhering to that contractual
- obligation, then it's -- it's acting pursuant to
- 19 the contract.
- 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
- just to serve the services under the contract.

1 Like --2 JUSTICE GORSUCH: Mr. Unikowsky? 3 MR. UNIKOWSKY: Yes. 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 Honor. There's not even close to enough money. 8 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, you'd agree it has to be Indians? 21 22 MR. UNIKOWSKY: 100 percent, I agree, 23 Your Honor. 24 JUSTICE GORSUCH: And in your 2.5 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.
- JUSTICE KAVANAUGH: And --
- 11 JUSTICE KAGAN: And if you were a
- 12 tribe that had a -- you seem to provide pretty
- much the full gamut of healthcare services, but
- if there were a tribe that didn't, that said,
- you know, we're only providing emergency
- services, something like that, then it would
- have to go only to emergency services; is that
- 18 correct?
- MR. UNIKOWSKY: I agree. I mean,
- that's maybe more of a question for Mr. Miller,
- 21 who -- his client had such a contract. But,
- yes, that is my understanding of -- of general
- purposes.
- 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
- means is that if we're essentially hiring a
- 14 subcontract to build a building, we just
- transfer a bunch of money to the subcontractor,
- that doesn't generate overhead costs. It's the
- 17 subcontractor who has the overhead, not us.
- So under the IHS's cost allocation
- 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.
- The other thing is it's not like
- 23 Congress doesn't like construction. It's just
- there's two separate appropriations provisions.
- 25 Like there's one to the Indian Health Service

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for services, and then there's a separate stream
for -- for construction. And so Congress has
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- 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 --
- 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 --
- MR. UNIKOWSKY: No, we don't -- we
- 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
- their biggest arguments is the practical
- 17 consequences of this, that you're going to be
- depriving money from direct service tribes.
- 19 How do you respond to that?
- 20 MR. UNIKOWSKY: All right. If I can
- 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

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1 contractor. So that's the -- that's not all
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- 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 --
- JUSTICE SOTOMAYOR: It's a nice
- 9 answer, but it doesn't answer --
- 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
- members, both ISDA and non-ISDA members, have
- submitted amicus briefs in our support because I
- 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
- accept the risk that Your Honor just identified.
- JUSTICE KAVANAUGH: And the risk is
- 24 if -- just so I understand it, if Congress
- 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.
- MR. UNIKOWSKY: Yeah, if.
- 14 JUSTICE KAVANAUGH: If it stays the
- same, your position will hurt the other tribes?
- MR. UNIKOWSKY: Theoretically, there
- 17 would -- you know, yes, if there's a limited pot
- of money and more goes to one thing, then less
- 19 goes to the other. That's just simple
- 20 mathematics.
- 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.

Т	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?
LO	MR. UNIKOWSKY: I think it was in the
L1	early 2010s, but I think there's a good
L2	explanation for that, Your Honor.
L3	JUSTICE ALITO: So how is it that
L 4	these tribes represented by excellent attorneys
L5	like you and Mr. Lloyd left all this money on
L 6	the table for so many years?
L7	MR. UNIKOWSKY: So there's two basic
L8	answers. One is that for many years there's
L 9	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.
- So this issue just didn't come up. I
- don't think that there's some kind of tradition
- here that's really relevant because the facts on
- 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?
- MR. UNIKOWSKY: Correct.
- JUSTICE ALITO: And if the government
- is right that the annual costs of accepting your
- 23 reading could be \$2 billion, then the first year
- 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?
- 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
- 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

- 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
- is \$12 billion? I mean, maybe today \$12 billion
- is not very much money, but then what would we
- do? Would we say, well, gee, we made a mistake,
- we decided the case based on the wrong
- 16 assumption?
- 17 MR. UNIKOWSKY: No, I don't think that
- 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.
- JUSTICE ALITO: Well, if it has such
- 23 -- if your reading has such severe consequences,
- does that say something about the plausibility
- of the reading?

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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?
               MR. UNIKOWSKY: I don't think it's
 7
      really an elephant in a mouse hole. I mean, the
8
 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
      reimbursement based on the same rate for that
14
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
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- 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.
- MR. UNIKOWSKY: No. No.
- 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.
- JUSTICE GORSUCH: Obviously, that's
- 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,
- tribes were getting much less than they were
- 24 entitled to under the statute because of these
- 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.
- 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?
- MR. UNIKOWSKY: About that, yes.
- 12 JUSTICE GORSUCH: So this 800 million
- to 2 billion that's on page 44 of their brief,
- 14 there's no cite?
- MR. UNIKOWSKY: No, it's an
- 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 --
- 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 completely implausible and that may have been 4 5 baked into this unexplained number, Your Honor. JUSTICE GORSUCH: We don't usually 6 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, 2.5 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 --
- $5325 \, (m) \, (1)$ 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
- that pot of money which is separate from the IS
- -- 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
- of money?
- 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.
- JUSTICE KAVANAUGH: Okay. And what do
- you do with -- I don't know that we've mentioned
- 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.
- And in the exact same statutory
- amendment in which (m) was enacted, (A) (3) was
- 17 enacted to specifically address contract support
- 18 costs. So, instead of drawing a negative
- 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
- of the federal program, which I think includes

- 1 program income. It's the same word, "program,"
- 2 in both provisions.
- 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
- it doesn't affect your position one bit, because
- it seems to me under (a)(2), you know, there are
- two qualifications in (A) and (B), and I think
- 16 (B) doesn't seem to fit very well, so it would
- have to be (A), but that doesn't seem to fit
- 18 very well either. So explain to me why that's
- 19 wrong.
- 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
- 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 everybody keeps talking about workers' comp? 6 7 MR. UNIKOWSKY: Yeah. That's -- well, that's not -- that's another thing. 8 9 JUSTICE BARRETT: That's another 10 thing? 11 MR. UNIKOWSKY: Yeah. 12 JUSTICE BARRETT: Okay. 13 MR. UNIKOWSKY: But -- so overhead -most of these costs are actually indirect costs, 14 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?
- 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.
- So, for example, you know, if there's
- 14 contracting, GSA would do the work if his was
- handling the program. We're doing the work when
- we're handling the program. That's the money
- we're seeking, just (A) and (B) money. And --
- 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
- "contractor," which is the earlier part of (2).
- 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?
- MR. UNIKOWSKY: One -- 100 percent.
- 11 His is required to spend the third -- to collect
- 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
- spend it, and so we're just asking to be put
- into the same -- into their shoes for purposes
- of contract support costs.
- JUSTICE BARRETT: And when you spend
- 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
- you not say that you can only claim these
- 23 contract support costs for expenditures that are
- of the sort that his would also make --
- MR. UNIKOWSKY: Oh --

Т	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
LO	differently from how his would.
L1	JUSTICE BARRETT: Mm-hmm.
L2	MR. UNIKOWSKY: But, first of all,
L3	that happens with the secretarial amount too
L 4	because the whole point of this statute is to
L5	promote self-determination. It reflects the
L6	assumption that the tribes may spend a
L7	particular dollar differently from how his would
L8	do it, and Congress thought that was a good
L 9	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 evactly 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.
- MR. UNIKOWSKY: We -- we --
- 12 100 percent, no, we cannot spend and we do not
- spend this money on non-Indian healthcare. If
- 14 an employee of our program uses the blood
- pressure facilities or goes to the dentist at
- one of our clinics, they pay from their own
- 17 insurance.
- 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?
- MR. UNIKOWSKY: So that -- that -- so
- 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
- some of the money on facility construction,
- 11 which his doesn't under these riders. But,
- 12 again, like, the -- the federal government
- spends money on facilities. They're just a
- 14 separate stream of appropriations.
- But, in general, when we do that --
- and, again, that's -- the representation in my
- 17 brief is -- is accurate because these are years
- 18 after the years in question.
- JUSTICE BARRETT: Mm-hmm.
- MR. UNIKOWSKY: Even when we've done
- 21 that, we don't consider that to be included in
- the base.
- JUSTICE BARRETT: Okay.
- 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? JUSTICE JACKSON: So I just want to be 4 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 are here, and there are enumerated purposes. 9 10 MR. UNIKOWSKY: Yes. 11 JUSTICE JACKSON: I'm looking at JA 12 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

23

- 24 practical matter, we spend all the program
- income on the services on -- on 124 and 125.

modify "purposes" a little bit, but as a

mean, it says "general purposes," which might

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

- 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
- just visualize this, we're talking about 1.8
- million acres, about 29,000 square miles, a
- thousand miles of roadless area, a couple hours
- 16 east of Phoenix, the Emergency Medical Service
- 17 program was severely underfunded.
- So, on page 101, the Indian Health
- 19 Service demands that the tribe agree to a clause
- 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.
- 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
- 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.
- 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.
- And one of the good things was (m) (1),
- that all program income had to go to further the
- 13 general purposes of the contract. So too the
- question about (a) (2) and (a) (3) and how they
- 15 relate. They require the administration -- the
- overhead has to be in connection with the
- 17 expenditure 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
- federal program that we discussed earlier. The
- 23 federal program includes direct service spending
- 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?
- MR. MILLER: Right. Well, of course,
- as Justice Kavanaugh pointed out, it's not
- presented in this case, but I will answer the
- 15 question.
- The issue of the government's
- 17 obligation with respect to services to
- non-beneficiaries has been litigated in another
- 19 setting. Contract support costs are not the
- only mandatory spending under the Act. There's
- 21 also leasing that is mandatory spending. If a
- 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.
- MR. MILLER: Oh, no. With respect,
- 12 Your Honor, it would mean in this situation that
- if there were substantial overhead costs
- 14 associated with services to non-beneficiaries,
- then you would discount that element, and his
- would not be responsible for reimbursing it.
- 17 And I should note that his has a
- mechanism already for doing this. His does this
- 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
- 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
- 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 --
- JUSTICE KAVANAUGH: But that --
- MR. MILLER: -- a quarter of a billion
- 25 dollars, but --

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1
                JUSTICE KAVANAUGH: -- that's not a --
 2
      okay. I'm going to stop you there.
 3
               MR. MILLER: -- I'm going --
                JUSTICE KAVANAUGH: I'm going to stop
 4
      you there. That is not an answer --
 5
 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
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place for ambulance crews to sleep in between

calls, so, yes, reconstructing a new facility to

24

- 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.
- 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 --
- MR. MILLER: No, but thank you for
- 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?
- 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
- a new house. And the tribe hires a company to

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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
      that garage. You don't have any overhead. You
 4
 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
      taking a long time to answer the bottom line.
 9
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
     who's going to pay for this, and the reason I am
16
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 --
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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
- 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
- here in fiscal year '24 and we're looking at
- fiscal year '25 or '26, they will make that
- 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
- learned from CBO about all 13 of those.
- This cost, let's say it goes up \$500
- 24 million, I have no idea what it would be. There
- is no data on that. Then that is an element

- 1 that the appropriations committee decides in
- 2 allocating the 13.
- 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
- to be a dollar for dollar impact on Indian
- services, it wasn't after the Ramah case.
- JUSTICE KAVANAUGH: Right.
- 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.
- 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?
- MR. MILLER: Basically EMS services
- and some of the suicide prevention and substance
- abuse programs the tribe has.
- 16 JUSTICE JACKSON: Did I hear you say
- 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.
- JUSTICE JACKSON: With the government?
- MR. MILLER: Yes.
- JUSTICE JACKSON: With the his?
- 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?
- MR. MILLER: Oh, yes. Well, the --
- 13 the EMS service -- let's take that again --
- 14 suffers from being able to hire sufficient
- personnel. They pay excess overtime, so if they
- 16 could hire another crew, then they wouldn't be
- 17 paying that overtime.
- They would upgrade, constant upgrade I
- 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

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1 services to non-Indians?
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- 2 MR. MILLER: No, Your Honor.
- 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
- spending the income are contract support costs
- 12 covered by 5325(a)(2)?
- MR. MILLER: The -- well, (a)(2), Your
- Honor, covers overhead. So, with respect to the
- 15 first half of your question, the cost of
- providing the EMS program in the first instance
- 17 --
- JUSTICE BARRETT: No, no, I understood
- 19 the third-party income question to be divided
- 20 into collection and spending --
- MR. MILLER: Yes.
- JUSTICE BARRETT: -- and that there
- 23 was no dispute that collection is covered and
- 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
- activity is an (a)(2) cost. So, even as to the
- 12 Secretary, there are two buckets funding the
- 13 tribe.
- JUSTICE BARRETT: Okay.
- MR. MILLER: The -- the -- the
- 16 program, the activity itself and the overhead
- 17 associated. But (a) (2), like (a) (3), isn't
- 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
- 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 spending program income. 4 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 Act is they couldn't do what his could have 14 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 appropriations to spend, 50/50, his wouldn't 20 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 a 25 percent indirect cost rate and we had 5 24

million from one source, 5 million from another

2.5

- 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,
- the tribes aren't the only ones who get
- 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
- 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 --
- JUSTICE BARRETT: No, no, but if a
- 22 hospital got paid, just say not a tribal --
- 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 d
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 --
- 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.
- I take it you disagree with their
- 11 number?
- MR. MILLER: Well, I disagree with
- 13 their number, and today the government said that
- 14 their number was concocted partially on the
- assumption that we were talking about overhead
- associated with services to non-beneficiaries,
- 17 which we're not.
- JUSTICE ALITO: Do you have a number?
- MR. MILLER: We do not have a number.
- 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.
- 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
LO	1994 said that program income was going to be
L1	part of the contract, and it knew that the
L2	agency had, for more than a decade, also
L3	JUSTICE ALITO: All right.
L 4	MR. MILLER: said that program
L5	income was part of the contract, and it wrote
L 6	the contract support cost provision to be key to
L7	the contract.
L8	JUSTICE ALITO: Thank you.
L9	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?

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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
                    ON BEHALF OF THE PETITIONERS
 6
 7
                MS. FLYNN: Thank you, Mr. Chief
      Justice. Just a few points.
 8
 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
      expenditure that generates what would otherwise
24
```

be an eligible contract support cost. That is

- 1 too extended of a chain to fit within "directly attributable" and so payment of these funds is 2 3 independently barred. The second thing I want to address, 4 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 Court at the very least to reserve that issue 24 2.5 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.
- We do not have reliable information
- 12 about how much third-party reimbursement income
- tribes are bringing in per year, including
- whether it comes from serving non-beneficiaries
- 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
- 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.
- 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
- eventually overtake the secretarial amount we
- 14 think is sound. And that's in part because of
- 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,
- they would have been able to produce another \$5
- 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.
- I would also say that our estimate
- about the forward-looking budget impact does not
- 24 include the value of any of these retrospective
- 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.
- I would say also, though, that (m) (1)
- 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.
- 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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