

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.)

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13 v.) No. 23-253

14 NORTHERN ARAPAHO TRIBE,)

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

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6 behalf of the Respondent in 23-253.
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8 of the Respondent in 23-250.
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P R O C E E D I N G S

(10:03 a.m.)

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

Ms. Flynn.

ORAL ARGUMENT OF CAROLINE A. FLYNN

ON BEHALF OF THE PETITIONERS

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

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

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

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

5 The statutory text and context refute
6 that theory, which would upend how the statute
7 has been administered for 35 years. ISDA's
8 provisions addressing contract support costs say
9 nothing about third-party revenue a tribe may
10 earn. ISDA deals with that separate income
11 stream in other provisions, including one
12 instructing that such income shall be treated as
13 supplemental funding to that in the contract.

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

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

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

8 I welcome the Court's questions.

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

11 MS. FLYNN: There are two --

12 JUSTICE THOMAS: -- the additional
13 income?

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

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

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

24 JUSTICE THOMAS: So, 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 JUSTICE THOMAS: Yeah.

7 MS. FLYNN: -- that provision, (m)(1),
8 is incorporated.

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

19 So it is a very open-ended limitation
20 that is not limited to just providing additional
21 contract services.

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

23 CHIEF JUSTICE ROBERTS: Well, under --
24 under your approach, a tribe is worse off if the
25 -- the more they undertake in the -- in the

1 direction of self-determination, right?

2 MS. FLYNN: I would --

3 CHIEF JUSTICE ROBERTS: In terms -- in
4 terms of funding, they are undertaking more
5 healthcare responsibilities and getting a
6 smaller percentage of the money back from the
7 government.

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

14 CHIEF JUSTICE ROBERTS: Right.

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

22 And there are ways that statute has --
23 or that Congress has built flexibilities into
24 the statute to enable tribes to earn more
25 third-party reimbursement income in the first

1 instance and have greater flexibility to spend
2 it so as to leverage it to build their programs
3 in ways that IHS cannot.

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

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

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

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

23 MS. FLYNN: Well, I -- I think that
24 Congress gave them that flexibility so that they
25 could grow their programs that way, but the

1 other ways in which IHS is differently situated
2 is that IHS can't use Medicaid and Medicare
3 proceeds, which are the bulk of the proceeds
4 that we're talking about, to spend on new
5 construction of new facilities. Tribes can.
6 That can enable the tribes to grow their
7 programs and bring in more third-party income.

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

17 JUSTICE KAGAN: Well, is that really
18 --

19 MS. FLYNN: -- non-beneficiaries.

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

25 MS. FLYNN: So I believe Congress

1 thought it was a difference when they
2 deliberately exempted the tribes from that
3 requirement and said that they can prioritize
4 other uses of these funds, including program
5 expansion, rather than having to ensure complete
6 compliance with Medicaid and Medicare in the
7 first instance.

8 JUSTICE KAGAN: Well, I mean --

9 MS. FLYNN: But I would --

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

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

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

1 cost provisions themselves, they tie the
2 obligation to pay these costs to the federal
3 program that is the subject of the contract.

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

10 JUSTICE GORSUCH: Counsel --

11 MS. FLYNN: And --

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

17 MS. FLYNN: I -- the payor of last
18 resort provision means that when there are
19 different available sources of funds, that the
20 tribes or the IHS program is --

21 JUSTICE GORSUCH: Is the payor of last
22 resort?

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

1 JUSTICE GORSUCH: No, but --

2 MS. FLYNN: -- Medicare and Medicaid,
3 for instance.

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

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

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

16 MS. FLYNN: We have not disputed that
17 reading of the payor of last resort provision in
18 this case.

19 JUSTICE GORSUCH: Okay.

20 MS. FLYNN: But I'm not sure that IHS
21 --

22 JUSTICE GORSUCH: Okay. So they have
23 -- they have to collect it, and then the
24 question is how do they spend it. And -- and
25 (m)(1) says it has to be consistent with the

1 general purposes of the contract. You indicated
2 that. And the contracts are specific about what
3 services they provide. EMS in some cases, other
4 kinds of particular services, right?

5 MS. FLYNN: Yes.

6 JUSTICE GORSUCH: So the general
7 purpose of the contract is Indian health, right?

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

9 JUSTICE GORSUCH: And Indian health,
10 right?

11 MS. FLYNN: Yes.

12 JUSTICE GORSUCH: Not -- not -- not --
13 not non-Indians?

14 MS. FLYNN: Yes.

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

20 MS. FLYNN: I agree with that, but the
21 services --

22 JUSTICE GORSUCH: So --

23 MS. FLYNN: -- that the tribe is -- I
24 just --

25 JUSTICE GORSUCH: So, if you do agree

1 with that, then what's the problem here? You
2 raised the specter that they're going to expand
3 their programs to help non-Indians. Maybe
4 they're free to do that -- you're right --
5 statutorily.

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

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

15 JUSTICE GORSUCH: -- particular
16 services.

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

22 JUSTICE GORSUCH: Why isn't that -- it
23 has to be consistent with the general purposes
24 of the contract, (m)(1). Why -- so those --
25 those purposes are the specific services that

1 have been provided -- contracted to be provided.

2 MS. FLYNN: So I -- I would not fight
3 Your Honor on imposing that limitation if you
4 were to say that there is some additional
5 contract support cost obligation tied to
6 third-party reimbursement.

7 JUSTICE GORSUCH: Okay. So would that
8 -- would that --

9 MS. FLYNN: I'm talking about the --
10 that is --

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

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

1 secretarial amount of the primary --

2 JUSTICE GORSUCH: Well, it certainly
3 has grown over time, but that's a function,
4 again, of them becoming payors of last resort
5 the way IHS sometimes is. And -- and that is a
6 big change. I grant you that.

7 But I think you've just agreed that
8 properly read, (m)(1) would limit it to Indian
9 healthcare and the particular services the
10 government has contracted for the tribes to
11 supply.

12 MS. FLYNN: So I would agree that the
13 -- the estimate we've provided about how, if the
14 tribes' theory were adopted or imposed on the
15 program nationwide, that would amount to about
16 800 million to \$2 billion per year. That would
17 be different, I assume, if the --

18 JUSTICE GORSUCH: It would be a lot
19 smaller under what I've just described, wouldn't
20 it?

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

23 JUSTICE KAVANAUGH: Is that -- is that
24 issue -- is that issue before us?

25 MS. FLYNN: That wasn't what the lower

1 courts decided here. I don't take the tribes to
2 be excluding reimbursement revenue from
3 non-Indian beneficiaries from the kind of
4 contract support costs they're asking for, and
5 so I -- I, you know, would be open to this Court
6 to --

7 JUSTICE KAGAN: I had thought --

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

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

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

25 JUSTICE KAGAN: I'll take that as a

1 friendly amendment.

2 MS. FLYNN: But I understood my friend
3 representing the Northern Arapaho to say that if
4 the tribe actually does spend third-party
5 reimbursement income on program services, that
6 that should lead to a different result.

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

13 JUSTICE KAVANAUGH: That's not raised
14 at all --

15 MS. FLYNN: But perhaps they can
16 clarify.

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

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

20 JUSTICE KAVANAUGH: I -- I didn't -- I
21 didn't see it at least.

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

23 JUSTICE BARRETT: Counsel --

24 JUSTICE SOTOMAYOR: Counsel -- I'm
25 sorry.

1 JUSTICE BARRETT: Go ahead.

2 JUSTICE SOTOMAYOR: Counsel, you've
3 been talking about this costing a lot. It may
4 well be. And -- and I'm interested in the other
5 side's response to the series of questions that
6 are going on now about that limitation.

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

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

23 There's always third-party contract --
24 contract supports that are reimbursed by the
25 government. Why is this any different? They're

1 not providing the service because of Medicaid or
2 Medicare. They're providing the service because
3 of their agreement with the government. This is
4 only a reimbursement. It's not a required
5 service agreement.

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

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

21 MS. FLYNN: Yes, but I -- to respond
22 to Your Honor's question about 5326 and the two
23 prohibitions there, so you were, I believe,
24 referencing the second prohibition, which is
25 that IHS funds cannot be spent to pay costs

1 associated with any contract that's not with
2 IHS.

3 We understand that prohibition to be
4 limited to contracts by which the tribe receives
5 funds, which is consistent with Congress's --
6 what we understand to be Congress's motivation
7 to not have IHS's appropriated funds be used to
8 subsidize other funding schemes.

9 But, even if you disagree with me
10 about that, I would point you to the first
11 prohibition in 5326. That is the one saying
12 that IHS's appropriated funds cannot be used to
13 spend on -- to reimburse costs that are not
14 directly attributable to ISDA contracts. And we
15 think that that language squarely applies here
16 because attributable is asking for a causation
17 --

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

23 MS. FLYNN: Because we think
24 attributable is calling for -- I mean, the word
25 means "capable of being produced by or brought

1 about by or caused by." And then you add
2 "directly," which is an adverb that doesn't
3 appear the other times that ISDA -- the three
4 other times that ISDA uses the word
5 "attributable." And that is --

6 JUSTICE SOTOMAYOR: Okay.

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

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 JUSTICE BARRETT: Counsel, can I --
11 I -- I -- this is a complicated statute and so I
12 have a question about how it actually works.

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

19 MS. FLYNN: That's correct.

20 JUSTICE BARRETT: Okay. When IHS
21 collects the money, does IHS then spend it?

22 MS. FLYNN: Yes. It has to first
23 dedicate it to the facility that earned its
24 compliance with Medicaid and Medicare, but yes.

25 JUSTICE BARRETT: Right. So, if the

1 tribe is standing in IHS's shoes, why shouldn't
2 the secretarial amount -- I -- I don't
3 understand the tribes -- and Mr. Unikowsky can
4 address this point -- I don't understand the
5 tribes to be saying it should be part of the
6 secretarial amount, but if the secretarial
7 amount includes the costs of collection, it's
8 not apparent to me why it wouldn't cover the
9 costs of expenditure in the same way that you're
10 saying IHS spends that money.

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

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

1 JUSTICE BARRETT: Except my confusion
2 is you're saying that the secretarial amount
3 does include the costs of collecting the
4 third-party income, right?

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

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

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

20 So the billing function, we think,
21 comes over with the secretarial amount because
22 it's tied up with providing the services and
23 getting the funds in -- in return but not with
24 the later decisions about how to spend this
25 money, which could be spent on building a new

1 facility, starting a new kind of healthcare
2 program the Secretary didn't previously run on
3 the tribes' behalf, that kind of thing.

4 JUSTICE GORSUCH: I -- I -- I think
5 the answer, though, if I understood it
6 correctly, to Justice Barrett is that when IHS
7 does collect third-party payments, it spends
8 that money to advance Indian health, and that
9 includes some overhead costs?

10 MS. FLYNN: Yes, that is correct. But
11 what the statute is telling us to look to for
12 purposes of deciding what counts for contract
13 support cost reimbursement is a federal program
14 --

15 JUSTICE GORSUCH: No, I -- I
16 understand. My question was IHS. And so, when
17 IHS spends that money, it incurs some overhead
18 costs, and those are obviously paid for by the
19 federal government.

20 MS. FLYNN: Yes.

21 JUSTICE GORSUCH: Okay.

22 MS. FLYNN: But the -- the statute is
23 telling --

24 JUSTICE GORSUCH: And then -- and then
25 -- and then -- and then just back to where we

1 were earlier, you said that Mr. Unikowsky didn't
2 raise an argument. I've got page 27 of the
3 brief in front of me. "At a minimum, contract
4 support costs are recoverable when program
5 income is used to fund enumerated services
6 within the contractual scope of work."

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

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

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

22 MS. FLYNN: So I --

23 JUSTICE GORSUCH: That is exactly
24 what's laid out in those pages.

25 MS. FLYNN: I don't think they're

1 distinguishing between serving eligible --
2 Indian beneficiaries and those that the tribe is
3 eligible to serve once they make a determination
4 that they can.

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

13 So I -- that's why I didn't understand
14 that to be an argument about distinguishing
15 between those two different kinds of
16 reimbursement schemes, but, of course, they can
17 --

18 JUSTICE KAVANAUGH: Can -- can you --

19 MS. FLYNN: -- clarify that.

20 JUSTICE KAVANAUGH: -- can you finish
21 your answer to the first question that Justice
22 Gorsuch just asked?

23 MS. FLYNN: Yes. So I took Justice
24 Gorsuch to be saying that shouldn't -- or
25 perhaps to be suggesting that shouldn't we think

1 of the federal program as that funded by the
2 secretarial amount, the appropriated funds, but
3 also third-party income because that's what IHS
4 would do when running these programs itself.

5 And I was pointing to the statutory
6 phrase, "the federal program that is the subject
7 of the contract." And that's in 5325(a)(3)(i).
8 And the program that is the subject of the
9 contract is the program that the tribe is
10 agreeing to undertake in exchange for the
11 secretarial amount, and you know that from model
12 contract language that appears in the contract.

13 For instance, in the Northern -- or in
14 the San Carlos Apache Tribe's contract, it's at
15 JA 54, where it says, "The contractor shall not
16 be obligated to continue performance that
17 requires an expenditure of funds in excess of
18 the amount of funds awarded under this
19 Contract." So that is tethering the obligation
20 to perform to the secretarial amount.

21 There's also a provision which also
22 comes from the model contract language that's
23 enacted into the statute, and in the San Carlos
24 Apache Tribe's contract, it's at JA 51, it says,
25 "The purpose of the contract is to transfer the

1 funding and the following related functions,
2 services, programs, and activities."

3 So we think the subject of the
4 contract language in the contract support cost
5 provision, which the next sub-clause which also
6 refers to the federal program, we think, is
7 referring back up to, is the program that is
8 delineated by the secretarial amount, the one
9 that the contractor is promising to undertake in
10 exchange for the secretarial amount, and not
11 parts -- services funded by other funding
12 streams.

13 JUSTICE KAVANAUGH: Okay.

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

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

1 favor?

2 MS. FLYNN: Because we believe that
3 statutory language is calling for courts to
4 apply the Indian canon, the common law Indian
5 canon that has been applied in this Court's
6 cases. And as that Court --

7 JUSTICE JACKSON: It doesn't say that.
8 It doesn't reference the -- can Congress not
9 come up with its own liberal construction
10 provision?

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

22 CHIEF JUSTICE ROBERTS: You can finish
23 your answer.

24 MS. FLYNN: Thank you. Those roots
25 include looking at context, they include looking

1 at statutory structure, they include thinking
2 about things like common sense. And we've laid
3 out some examples in our reply brief.

4 JUSTICE SOTOMAYOR: I'm sorry --

5 CHIEF JUSTICE ROBERTS: Thank you --

6 JUSTICE SOTOMAYOR: Oh, sorry.

7 CHIEF JUSTICE ROBERTS: -- thank you,
8 counsel.

9 Justice Thomas, anything further?

10 Justice Alito?

11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Just to be clear
13 on that last point --

14 MS. FLYNN: Mm-hmm.

15 JUSTICE SOTOMAYOR: -- I know some of
16 my colleagues believe that we shouldn't be
17 making choices of who to favor in interpretive
18 principles. But it's not us making that choice;
19 it's the statute making that choice, correct?

20 MS. FLYNN: Yes. The statute calls
21 for the application of the Indian canon.

22 JUSTICE SOTOMAYOR: All right. So, if
23 there is an ambiguity, it should be -- we should
24 follow the dictates of the choice specified by
25 Congress, correct? You think there's none, but

1 if we believe there is?

2 MS. FLYNN: Yes, but I believe you can

3 --

4 JUSTICE SOTOMAYOR: All right. Thank
5 you, counsel.

6 CHIEF JUSTICE ROBERTS: Justice?
7 Justice Gorsuch?

8 Justice Kavanaugh?

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

13 MS. FLYNN: Sure. So IHS's current
14 contract support cost obligation is about 1
15 billion per year. Its total funding is 8
16 billion per year. And because contract support
17 costs are discretionary funding, it falls under
18 discretionary funding caps government-wide but
19 also applicable to this committee.

20 And so it stands to reason that if all
21 of a sudden contract support costs just explode,
22 Congress is going to have to find the cuts
23 elsewhere to keep the budget under the
24 discretionary spending caps. And we believe
25 there's a real danger that that funding is going

1 to come from the other 40 percent of IHS's
2 budget, which is providing direct services to
3 tribes that decide not to enter into these
4 contracts in contexts --

5 JUSTICE KAVANAUGH: Because Congress
6 couldn't cut, without changing its rules,
7 mandatory spending, correct, so it would have to
8 come out of the other discretionary funding?

9 MS. FLYNN: That's what the cap
10 applies to, yes. And, you know, IHS has asked
11 for this funding to be transferred to mandatory
12 funding. It's asked for years. Congress has
13 not done that. And so --

14 JUSTICE KAVANAUGH: When you say "this
15 funding," which funding?

16 MS. FLYNN: Both just CSC or Contract
17 Support Costs in particular and also all of
18 IHS's income.

19 JUSTICE KAVANAUGH: But, right now,
20 it's still discretionary?

21 MS. FLYNN: Right now, it is still
22 discretionary.

23 JUSTICE KAVANAUGH: So subject to the
24 cap, okay.

25 MS. FLYNN: Yes.

1 JUSTICE KAVANAUGH: And that would --
2 okay. I understand that.

3 On the 35 years point, Justice
4 Gorsuch -- I'm just interested in your further
5 response to things changed in 2010 after the
6 Health Care Act was passed in 2010. What was
7 your full response to that? Do you see that as
8 causing the change that prompted this issue, or
9 where -- where else do you see it coming from,
10 other than the overall underfunding problem that
11 Justice Sotomayor raised?

12 MS. FLYNN: So I don't understand --
13 Congress in the Affordable Care Act enacted this
14 payor of last resort provision, but it's not
15 part of ISDA, it's not part of the Indian Health
16 Care Improvement Act, and so I don't -- I don't
17 understand Congress to have wanted to affect a
18 sea change to ISDA funding by way of that
19 provision. I'm not aware of anything in the
20 legislative background suggesting that that was
21 the case.

22 I would also say that I understood the
23 tribes to be saying that there were changes made
24 in 1994 that actually affected this change.
25 They think that's by the addition of (m) and

1 also the fact that the model contract now has
2 the authority section that cross-references all
3 of Title I.

4 I think that would be a very sort of
5 triple bank shot way of getting across this
6 meaning when Congress was otherwise addressing
7 the relationship between contract funding and
8 the receipt of third-party income.

9 But also, if that is what Congress
10 tried to accomplish in 1994, nobody noticed for
11 decades. IHS has been administering this
12 program the way we've been advocating for in
13 this case since that time.

14 JUSTICE KAVANAUGH: Has anyone in
15 Congress raised concerns about that that you're
16 aware of?

17 MS. FLYNN: I'm not aware of this
18 contract support cost dispute vis-à-vis
19 third-party reimbursement income coming up in
20 the background of these laws. I -- I'm not
21 aware of it ever being raised to the surface.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: So the questions

1 that I was asking you before really related to
2 53 -- 5325(a)(1) and kind of asking you why this
3 wouldn't have been included in the secretarial
4 amount.

5 MS. FLYNN: Mm-hmm.

6 JUSTICE BARRETT: Just want to clarify
7 something about 5325(a)(2).

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

11 MS. FLYNN: Mm-hmm.

12 JUSTICE BARRETT: And (a)(2)(B), the
13 example would be legal services from DOJ, you
14 know, something that IHS doesn't have to provide
15 for itself or hire lawyers for itself because it
16 has government lawyers outside the agency that
17 it can rely on, correct?

18 MS. FLYNN: Yes.

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

23 Because it seems like these would not
24 be expenses or -- or I -- I took some of your
25 answers in your brief -- your answers today and

1 your brief to be saying that these are expenses
2 that the Secretary wouldn't normally incur in
3 spending the money because the Secretary has
4 constraints in the way it can spend third-party
5 income that do not apply to the tribe.

6 Do I have that right?

7 MS. FLYNN: Yes.

8 JUSTICE BARRETT: Okay. So why
9 couldn't these then be contract support costs
10 under 5325(a)(2)? Because they are not costs
11 that are normally -- and I want you to ignore
12 your argument about the threshold 5325(a)(2) for
13 this point and just look at 50 -- 5325(a)(2)(A).

14 They -- why can't they count as costs
15 that the Secretary does not incur but the tribes
16 do? Is your argument just because they're not
17 incurred in operation of the program?

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

21 JUSTICE BARRETT: No.

22 MS. FLYNN: Or sorry.

23 JUSTICE BARRETT: I'm -- I'm asking if
24 they could qualify -- or why can't they qualify
25 under (a)(2)(A).

1 MS. FLYNN: So I think that what
2 (a)(2)(A) is asking about is actually the
3 expenses like the overhead expenses or the
4 expenses like worker comp that comes along with
5 spending, so not with the underlying activity of
6 earning the money in the first instance if --

7 JUSTICE BARRETT: But aren't these
8 costs that tag along with spending, like
9 spending the third-party funds to do whatever it
10 is the tribes choose to do to further the
11 general purposes of the contract?

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

25 JUSTICE BARRETT: And so the most

1 important part for the government's purposes is
2 that you define this to be outside of the
3 program?

4 MS. FLYNN: Yes. I mean, that's part
5 of our argument. We have the other statutory --
6 yes, yeah, yes.

7 JUSTICE BARRETT: Okay, thanks.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: And you define it to
11 be outside of the program despite the fact that
12 Section 1623(b) requires for IHS or the tribes
13 to be the payor of last resort?

14 MS. FLYNN: Yes, because -- for the
15 reasons I was saying, the program defined for
16 this funding provision, 23 -- or 5325(a), is the
17 federal program that is the subject of the
18 contract.

19 The payor of last resort provision,
20 again, not part of ISDA, is just speaking to
21 when there are eligible sources of funding,
22 which payor has to pay that. But I'm not sure I
23 see that as changing the meaning of the federal
24 program that is the subject of the contract or
25 makes the tribe acting -- act as a contractor

1 when it spends third-party reimbursement income.

2 JUSTICE JACKSON: All right. And if
3 the costs balloon, which seems to be a lot of
4 your concern, you explored with Justice
5 Kavanaugh where the cuts might have to come
6 from, but I'm wondering if there's something
7 that precludes renegotiation of the contracts in
8 light of potential cost escalations of the
9 nature that you're talking about?

10 MS. FLYNN: So I take the tribes to be
11 arguing that we don't have flexibility to change
12 the model contract language that incorporates
13 (m)(1) in the way that they think gives rise to
14 this obligation to pay contract support costs.

15 I'm not sure --

16 JUSTICE JACKSON: There's no revisit
17 -- I -- I just don't know as a matter of just
18 interest here how -- how these contracts work.
19 There's no opportunity for the government to
20 renegotiate terms?

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

25 JUSTICE JACKSON: What about an amend

1 --

2 MS. FLYNN: -- authority section --

3 JUSTICE JACKSON: -- what about an
4 amendment from Congress? I mean, you say
5 Congress hasn't -- it isn't clear that Congress
6 has ever really focused on this interpretation.
7 So that's a possibility if there's a big
8 ballooning and a problem that arises from that.

9 MS. FLYNN: Sure. It's always the
10 case that Congress could revisit the statutory
11 scheme and take some action to address this
12 problem, but we just don't think that Congress
13 created this problem in how it set up the -- the
14 funding scheme in the first instance.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Unikowsky.

19 ORAL ARGUMENT OF ADAM G. UNIKOWSKY
20 ON BEHALF OF THE RESPONDENT IN 23-253

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

23 The Self-Determination Act entitles
24 the tribes to recover the disputed contract
25 support costs in this case. The bulk of the

1 disputed costs are indirect costs.

2 Under Section 5325(a)(3)(A)(ii), such
3 costs are recoverable if they're incurred in
4 connection with the operation of the federal
5 program, function, service, or activity pursuant
6 to the contract. The disputed costs in this
7 case meet that description. If IHS was running
8 tribal healthcare, it would collect program
9 income and spend it on healthcare services.

10 In the ISDA contract, IHS transferred
11 to the tribe the responsibility both to collect
12 and to spend the program income on healthcare.
13 So, when the tribe carries out healthcare
14 services using program income, it does so as a
15 means of fulfilling its contractual obligation
16 to further the general purposes of the contract.
17 So it's acting pursuant to the contract.

18 And a similar analysis applies to the
19 smaller amount of direct contract support
20 costs sought by Northern Arapaho under Section
21 5325(a)(3)(A)(i).

22 Section 5326 is no barrier for the
23 tribes' recovery of costs in this case. The
24 costs are directly attributable to the contract
25 because they arise from the tribes' work

1 pursuant to that contract, and they're not
2 associated with any third-party Medicare or
3 Medicaid provider agreements because the costs
4 have nothing to do with the work under those
5 agreements.

6 Finally, ruling in the tribes' favor
7 would further the purposes of the ISDA by
8 promoting tribal self-determination and ensuring
9 that adequate resources are available for
10 healthcare in chronically underserved
11 communities.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Mr. Unikowsky, what
14 do you do with -- you went directly to
15 (a)(3)(A). What do you do with (a)(2)?

16 MR. UNIKOWSKY: So, Your Honor, we
17 don't think we need to independently satisfy
18 (a)(2). But, if you don't agree with me on
19 that, we do --

20 JUSTICE THOMAS: So you think it's
21 just surplusage?

22 MR. UNIKOWSKY: No, it's not
23 surplusage, Your Honor. So I think that the
24 sequence -- I want to make clear I think we do
25 satisfy it, but I just want to, as our

1 first-line argument, in 1988, Congress enacted
2 (a)(2), and there's lots of disputes after that
3 over what was covered, what wasn't covered.

4 IHS was chronically not paying. And
5 so, in '94, Congress added (a)(3) to clarify
6 that those categories of costs are deemed to
7 satisfy (a)(2). So it seems to me that if
8 Congress goes out of its way --

9 JUSTICE THOMAS: Where does it say
10 that?

11 MR. UNIKOWSKY: Well, it says "shall
12 include." So, if you look at the ordering,
13 (a)(3) says "the contract support costs that are
14 eligible costs for the purposes of receiving
15 funding under this chapter shall include" the
16 enumerated categories. There's no
17 cross-reference to (a)(2). There's no proviso.
18 There is a proviso on (a)(1) but not (a)(2).

19 So it just seems to me viewing this
20 text literally, if you satisfy (a)(3), you
21 prevail, and that's the point of adding this
22 clarification.

23 But I just want to be clear, if you
24 don't agree with anything I just said, that's
25 not essential to our position. If you think

1 that we have to satisfy (a)(2), emphatically we
2 think that we do. You know, (a)(2) says that
3 the costs "shall consist of an amount for the
4 reasonable cost of activities which must be
5 carried out by a tribal organization as a
6 contractor to ensure compliance with the terms
7 of the contract. That is satisfied because
8 (m)(1) is a term of the contract."

9 When we are collecting and then
10 spending the -- the program income, we are
11 acting as a contractor. We must, under the
12 contract, collect this money and spend it on
13 healthcare services. So we're acting as a
14 contractor just as much as we're acting as a
15 contractor when we spend money on the
16 secretarial amount.

17 So, based on the first part of the
18 argument, there was a number of questions that
19 arose which I wanted to answer. I wanted to
20 answer the questions about non-beneficiaries, as
21 well as some of Justice Barrett and some of
22 Justice Kavanaugh's questions.

23 JUSTICE JACKSON: Can I just ask you
24 --

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

1 JUSTICE JACKSON: -- before you do
2 that, really quickly, so (m)(1) is a term of the
3 contract, but what do you say about their
4 argument that (m) -- the (m)(1) obligation is
5 more open-ended than the scope of the work
6 itself?

7 MR. UNIKOWSKY: Well, I mean, it does
8 give the tribe a measure of discretion. It
9 talks about general purposes, but I think that
10 has to be read in conjunction with the contract
11 itself, which doesn't say that the purpose is
12 just generally to promote healthcare or
13 generally promote -- to promote, excuse me,
14 self-determination. There's like a purpose
15 provision that says that the purpose of the
16 contract is to transfer an enumerated set --
17 enumerated set of obligations from IHS to the
18 tribe.

19 So it seems to me that furthering the
20 general purpose of the contract requires
21 slotting it in one of those enumerated purposes
22 or at least something that's like really close
23 to those purposes. I realize the word "purpose"
24 has "general," the word "general," attached to
25 it, but I don't think that that entitles the

1 tribes to just do whatever it wants to or spend
2 the money on healthcare in general. It's got to
3 be tied to the purpose provision in the contract
4 itself.

5 CHIEF JUSTICE ROBERTS: Well, but, I
6 mean, if you add the direction to interpret the
7 statutory language in favor of the tribes, that
8 purpose provision doesn't seem to me to be a
9 very significant constraint. I mean, the -- you
10 know, the -- the argument on the other side -- I
11 -- or at least one of the concerns is that the
12 tribes would be able to expand the provision of
13 healthcare to all sorts of areas that do not
14 primarily benefit tribal members and yet still
15 be entitled to reimbursement.

16 MR. UNIKOWSKY: All right. So let me
17 address this issue of non-beneficiaries head-on
18 because I understand it came up significantly in
19 the first part of the argument.

20 Okay. So, first of all, for about
21 half of tribes, including San Carlos, they don't
22 serve non-beneficiaries at all. Even for the
23 others, it's often very little. So let me just
24 explain what Northern Arapaho does because a
25 statement was made in the first half of the

1 argument about Northern Arapaho's services to
2 non-beneficiaries.

3 Non- -- Northern Arapaho does serve
4 non-beneficiaries but only if they're employees
5 of Northern Arapaho's healthcare program, and
6 that's less than 3 percent of the total number
7 of users of Northern Arapaho's program. So, if
8 there's a nurse who's non-Indian who lives on
9 the reservation and works at a Northern Arapaho
10 clinic and then she wants to get her blood
11 pressure checked, then, as an employee benefit,
12 she can do that in the same building. She
13 doesn't have to drive potentially a long
14 distance in central Wyoming to some other
15 clinic.

16 But that is not -- that's not paid for
17 by IHS. She has to pay out of pocket or,
18 realistically, from her own insurance policy,
19 okay? So none of the Secretary's funding ever
20 goes to the provision of healthcare to those
21 non-beneficiaries.

22 JUSTICE KAGAN: That's not true for
23 some tribes, is it?

24 MR. UNIKOWSKY: No, I think it's true
25 for all tribes. The tribes can serve, but they

1 can't spend the government's money because there
2 can't be a diminution of healthcare services for
3 Indians. So I think the way it works is the
4 non-Indian has to pay out of pocket for the --
5 or from the person's own insurance policy, and
6 the tribe collects that money. I will
7 acknowledge the tribe does consider that to be
8 program income. That's not a question raised in
9 this case.

10 But the tribe thinks that if it's
11 actually collecting that money, that's program
12 income, but it then spends every single penny of
13 that money on services for Indians. We never
14 ever spend the program income that we obtain on
15 services for non-Indians.

16 CHIEF JUSTICE ROBERTS: Well, but
17 you're --

18 JUSTICE KAGAN: And is that true for
19 all tribes?

20 MR. UNIKOWSKY: Yes, I think it is
21 true. Absolutely it's true, that non-Indians
22 who use the services, they have to pay from
23 their own insurance policy. The tribe might
24 collect that money and spend it, but the tribe
25 is not spending program income to fund services

1 for non-Indians.

2 CHIEF JUSTICE ROBERTS: Well, but they
3 -- you're talking about the -- the -- the
4 principle, but we're talking about support
5 services, and I assume they don't -- well, maybe
6 they do -- allocate support services differently
7 depending upon which services go primarily to
8 non- -- non-tribal members and others to tribal
9 members?

10 MR. UNIKOWSKY: So, historically,
11 Northern Arapaho hasn't done that just because
12 it's such a tiny percentage. That's a question
13 that's not raised in this case.

14 I think that the government, if it
15 wishes to, can argue, can defend a case on the
16 ground that a portion of the services that are
17 allocable to non-Indians shouldn't be included.
18 And that's fine. That can -- that can be
19 litigated.

20 I mean, there's -- the -- the argument
21 on the other side is that there's this
22 provision, Section 1680, that says -- 1680c,
23 that says that services provided shall be -- to
24 non-Indians shall be deemed to be provided under
25 this agreement. But, like, that hasn't been

1 construed. It's not an issue in this case. So
2 we'd ask the Court to -- to reserve that
3 question.

4 JUSTICE KAGAN: So if I can understand
5 what your argument on page 27 refers to, what
6 the limitation is in that argument and what it's
7 not.

8 MR. UNIKOWSKY: Okay. So the
9 argument -- the alternative argument we have
10 made is that every single penny of program
11 income that we receive under these contract
12 years, we spend it on services enumerated in the
13 scope of work for Indians only, okay?

14 And that's really because the scope of
15 work for Northern Arapaho is pretty broad. It's
16 like all, you know, outpatient medical services,
17 dental services, radiology. There's, you know,
18 behavioral health. There's lots and lots of
19 different services that are transferred in the
20 scope of work. And so every -- all the dollars
21 we spend are allocated towards programs in the
22 scope of work.

23 But I just want to be clear, the --
24 the broader argument, we're not saying you can
25 use program income to give -- to -- to offer

1 services to non-Indians, okay? I think all
2 those services have to go towards Indians.
3 That's what the general purpose of the contract
4 is. It's to serve Indians. And so --

5 JUSTICE ALITO: Well, put aside --

6 JUSTICE BARRETT: But you're saying
7 you should get --

8 JUSTICE ALITO: -- put aside the
9 question of what you are doing and focus on the
10 question of what the statutory language means.
11 So what exactly are the general purposes of the
12 contract under 5325(m)(1)?

13 MR. UNIKOWSKY: Okay. So the purposes
14 of the contract -- I'll get to "general" -- the
15 modifier "general" in just one second. The
16 purposes of the contract are laid out in the
17 self-determination agreement -- contract itself.
18 And that's part of the model agreement. It says
19 the purposes are to transfer the enumerated set
20 of services from IHS to the tribe. That's the
21 purpose.

22 So, in terms of what "general purpose"
23 means, I think that gives the tribe a little bit
24 of discretion. Just as one example, tribes have
25 generally construed "general purposes" to open

1 the door to building facilities at which the
2 services will be offered. So, for instance, if,
3 you know, the responsibility for dental services
4 is transferred, tribes have construed that
5 language to say you can build a clinic.

6 JUSTICE ALITO: Well, is -- are the --
7 could you give me a simpler answer or maybe it
8 doesn't lend itself to a simpler answer? Are
9 the general purposes of the contract simply to
10 further Indian health?

11 MR. UNIKOWSKY: No. I think it's
12 narrower than that --

13 JUSTICE ALITO: No?

14 MR. UNIKOWSKY: -- Your Honor.

15 JUSTICE ALITO: Okay. In -- in what
16 way is it narrower?

17 MR. UNIKOWSKY: I think it's -- the
18 general purpose is you look at the purpose of
19 the contract as laid out in the contract itself,
20 and I think the word "general" modifier requires
21 that at least it be related to those purposes,
22 right, not just anything to do with Indian
23 health. I -- I just want to make one other
24 point about that.

25 JUSTICE KAGAN: So it's easier to say

1 --

2 JUSTICE ALITO: But I still don't
3 understand the -- could you just tell me what it
4 means?

5 MR. UNIKOWSKY: Yeah. So --

6 JUSTICE ALITO: What does it not mean?
7 Suppose -- suppose the tribe wants to set up a
8 scholarship program for tribal members or
9 Indians to go to medical school. Does that fall
10 within the general purposes of the contract?

11 MR. UNIKOWSKY: I probably would say
12 no. This question has never come up. It's
13 never been litigated a single time for a
14 practical reason.

15 JUSTICE ALITO: Yeah. Well, now it's
16 being litigated.

17 MR. UNIKOWSKY: No, it's not, Your
18 Honor, because there's no disputes in this case
19 that we satisfy the general purposes provision.
20 The reason that this generally has not --

21 JUSTICE ALITO: But we have to say
22 what "general purposes" means.

23 MR. UNIKOWSKY: I -- I don't think so,
24 Your Honor. I think --

25 JUSTICE ALITO: No?

1 MR. UNIKOWSKY: -- that you should
2 hold that, as long as that is satisfied, as long
3 as the tribe are adhering to that contractual
4 obligation, then it's -- it's -- it's acting
5 pursuant to the contract.

6 The reason this has not -- never been
7 litigated, what "general purposes" means, is
8 that the amount of money that the tribe gets is
9 the sum of these two funding streams, and
10 Congress understands that that sum is necessary
11 just to serve the services under the contract.
12 Like --

13 JUSTICE GORSUCH: Mr. Unikowsky?

14 MR. UNIKOWSKY: Yes?

15 JUSTICE GORSUCH: There's not so much
16 money here that the tribes are spending this on
17 frolics and detours, right? I mean --

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

20 JUSTICE GORSUCH: -- I mean, there's
21 not even enough money to provide healthcare to
22 the Indians on the reservations, and you're --
23 you're -- you're operating out of decrepit old
24 buildings in many cases. And -- and that's what
25 we're really talking about. Nor are Indian --

1 Indian Healthcare Services providing massive
2 benefits to non-Indians all across America.
3 We're talking about a reservation in central
4 Wyoming with an incredibly poor population of
5 Native Americans.

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

8 MR. UNIKOWSKY: One hundred percent I
9 agree, Your Honor.

10 JUSTICE GORSUCH: And in your
11 contract, in terms of what's enumerated as the
12 general purposes, include outpatient ambulatory
13 medical care and primary care, nursing, mental
14 health, the clinical medical laboratory,
15 radiology, physical therapy, the pharmacy,
16 optometry, dental care, and community health.
17 You'd agree it has to be limited to those things
18 too?

19 MR. UNIKOWSKY: Yes, Your Honor,
20 absolutely, 100 percent.

21 JUSTICE KAVANAUGH: If a --

22 JUSTICE KAGAN: And if it were a tribe
23 that had a -- you seem to provide pretty much
24 the full gamut of healthcare services, but if
25 they were a tribe that didn't, that said, you

1 know, we're only providing emergency services,
2 something like that, then it would have to go
3 only to emergency services, is that correct?

4 MR. UNIKOWSKY: I agree. I mean,
5 that's maybe more of a question for Mr. Miller,
6 who -- his client had such a contract. But,
7 yes, that is my understanding of -- of "general
8 purposes."

9 JUSTICE SOTOMAYOR: What do you do
10 with their argument that there are expenses that
11 the government doesn't incur, like building
12 buildings, that that's not included in their
13 formula? Why should you get support service
14 funds for that activity?

15 MR. UNIKOWSKY: So my primary answer
16 to that is we actually don't. I mean, there's
17 -- there's back-and-forth in the briefs about
18 this, but, like, the cost methodology of IHS
19 actually requires us to deduct the construction
20 cost from the cost base when we're calculating
21 contract support costs.

22 So, translated into English, what that
23 means is that if we're essentially hiring a
24 subcontract to build a building, we just
25 transfer a bunch of money to the subcontractor,

1 that doesn't generate overhead costs. It's the
2 subcontractor who has the overhead, not us.

3 So, under the IHS's cost allocation
4 methodology in the Indian Health Manual, we have
5 to deduct those costs anyway. So, as a
6 practical matter, it -- it really doesn't come
7 up.

8 The other thing is it's not like
9 Congress doesn't like construction. It's just
10 there's two separate appropriations provisions.
11 Like there's one to the Indian Health Service
12 for services, and then there's a separate stream
13 for -- for construction. And so Congress has
14 just ensured that there's no mixing, that a
15 certain amount of money is for services and a
16 certain amount is for --

17 JUSTICE KAVANAUGH: On -- on --

18 JUSTICE SOTOMAYOR: So to -- to the
19 extent that you -- the government doesn't pay
20 for certain things or they're not included in
21 the program, you're not getting reimbursed
22 contract --

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

25 JUSTICE SOTOMAYOR: All right. Could

1 I ask one -- I mean, the government's, one of
2 their biggest arguments is the practical
3 consequences of this, that you're going to be
4 depriving money from direct service tribes.

5 How do you respond to that?

6 MR. UNIKOWSKY: All right. If I can
7 offer a couple responses. So, first of all, the
8 liberal construction provision in the
9 self-determination contract says that the
10 provisions of the statute and contract will be
11 construed liberally for the benefit of the
12 contractor. So that's the -- that's not all
13 tribes in general. That's for the contractor in
14 particular. So I think the Court should --
15 should remain focused on the contractor's
16 interests when applying that.

17 Second of all, I -- I think it's going
18 --

19 JUSTICE SOTOMAYOR: It's a nice
20 answer, but it doesn't answer --

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

23 (Laughter.)

24 MR. UNIKOWSKY: So I -- I think it's
25 notable that two pantribal organizations, the

1 National Indian Health Board and the National
2 Congress of American Indians, both of which have
3 members, both ISDA and non-ISDA members, have
4 submitted amicus briefs in our support because I
5 think the feeling is among tribal organizations
6 that the Self-Determination Act is so important
7 for Indian sovereignty that we're willing to
8 accept the risk that Your Honor just identified.

9 JUSTICE KAVANAUGH: And -- and the
10 risk is if -- just so I understand it, if
11 Congress doesn't change the discretionary
12 funding cap that applies to IHS generally and
13 you prevail in this case, it necessarily will
14 mean less funding for other tribes that IHS
15 directly provides healthcare for? Is that the
16 -- that's the issue?

17 MR. UNIKOWSKY: That's the -- that's
18 the -- I mean, that's assuming that the
19 appropriations amount will stay the same, and
20 that's completely speculative. I mean, after
21 the Salazar --

22 JUSTICE KAVANAUGH: Right. I -- I
23 said if.

24 MR. UNIKOWSKY: Yeah, if.

25 JUSTICE KAVANAUGH: If it stays the

1 same, your position will hurt the other tribes?

2 MR. UNIKOWSKY: Theoretically, there
3 would -- you know, yes, if there's a limited pot
4 of money and more goes to one thing, then less
5 goes to the other. That's just simple
6 mathematics.

7 JUSTICE KAVANAUGH: Exactly. That's
8 why it's -- we've got -- we've got to think
9 about this more generally than just -- I mean,
10 your first answer to Justice Sotomayor was a bit
11 narrow. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas?

15 Justice Alito?

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

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

24 JUSTICE ALITO: So how is it that
25 these tribes represented by excellent attorneys

1 like you and Mr. Lloyd left all this money on
2 the table for so many years?

3 MR. UNIKOWSKY: So there -- there's
4 two basic answers. One is that for many years
5 there's these appropriations caps under which
6 tribes couldn't even recover contract support
7 costs on the secretarial amount. It took two
8 cases from this Court, the Cherokee Nation case
9 and then the Salazar versus Ramah Navajo Chapter
10 case in 2012, for this Court to hold that the
11 tribes actually are entitled to all of the
12 contract support costs under the statute, and
13 that's when these lawsuits started being
14 brought.

15 And the second point is the payor of
16 last resort provision that Justice Gorsuch
17 raised. So, like, that's when tribes really
18 started feeling like they had to go out and
19 collect this money, they had no choice. And, by
20 the way, it's not just the statute. Our
21 contract, Northern Arapaho's contract, also
22 requires us to collect it, and so we were
23 encountering all of these support costs.

24 So this issue just didn't come up. I
25 don't think that there's some kind of tradition

1 here that's really relevant because the facts on
2 the ground changed in the early 2010s. That's
3 when the tribes started bringing these lawsuits.

4 JUSTICE ALITO: All right. So the
5 statute of limitations for this is six years,
6 right?

7 MR. UNIKOWSKY: Correct.

8 JUSTICE ALITO: And if the government
9 is right that the annual costs of accepting your
10 reading could be \$2 billion, then the first year
11 bill could be more than \$12 billion?

12 MR. UNIKOWSKY: I don't think that's
13 the case here. So, first of all, that 800 --

14 JUSTICE ALITO: Why not? Why would
15 that not be the case?

16 MR. UNIKOWSKY: Well, first of all, we
17 don't know where that estimate comes from.
18 Like, that's not in the record. It's just a
19 conversation between someone at IHS with the
20 SG's office giving these numbers that come out
21 of nowhere from our perspective.

22 JUSTICE ALITO: Well, what numbers do
23 you have?

24 MR. UNIKOWSKY: We don't have any
25 numbers. It's not -- I mean, having to talk to

1 people in -- in this area, people are -- tend to
2 be skeptical of these high numbers.

3 Like, the government takes the
4 position, it represents that contract support
5 costs will start exceeding the secretarial
6 amount. I don't think that's ever happened.
7 That's certainly not true in these cases. I
8 think that's extremely speculative.

9 And also, the other thing is, I mean,
10 it's true there's a six-year statute of
11 limitations, but I don't think every single
12 tribe in the country is going to necessarily
13 bring these suits. I mean, I can't -- I can't
14 predict.

15 JUSTICE ALITO: Why would they not?

16 MR. UNIKOWSKY: I mean, maybe they --
17 I mean, I can't predict the types of litigations
18 that are going to happen, but, you know, I mean,
19 this is what the statute requires, Your Honor.
20 I mean, the government may --

21 JUSTICE ALITO: Well, what if it turns
22 out that their estimate is right, it's \$2
23 billion a year, so the bill for the first year
24 is \$12 billion? I mean, maybe today \$12 billion
25 is not very much money. But then what would we

1 do? Would we say, well, gee, we made a mistake,
2 we decided the case based on the wrong
3 assumption?

4 MR. UNIKOWSKY: No, I don't think that
5 the amount of money in hypothetical judgments
6 from a number that is not in the record and was
7 just taken out of nowhere is a basis to decide
8 this case against the tribe.

9 JUSTICE ALITO: Well, if it has such
10 -- if your reading has such severe consequences,
11 does that say something about the plausibility
12 of the reading?

13 MR. UNIKOWSKY: I don't think -- I --
14 I just respectfully disagree.

15 JUSTICE ALITO: Congress hid this --
16 this -- this mastodon in an ant hill, in an ant
17 hole or whatever it is, elephants in mouse
18 holes? This is even bigger?

19 MR. UNIKOWSKY: I don't think it's
20 really an elephant in a mouse hole. I mean, the
21 amount of program income we're -- we're already
22 getting contract support costs in the
23 secretarial amount. There's in some cases a
24 smaller, occasionally larger amount of program
25 income, and we're just seeking the same

1 reimbursement based on the same rate for that
2 additional unit of income. So I -- I just -- I
3 don't think it's -- it's that extreme of an
4 outlier.

5 JUSTICE ALITO: Thank you, thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 Justice Kagan?

9 Justice Gorsuch?

10 JUSTICE GORSUCH: I just want to make
11 sure I got it right with respect to why this
12 happened. You brought suit in 2011, I think, is
13 that right, somewhere in there? One -- one of
14 you did.

15 MR. UNIKOWSKY: Yeah. It was not my
16 -- our case, ours is 2016 and 2017.

17 JUSTICE GORSUCH: 2017?

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

19 JUSTICE GORSUCH: All right, all
20 right. Okay. I think one was 2011.

21 MR. UNIKOWSKY: But we -- we weren't
22 -- we didn't even enter into these contracts
23 until then, so --

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

1 MR. UNIKOWSKY: No. No.

2 JUSTICE GORSUCH: And then 2010 you
3 became the payor of last resort. You have a --
4 contractual obligation to collect these monies.

5 MR. UNIKOWSKY: Right.

6 JUSTICE GORSUCH: Obviously, that's
7 why that now it becomes what happens about
8 spending it.

9 MR. UNIKOWSKY: Right. Plus, tribes
10 weren't -- I mean, again, like before 2012,
11 tribes were getting much less than they were
12 entitled to under the statute because of these
13 appropriations caps which have been lifted by
14 Congress after this Court's decision in Salazar
15 versus Ramah Navajo Chapter. That's what got a
16 lot of this litigation started.

17 JUSTICE GORSUCH: Do you know how much
18 money your client is seeking in contract support
19 costs roughly?

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

22 JUSTICE GORSUCH: One point five
23 million dollars?

24 MR. UNIKOWSKY: About that, yes.

25 JUSTICE GORSUCH: So this 800 million

1 to 2 billion that's on page 44 of their brief,
2 there's no cite?

3 MR. UNIKOWSKY: No, it's an
4 unexplained estimate by IHS that's not in the
5 record of how much something is going to cost.
6 I have to say, like --

7 JUSTICE GORSUCH: And that's also
8 premised perhaps on their understanding that
9 general purposes can include creating --

10 MR. UNIKOWSKY: That it cycles, that's
11 right.

12 JUSTICE GORSUCH: -- health spas for
13 non-Indians.

14 MR. UNIKOWSKY. Yeah, it's like
15 there's this language in the brief about cycles
16 of spending money, and we think that's
17 completely implausible, and that may have been
18 baked into this unexplained number, Your Honor.

19 JUSTICE GORSUCH: We don't usually
20 allow record evidence to be introduced for the
21 first time in this Court without a citation to
22 anything that might include services that would
23 not be even covered under your interpretation of
24 the agreement.

25 MR. UNIKOWSKY: I agree. I also think

1 the Court can take judicial notice that
2 unexplained government estimates about how much
3 things will -- will cost are not always
4 perfectly accurate, so we'd ask the Court to
5 apply that principle here.

6 JUSTICE GORSUCH: Thank you.

7 JUSTICE KAVANAUGH: They usually
8 underestimate it, but anyway, that's a -- that's
9 a separate issue.

10 Do I have it right that the question
11 here is about the pot of money that comes in
12 from third-party payors, from Medicare,
13 insurers, tortfeasors and what have you, and
14 then you take that pot of money which is under a
15 separate statute and you spend that for
16 healthcare services, correct?

17 MR. UNIKOWSKY: Well, I would quibble
18 with under a separate statute. It's 23 --
19 5325(m)(1) and (m)(2). But, yes, we take the
20 money from Medicare and Medicaid and we spend it
21 on -- on healthcare.

22 JUSTICE KAVANAUGH: And if you were to
23 lose this case, what you do as I understand it,
24 what has happened previously is that you use
25 that pot of money which is separate from the IS

1 -- his appropriated money that comes to you, you
2 use that pot of money to pay not only for the
3 Indian healthcare services but for these
4 overhead costs, right? It comes out of that pot
5 of money?

6 MR. UNIKOWSKY: That's correct. We'd
7 have to use that or maybe the tribe's general
8 treasury, but we wouldn't have -- get it from
9 the Secretary.

10 JUSTICE KAVANAUGH: Okay. And what do
11 you do with -- I don't know that we've mentioned
12 it as much -- 5325(m), the provision that says
13 the third-party income's not a basis for
14 reducing the allocation that comes from IHS,
15 which suggests that Congress was concerned
16 about, oh, because you get this third-party
17 money, maybe the IHS amount should be reduced,
18 and Congress wanted to say no, that's -- that's
19 not correct, and from that, the implication
20 would be surely they were not anticipating, oh,
21 that it would increase. Just want to make sure
22 you can respond to that.

23 MR. UNIKOWSKY: Yeah, I don't agree
24 with that inference. I think that (m) should be
25 construed literally. As you said, Congress was

1 concerned that IHS would deduct because of the
2 program income and it said don't deduct.

3 And in the exact same statutory
4 amendment in which (m) was enacted, (a)(3) was
5 enacted to specifically address contract support
6 costs. So, I -- I -- instead of drawing a
7 negative implication from (m), I think I would
8 just look at the -- a provision just joined at
9 the hip in the exact same enactment, (a)(3),
10 that specifically addresses the issue of
11 contract support costs and said that we can
12 recover all costs that are "in connection with
13 the operation of the Federal program," which I
14 think includes program income. It's the same
15 word, "program," in both provisions.

16 JUSTICE KAVANAUGH: Do you agree that
17 to be an (a)(3) cost, it has to be an (a)(2)
18 cost?

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

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: Okay. Tell me why

1 it doesn't affect your position one bit, because
2 it seems to me under (a)(2), you know, there are
3 two qualifications in (A) and (B), and I think
4 (B) doesn't seem to fit very well, so it would
5 have to be (A), but that doesn't seem to fit
6 very well either. So explain to me why that's
7 wrong.

8 MR. UNIKOWSKY: Well, I don't agree,
9 Your Honor. In fact, I don't even think it's
10 disputed that we satisfy (A) and (B). I think
11 the government is disputing the -- the earlier
12 part of the statute talking about a contract to
13 ensure compliance.

14 So -- so, for example, (A) covers
15 things like stuff that the -- that OPM would do,
16 human resources or contracting services that GSA
17 would do, things like that.

18 JUSTICE BARRETT: You mean like
19 everybody keeps talking about workers' comp?

20 MR. UNIKOWSKY: Yeah. Or that's --
21 well, that's not -- that's another thing.

22 JUSTICE BARRETT: That's another
23 thing?

24 MR. UNIKOWSKY: Yeah.

25 JUSTICE BARRETT: Okay.

1 MR. UNIKOWSKY: But -- so overhead --
2 most of these costs are actually indirect costs,
3 not direct costs --

4 JUSTICE BARRETT: Okay.

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

8 JUSTICE BARRETT: Right.

9 MR. UNIKOWSKY: There needs to be an
10 HR person. So, if IHS is running healthcare,
11 OPM, a separate branch of the government, is
12 going to be doing all that HR stuff, putting
13 them on the payroll, making sure they're paid,
14 handling their pensions. So that's an -- that's
15 an (A) cost, okay?

16 JUSTICE BARRETT: Okay.

17 MR. UNIKOWSKY: And so the tribe gets
18 that from the government because, you know, if
19 -- if IHS isn't paying for it, nor should the
20 tribe. So what we're seeking in this case are
21 all costs that fall under (A) or (B). It's the
22 exact same type of overhead that the Secretary
23 wouldn't pay out of pocket. It's just with
24 respect to the programs funded by the program
25 income.

1 So, for example, you know, if there's
2 contracting, GSA would do the work. If IHS was
3 handling the program, we're doing the work when
4 we're handling the program. That's the money
5 we're seeking, just (A) and (B) money. And --

6 JUSTICE BARRETT: Okay.

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

12 JUSTICE BARRETT: Right.

13 MR. UNIKOWSKY: And I think we are
14 because we are carrying out our contractual
15 obligations when we perform these services under
16 (A)(i).

17 JUSTICE BARRETT: In the same way that
18 the Secretary would?

19 MR. UNIKOWSKY: Yes.

20 JUSTICE BARRETT: In the same way that
21 IHS would if IHS were spending the third-party
22 income?

23 MR. UNIKOWSKY: One -- 100 percent.
24 IHS is required to spend the third -- to -- to
25 collect the third-party money under 1623 and

1 then spend it. So we're stepping into their
2 shoes. We also are required to collect that
3 money and spend it, and so we're just asking to
4 be put into the same -- into their shoes for
5 purposes of contract support costs.

6 JUSTICE BARRETT: And when you spend
7 it when you're standing in their shoes, this
8 back-and-forth about what furthers the general
9 purposes of the contract, you would say or would
10 you not say that you can only claim these
11 contract support costs for expenditures that are
12 of the sort that IHS would also make --

13 MR. UNIKOWSKY: Oh --

14 JUSTICE BARRETT: -- or is it a
15 broader universe?

16 MR. UNIKOWSKY: No, I think, because
17 the -- IHS also has a lot of discretion. So we
18 -- it says for us "further the general purposes
19 of the contract." But IHS has a very, very
20 broad discretion to spend the money on Indian
21 healthcare as well. Like, it's true it's
22 possible that we might spend a particular dollar
23 differently from how IHS would.

24 JUSTICE BARRETT: Mm-hmm.

25 MR. UNIKOWSKY: But, first of all,

1 that happens with the secretarial amount too
2 because the whole point of this statute is to
3 promote self-determination. It reflects the
4 assumption that the tribes may spend a
5 particular dollar differently from how IHS would
6 do it, and Congress thought that was a good
7 thing.

8 So both -- both the tribe and the IHS
9 has a measure of flexibility in spending this
10 money on healthcare. Individual dollars might
11 be allocated differently, but the types of
12 things we're doing, spending money on
13 healthcare, are exactly the types of things that
14 IHS would be doing with the same money.

15 JUSTICE BARRETT: Which might be a
16 reason why it's -- your concession is -- was
17 that it can't be spent on non-Indian healthcare
18 because IHS wouldn't spend it?

19 MR. UNIKOWSKY: Absolutely not.

20 JUSTICE BARRETT: So you couldn't
21 stand in their shoes --

22 MR. UNIKOWSKY: No.

23 JUSTICE BARRETT: -- for that purpose.

24 MR. UNIKOWSKY: We -- we --
25 100 percent, no, we cannot spend and we do not

1 spend this money on non-Indian healthcare. If
2 an employee of our program uses the blood
3 pressure facilities or goes to the dentist at
4 one of our clinics, they pay from their own
5 insurance.

6 JUSTICE BARRETT: But you're -- you're
7 collecting the overhead costs of that in
8 contract support costs because you don't parse
9 all that out, right?

10 MR. UNIKOWSKY: So that -- that -- so
11 that's not an issue that's been raised in this
12 case. Just because it's so de minimis, I think,
13 we haven't done that. It's possible in a
14 different case the government can say you have
15 to parse that out, and that -- that's an issue
16 that can be litigated.

17 JUSTICE BARRETT: Is there anything
18 that you spend these third-party funds on that
19 IHS does not, or is it complete overlapping
20 circles?

21 MR. UNIKOWSKY: So, in some of the
22 years after the years in question, I think we've
23 spent some of the money on facility
24 construction, which IHS doesn't under these
25 riders. But, again, like, the -- the federal

1 government spends money on facilities. They're
2 just a separate stream of appropriations.

3 But, in general, when we do that --
4 and, again, that's -- the representation in my
5 brief is -- is accurate because these are years
6 after the years in question.

7 JUSTICE BARRETT: Mm-hmm.

8 MR. UNIKOWSKY: Even when we've done
9 that, we don't consider that to be included in
10 the base.

11 JUSTICE BARRETT: Okay.

12 MR. UNIKOWSKY: As I said, we deduct
13 the costs of construction.

14 JUSTICE BARRETT: Okay. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: So I just want to be
18 clear on the purposes of the contract because
19 that's the most interesting thing that I think
20 I've heard you say. In looking at the Joint
21 Appendix, there are -- the contract agreements
22 are here, and there are enumerated purposes.

23 MR. UNIKOWSKY: Yes.

24 JUSTICE JACKSON: I'm looking at JA
25 51, 52. So it's your position that these

1 third-party funds would have to be spent for one
2 of these enumerated categories?

3 MR. UNIKOWSKY: Yes. So that --
4 that's actually San Carlos's contract.

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

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

8 JUSTICE JACKSON: Yes.

9 MR. UNIKOWSKY: So we spend -- so, I
10 mean, it says "general purposes," which might
11 modify "purposes" a little bit, but as a
12 practical matter, we spend all the program
13 income on the services on -- on 124 and 125.

14 JUSTICE JACKSON: Would you have to?

15 MR. UNIKOWSKY: Yeah, I think so. I
16 think we do have to. I don't think "general
17 purposes" modifies "purposes" to a sufficient
18 degree that we can just go on a frolic and spend
19 money on some completely different thing.

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

22 MR. UNIKOWSKY: Yes.

23 JUSTICE JACKSON: That's a limitation
24 on you?

25 MR. UNIKOWSKY: That's how we

1 understand it, yes.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. MILLER: Maybe I'll --

6 CHIEF JUSTICE ROBERTS: Mr. Miller.

7 ORAL ARGUMENT OF LLOYD B. MILLER
8 ON BEHALF OF THE RESPONDENT IN 23-250

9 MR. MILLER: Mr. Chief Justice, may it
10 please the Court:

11 Maybe I'll begin with Justice
12 Jackson's question about page 51. We have six
13 programs here, including the EMS program, which
14 is a major feature of the government's motion to
15 dismiss that was -- that is the subject of this
16 case. The third-party revenue spending has to
17 be anchored to those six programs. It cannot be
18 spent on a dental program. We don't see dental
19 there. It cannot be spent just on general
20 health. Even interpreting that term broadly and
21 generously in light of the Indian canon, it
22 still has to be anchored in these six programs.

23 With regard to these six programs,
24 when the Indian Health Service awarded a
25 contract to the San Carlos Apache Tribe, and

1 just visualize this, we're talking about 1.8
2 million acres, about 29,000 square miles, a
3 thousand miles of roadless area, a couple hours
4 east of Phoenix, the Emergency Medical Service
5 program was severely underfunded.

6 So, on page 101, the Indian Health
7 Service demands that the tribe agree to a clause
8 that says, in running the EMS program, it will
9 maintain an efficient billing system to maximize
10 third-party revenues.

11 Why? Because IHS knew that there was
12 no way this program could be run at even a
13 moderate level without third-party revenues
14 coming into the program and going out into the
15 program, going -- coming in from program income
16 and going out into services. So that's why this
17 clause is such a pivotal element of the
18 contract.

19 Now we rely on (m) -- (m)(1), and
20 (m)(1) was enacted in 1994, but that was not the
21 first time the concept that program income goes
22 into the contract was invented.

23 First of all, it is a standard
24 government contracting clause in the OMB
25 regulations. You can go to 2 C.F.R. 200.307, I

1 think it's (e)(2). But, more specifically, the
2 Indian Health Service, in the sample contract
3 that the Indian Health Service had in the 1980s,
4 required that all program income be spent to
5 provide additional services and benefits under
6 the contract.

7 So this was an old concept, not a new
8 concept, that Congress put in there in 1994.
9 Well, why did Congress put it in 1994? I mean,
10 there it was in the sample contract that IHS had
11 because Congress decided that IHS could not be
12 trusted to administer this program at all.

13 That was the positive provision, that
14 program income comes into the contract, but
15 there were a lot of negative provisions in the
16 old sample contract. There were a lot of
17 negative provisions in regulations that IHS had
18 adopted, proposed to adopt in January '94.

19 So Congress comes in, clears the
20 decks, says we are declaring what the master
21 contract is going to say, we are prohibiting a
22 raft of things that the agency proposed in these
23 regulations, but we are cementing the good
24 things.

25 And one of the good things was (m)(1),

1 that all program income had to go to further the
2 general purposes of the contract. So too the
3 question about (a)(2) and (a)(3) and how they
4 relate. They require the administration -- the
5 -- the overhead has to be in connection with the
6 expenditure of -- of -- of -- the -- excuse me,
7 with the administration of the contract.

8 And the contract, as we just saw,
9 requires the spending of program income. So we
10 satisfy (a)(3). It's, of course, part of the
11 federal program that we discussed earlier. The
12 federal program includes direct service spending
13 from the secretarial amount and also program
14 income spending. So -- and IHS spends both
15 tranches of money. The tribe spends both
16 tranches of money.

17 CHIEF JUSTICE ROBERTS: You -- you've
18 heard --

19 MR. MILLER: So it's indisputably part
20 of the federal program.

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

1 MR. MILLER: Right. Well, of course,
2 as Justice Kavanaugh pointed out, it's not
3 presented in this case, but I will answer the
4 question.

5 The issue of the government's
6 obligation with respect to services to
7 non-beneficiaries has been litigated in another
8 setting. Contract support costs are not the
9 only mandatory spending under the Act. There's
10 also leasing that is mandatory spending. If a
11 tribe uses a tribal facility to run the federal
12 program, then the federal government needs to
13 pay the leasing costs.

14 That issue has been litigated, and the
15 Court have held in the Jamestown case that
16 there's a reasonableness limitation to the
17 leasing costs. Incidentally, reasonableness
18 comes up twice, once in (a)(2), once in (a)(3).
19 So there's a reasonableness limitation on the
20 overhead also. So that's just thing one.

21 CHIEF JUSTICE ROBERTS: Well, but that
22 presumably doesn't have anything to do with the
23 allocation between tribal members and non-tribal
24 members.

25 MR. MILLER: Oh, no. With respect,

1 Your Honor, it would mean in this situation that
2 if there were substantial overhead costs
3 associated with services to non-beneficiaries,
4 then you would discount that element, and IHS
5 would not be responsible for reimbursing it.

6 And I should note that IHS has a
7 mechanism already for doing this. IHS does this
8 in the leasing arena. If I go to IHS and ask
9 for a lease to compensate for the use of a
10 tribal facility, IHS will ask for data, how many
11 non-beneficiaries do you serve? Zero. Then the
12 they cover the whole lease. Fifty percent,
13 which is unheard of, but 50 -- well, there are
14 examples, I suppose, then IHS will whack off a
15 part of the leasing cost to be sure that they
16 are only supporting services to Indians because
17 this is an Indian healthcare program.

18 I also wanted to address the --

19 JUSTICE KAVANAUGH: Can I ask --

20 MR. MILLER: Yes?

21 JUSTICE KAVANAUGH: -- what their --

22 on the question of whether the tribe can use
23 this money for something that IHS itself
24 couldn't use the money for, I think Mr.
25 Unikowsky to Justice Barrett in that last

1 colloquy at the very end noted facility
2 construction, and I wanted to follow up with you
3 on that since you're here on facility
4 construction.

5 If that happened with the use of these
6 -- of the third-party income funds, overhead
7 costs, your answer?

8 MR. MILLER: Right. Thank you, Your
9 Honor. As Mr. Unikowsky indicated, we don't
10 have a separate appropriation for construction.
11 IHS does. That's how they get their
12 construction money --

13 JUSTICE KAVANAUGH: But that --

14 MR. MILLER: -- a quarter of a billion
15 dollars, but --

16 JUSTICE KAVANAUGH: -- that's not a --
17 okay. I'm going to stop you --

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

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

21 MR. MILLER: Right.

22 JUSTICE KAVANAUGH: -- to the
23 statutory question that Justice Barrett was
24 posing. That's a -- that's a real-world answer,
25 which is a good real-world answer, but it's not

1 -- I don't think it's a great statutory answer.
2 So keep going.

3 MR. MILLER: I -- I agree with Your
4 Honor that if a -- if a construction activity
5 serves the general purposes of, let's just take
6 the EMS program, then it's under the umbrella.
7 It's within. Let's consider it.

8 So building a garage to house the
9 ambulances or to do maintenance work on the
10 ambulances, Roger. To build a new facility
11 where the ambulance crews were sleeping because
12 they were decrepit and there were -- there were
13 holes in the walls and -- and it was not an
14 acceptable place for ambulance crews to sleep in
15 between calls, so, yes, reconstructing a new
16 facility to house the ambulance crews,
17 absolutely.

18 Are those construction activities
19 things that the tribe can do with the
20 third-party revenue money but that IHS cannot do
21 because it needs permission from Congress? Yes.
22 That is a fact.

23 JUSTICE KAVANAUGH: Yes is the answer
24 to that?

25 MR. MILLER: Yes is that -- is the

1 answer to that question.

2 JUSTICE SOTOMAYOR: Would you ever --

3 JUSTICE KAVANAUGH: And the overhead
4 -- the overhead for that, just to follow up on
5 that, the overhead for that, or maybe your --
6 already answered this, I just want to --

7 MR. MILLER: No, but thank you for
8 asking the question. The -- so the overhead on
9 that, just as if you and I hire a --

10 JUSTICE KAVANAUGH: That's what you're
11 seeking, right?

12 MR. MILLER: Yes, but there would be
13 no overhead on it, is what I was about to say,
14 Your Honor. Unless I'm a general contractor
15 building my own house, I hire a company to build
16 a new house. And the tribe hires a company to
17 build that garage. It doesn't build it itself.

18 So the company that hires pays --
19 charges you \$500,000, a million dollars to build
20 that garage. You don't have any overhead. You
21 just procure the contract, but you're not
22 running the contract. So this is why my friend
23 --

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

1 MR. MILLER: Yeah. Justice --

2 JUSTICE SOTOMAYOR: Are you going to
3 include any overhead as contract support?

4 MR. MILLER: No.

5 JUSTICE SOTOMAYOR: Thank you.

6 JUSTICE KAVANAUGH: On the question of
7 who's going to pay for this -- and the reason I
8 am looking at this is not some kind of fiscal
9 responsibility canon or something. It's just
10 trying to figure out how Congress would have
11 been thinking about this.

12 But, if the discretionary cap stays
13 the same, the money here -- and I asked Mr.
14 Unikowsky this -- the money here will
15 necessarily come from other tribes receiving --
16 who don't provide the healthcare services
17 themselves, where IHS provides the healthcare
18 services directly. That's almost logically
19 necessary, right?

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

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

25 MR. MILLER: I -- I would incorporate

1 by reference everything that my -- my friend
2 said, except the answer to that question. CBO
3 will advise the appropriations chairman and
4 chairwoman in the Senate and the House what the
5 -- what the spending projections are for the
6 next year. So, if Your Honors make a decision
7 here in fiscal year '24 and we're looking at
8 fiscal year '25 or '26, they will make that
9 decision to the appropriate -- they will provide
10 that information to the appropriators. The
11 appropriators then have to divvy up the
12 appropriation in 13 pieces, mindful of what they
13 learned from CBO about all 13 of those.

14 This cost, let's say it goes up \$500
15 million, I have no idea what it would be. There
16 is no data on that. Then that is an element
17 that the appropriations committee decides in
18 allocating the 13.

19 Then, when it gets to the environment
20 and natural resources committee, that committee
21 decides how to further divvy it up among the
22 American Indian Museum and the BIA and the
23 Interior Department and all of its agencies at
24 the Interior Department. There is no way to
25 predict what the ultimate impact would be on the

1 funding of the Indian Health Service, none at
2 all.

3 And to suggest that no, no, it's going
4 to be a dollar-for-dollar impact on Indian
5 services, it wasn't after the Ramah case.

6 JUSTICE KAVANAUGH: Right.

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

8 JUSTICE KAVANAUGH: So I think I -- I
9 -- so that's -- a reasonable answer to that
10 question would be, well, you're assuming the
11 discretionary cap would stay the same, but
12 you're wrong. I'm wrong in thinking that the
13 discretionary cap will necessarily stay the same
14 based on the process. That's a predictive
15 judgment you're making.

16 MR. MILLER: Right. And part of it is
17 because the IHS appropriation was an 8 or \$9
18 billion appropriation inside a \$55 billion
19 appropriation --

20 JUSTICE KAVANAUGH: Well --

21 MR. MILLER: -- which is inside a \$700
22 billion discretionary appropriation. So there's
23 just no way really to predict that.

24 JUSTICE GORSUCH: How much money are
25 you seeking in this case?

1 MR. MILLER: One million dollars a
2 year, Your Honor, for three years, each of the
3 three-year contract.

4 JUSTICE GORSUCH: For basically EMS
5 services in -- Arizona?

6 MR. MILLER: Basically EMS services
7 and some of the suicide prevention and substance
8 abuse programs the tribe has.

9 JUSTICE JACKSON: Did I hear you say
10 that these were three-year contracts? Is that
11 what you --

12 MR. MILLER: Contracts can be three
13 years. These were three-year contracts.

14 JUSTICE JACKSON: With the government?

15 MR. MILLER: Yes.

16 JUSTICE JACKSON: With the IHS?

17 MR. MILLER: Yes. And they're
18 recurring. So, after three years, you sign up
19 for another three years if you want to.

20 JUSTICE JACKSON: And they could be
21 renegotiated at that time?

22 MR. MILLER: Absolutely, absolutely.

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

25 MR. MILLER: As a contract recovery

1 under the Contract Disputes Act, Your Honor? If
2 -- if that's the question, then that --

3 JUSTICE KAGAN: What -- what services
4 will you provide with that?

5 MR. MILLER: Oh, yes. Well, the --
6 the EMS service -- let's take that again --
7 suffers from being able to hire sufficient
8 personnel. They pay excess overtime, so if they
9 could hire another crew, then they wouldn't be
10 paying that overtime.

11 They would upgrade, constant upgrade I
12 must say, the ambulances driving on country
13 roads. So they would upgrade ambulances,
14 upgrade equipment in the ambulances, and upgrade
15 the training of the EMT crews. This is just the
16 normal -- normal work of an EMS program. And,
17 most importantly, reduce response times.

18 JUSTICE KAGAN: And do you provide any
19 services to non-Indians?

20 MR. MILLER: No, Your Honor.

21 JUSTICE BARRETT: Can I ask you what I
22 hope is just a simplistic clarifying question.
23 So am I right that both parties agree -- and the
24 government can correct me if this is not the
25 government's position -- that the costs of

1 collecting third-party income fall under
2 5325(a)(1) as part of the secretarial amount and
3 what you're arguing is that the costs of
4 spending the income are contract support costs
5 covered by 5325(a)(2)?

6 MR. MILLER: The -- well, (a)(2), Your
7 Honor, covers overhead. So, with respect to the
8 first half of your question, the cost of
9 providing the EMS program in the first instance
10 --

11 JUSTICE BARRETT: No, no, I understood
12 the third-party income question to be divided
13 into collection and spending --

14 MR. MILLER: Yes.

15 JUSTICE BARRETT: -- and that there
16 was no dispute that collection is covered and
17 that the reason why collection is covered is
18 that it falls under 5325(a)(1) in the
19 secretarial amount and so that what we're trying
20 to find is a home for spending, and you say that
21 home is not 5325(a)(1) but 5325(a)(2)?

22 MR. MILLER: Right. If I may, Your
23 Honor, the -- the program collection activity is
24 an (a)(1) activity.

25 JUSTICE BARRETT: Okay.

1 MR. MILLER: And we can find where the
2 billing operations are spelled out in the
3 contract. Overhead on the program collection
4 activity is an (a)(2) cost. So, even as to the
5 Secretary, there are two buckets funding the
6 tribe.

7 JUSTICE BARRETT: Okay.

8 MR. MILLER: The -- the -- the
9 program, the activity itself and the overhead
10 associated. But (a)(2), like (a)(3), isn't
11 limited to what comes to the tribe under (a)(1).

12 (a)(2) is limited by the terms of the
13 contract, not by the terms of (a)(1). I know
14 the government's brief on page 2, I think, dices
15 and rearranges the words, but the costs are to
16 support the contract and contract compliance
17 costs. So the touchstone for (a)(2), like
18 (a)(3), is what does the contract say.

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

23 And with regard to breaking the bank,
24 by the way, you're only talking about an average
25 indirect cost rate around the United States is

1 25 percent, although my client's rate was
2 17 percent. So they lost out on about
3 17 percent of the program income spending they
4 should have had.

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

16 But, when the tribe comes in, if it
17 has a 25 percent indirect cost rate and we had 5
18 million from one source, 5 million from another
19 source, 10 million total, 2 and a half billion
20 dollars required for indirect costs, we have to
21 fund some of that 2 and a half million out of
22 the program revenue that came into the tribe.

23 IHS doesn't have that. They get the
24 benefit of the whole 10 million. And the tribe
25 would get the benefit of the whole 10 million if

1 the overhead were reimbursed on top --

2 JUSTICE BARRETT: But is that part --

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

4 JUSTICE BARRETT: Is that partly
5 explicable by the fact that, I mean, you know,
6 the tribes aren't the only ones who get
7 third-party payments, like from Medicare,
8 Medicaid, or private insurers. That overhead is
9 partly built into that?

10 MR. MILLER: No, the overhead comes in
11 when we -- when we spend the money. I mean, if
12 we spend the money to increase salaries, if we
13 spend the money to add another --

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

16 MR. MILLER: Yes.

17 JUSTICE BARRETT: -- medical facility.
18 Well, I'll -- I'll finish that up during the --

19 CHIEF JUSTICE ROBERTS: Thank you --

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

21 CHIEF JUSTICE ROBERTS: -- counsel.

22 Go ahead.

23 MR. MILLER: If a hospital got paid
24 Medicare and Medicaid money, the hospital can do
25 anything it wants with it. It's not required --

1 it's not limited by any federal statute in its
2 use of the money. And if a doctor the same. If
3 the doctor receives money from Medicare and
4 Medicaid, it can use it to pay the -- the
5 scholarship of its son.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 Justice Alito?

10 JUSTICE ALITO: Well, just to follow
11 up on a few questions that were asked earlier,
12 in assessing what Congress thought this whole
13 scheme would amount to, do you think it is
14 illegitimate to consider how much it will cost?

15 MR. MILLER: I -- I don't -- I don't
16 think anything is illegitimate in terms of
17 considering what Congress might have expected,
18 but I -- I do think we have to look at what
19 Congress did in 1994 --

20 JUSTICE ALITO: All right.

21 MR. MILLER: -- in the Act proposed.

22 JUSTICE ALITO: So it's not
23 illegitimate -- that wasn't an illegitimate line
24 of inquiry.

25 And the government has been accused of

1 making up a number and trying to smuggle it into
2 the case without record support. I take it you
3 disagree with their number?

4 MR. MILLER: Well, I disagree with
5 their number, and today the government said that
6 their number was concocted partially on the
7 assumption that we were talking about overhead
8 associated with services to non-beneficiaries,
9 which we're not.

10 JUSTICE ALITO: Do you have a number?

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

12 JUSTICE ALITO: Thank you.

13 MR. MILLER: All I know is, for the
14 San Carlos Apache Tribe, it's about a million
15 dollars a year.

16 JUSTICE ALITO: Well, do you think in
17 a case involving the interpretation of the
18 statute, the question is what the statute means
19 and what it will mean as applied to -- in all
20 the instances in which it will be invoked or
21 just what it would mean in the particular case
22 that happens to come before the Court?

23 MR. MILLER: The question I ask myself
24 is what did -- what did Congress intend when it
25 enacted the statute because we're bound by the

1 text of the statute. And Congress in 1994 said
2 that program income was going to be part of the
3 contract, and it knew that the agency had, for
4 more than a decade, also said that program
5 income --

6 JUSTICE ALITO: All right.

7 MR. MILLER: -- was part of the
8 contract, and it wrote the contract support cost
9 provision to be key to the contract.

10 JUSTICE ALITO: Thank you.

11 MR. MILLER: Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

14 Justice Gorsuch?

15 Justice Kavanaugh?

16 Justice Barrett?

17 Justice Jackson?

18 Great. Thank you, counsel.

19 MR. MILLER: Thank you.

20 CHIEF JUSTICE ROBERTS: Rebuttal, Ms.
21 Flynn.

22 REBUTTAL ARGUMENT OF CAROLINE A. FLYNN

23 ON BEHALF OF THE PETITIONERS

24 MS. FLYNN: Thank you, Mr. Chief
25 Justice. Just a few points.

1 So, first, I do want to emphasize at
2 the outset that we have been talking a lot today
3 about the funding provisions in 5325(a) and (m)
4 and how those work together, but there is a
5 separate prohibition that does apply,
6 notwithstanding any other provision of law, and
7 that -- says that IHS cannot pay costs that are
8 not directly attributable to the ISDA contract.

9 Here, there is an extended chain of
10 causation. The tribe has to first perform
11 services that are eligible for receiving
12 reimbursements, it then has to collect that
13 money, then decide how to spend that money,
14 which may not even be during the same contract
15 period, and then it has to be the kind of
16 expenditure that generates what would otherwise
17 be an eligible contract support cost. That is
18 too extended of a chain to fit within "directly
19 attributable" and so payment of these funds is
20 independently barred.

21 The second thing I want to address,
22 this question of whether when we're talking
23 about the kind of third-party reimbursement
24 income that can trigger this corresponding
25 contract support cost obligation from IHS, there

1 were questions about whether that kind of income
2 includes income from serving non-beneficiaries
3 or just income from serving Indians.

4 And I took my friend from the Northern
5 Arapaho to say that they do consider the program
6 income they're talking about in this case to
7 include both kinds of reimbursement revenue.
8 That is how I understood the arguments to be in
9 this case thus far.

10 But I also took my friends on the
11 other side to say that you do not have to decide
12 that question about whether the kind of
13 reimbursement income that could potentially
14 trigger CSC from IHS includes income from
15 serving non-Indians. And I would encourage the
16 Court at the very least to reserve that issue
17 and not decide whether that amount of income can
18 include that kind of income stream.

19 There were also questions about our
20 budget estimate in this case, about the
21 repercussions of this case. I do want to
22 clarify that, yes, our estimate is based on --
23 if you base contract support costs on all kinds
24 of third-party reimbursement income that can
25 come in, and so it is tied to that, but that

1 estimate is tied to the available information we
2 have.

3 We do not have reliable information
4 about how much third-party reimbursement income
5 tribes are bringing in per year, including
6 whether it comes from serving non-beneficiaries
7 or beneficiaries, because IHS doesn't have
8 reason to collect that information in a
9 comprehensive way. But we can look at the value
10 of the claims that have been made so far and we
11 can look to how much third-party reimbursement
12 income IHS comes -- brings in to make estimates.

13 The value of the claims we're seeing
14 so far, we are already facing a claim in the
15 District of Arizona seeking nearly \$110 million
16 in additional contract support costs for a
17 single contract year. We're seeing other claims
18 for 40 million for a single contract year and 90
19 million for another contract year. In one of
20 those cases, the Gila River case, there's a
21 single fiscal year where the tribe -- what the
22 tribe is saying that they are owed in contract
23 support costs is about \$48 million, and that --
24 that's the total including what they were
25 already paid, and that comes close to what they

1 received in the secretarial amount for that same
2 year, which was \$51 million.

3 So our prediction that this will
4 eventually overtake the secretarial amount, we
5 think, is sound, and that's in part because of
6 the allegations like those in the San Carlos
7 Apaches' complaint that if they had received an
8 additional \$3 million in contract support costs,
9 they would have been able to produce another \$5
10 million in third-party reimbursement income, and
11 that is part of the damages claim that they are
12 seeking against us in this case.

13 I would also say that our estimate
14 about the forward-looking budget impact does not
15 include the value of any of these retrospective
16 judgments that do have a six-year statute of
17 limitations.

18 Finally, just one final point, there's
19 been discussion about what falls within
20 (m)(1) -- sorry -- 5325(m)(1) and what counts as
21 being within the general purposes of the
22 contract. I would -- I understood my friends to
23 be saying it has to be very closely tied to
24 contract services, although there seems to be
25 some expenses, like building facilities, which

1 can be done under ISDA but has to be done under
2 a separate ISDA contract if the tribe wants to
3 fund it that way, but they think that they could
4 fund that using third-party reimbursement
5 income.

6 I would say also, though, that (m)(1)
7 has to be read consistently with 1641(d)(2).
8 This is the provision of the IHCIA that also
9 governs the same reimbursement income, and that
10 provision says that tribes can spend it on any
11 healthcare-related purpose or otherwise to
12 achieve the general objectives of the IHCIA.

13 You have to read those consistently.
14 It can't be that (m)(1) permits -- forbids uses
15 that this other provision permits, and so that's
16 why I do think that the -- the idea that tribes
17 are limited to spending this just on program
18 services cannot be correct.

19 If there are no further questions, we
20 ask that you reverse in both cases. Thank you,
21 Your Honor.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 The case is submitted.

25 (Whereupon, at 11:30 a.m., the case

1 was submitted.)

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