

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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14 NORTHERN ARAPAHO TRIBE,)
15 Respondent.)
16 - - - - -

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

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

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25

1 APPEARANCES:
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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: Well, if that's the
25 case, I guess their argument is then it is a

1 part of the contract?

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

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

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

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

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

24 MS. FLYNN: I would --

25 CHIEF JUSTICE ROBERTS: In terms -- in

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

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

11 CHIEF JUSTICE ROBERTS: Right.

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

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

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

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

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

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

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

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

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

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

16 MS. FLYNN: -- non-beneficiaries.

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

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

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

5 JUSTICE KAGAN: Well, I mean --

6 MS. FLYNN: But I would --

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

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

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

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

7 JUSTICE GORSUCH: Counsel --

8 MS. FLYNN: And --

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

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

18 JUSTICE GORSUCH: Is the payor of last
19 resort?

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

23 JUSTICE GORSUCH: No, but --

24 MS. FLYNN: -- Medicare and Medicaid,
25 for instance.

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

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

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

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

16 JUSTICE GORSUCH: Okay.

17 MS. FLYNN: But I'm not sure that IHS
18 --

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

1 kinds of particular services, right?

2 MS. FLYNN: Yes.

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

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

6 JUSTICE GORSUCH: And Indian health,
7 right?

8 MS. FLYNN: Yes.

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

11 MS. FLYNN: Yes.

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

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

19 JUSTICE GORSUCH: So --

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

22 JUSTICE GORSUCH: So, if you do agree
23 with that, then what's the problem here? You
24 raised the specter that they're going to expand
25 their programs to help non-Indians. Maybe

1 they're free to do that -- you're right --
2 statutorily.

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

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

12 JUSTICE GORSUCH: -- particular
13 services.

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

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

24 MS. FLYNN: So I -- I would not fight
25 Your Honor on imposing that limitation if you

1 were to say that there is some additional
2 contract support cost obligation tied to
3 third-party reimbursement.

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

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

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

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

23 JUSTICE GORSUCH: Well, it certainly
24 has grown over time, but that's a function,
25 again, of them becoming payors of last resort

1 the way IHS sometimes is. And -- and that is a
2 big change. I grant you that.

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

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

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

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

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

21 MS. FLYNN: That wasn't what the lower
22 courts decided here. I don't take the tribes to
23 be excluding reimbursement revenue from
24 non-Indian beneficiaries from the kind of
25 contract support costs they're asking for, and

1 so I -- I, you know, would be open to this Court
2 to --

3 JUSTICE KAGAN: I had thought --

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

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

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

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

23 MS. FLYNN: But I understood my friend
24 representing the Northern Arapaho to say that if
25 the tribe actually does spend third-party

1 reimbursement income on program services, that
2 that should lead to a different result.

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

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

11 MS. FLYNN: But perhaps they can
12 clarify.

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

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

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

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

19 JUSTICE BARRETT: Counsel --

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

22 JUSTICE BARRETT: Go ahead.

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

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

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

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

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

1 service agreement.

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

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

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

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

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

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

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

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

1 And that is --

2 JUSTICE SOTOMAYOR: Okay.

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

4 JUSTICE SOTOMAYOR: Thank you,
5 counsel.

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

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

15 MS. FLYNN: That's correct.

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE GORSUCH: I think the answer,

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

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

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

16 MS. FLYNN: Yes.

17 JUSTICE GORSUCH: Okay.

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

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

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

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

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

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

18 MS. FLYNN: So I --

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

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

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

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

14 JUSTICE KAVANAUGH: Can -- can you --

15 MS. FLYNN: -- clarify that.

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

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

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

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

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

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

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

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

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

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

1 cases. And as that Court --

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

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

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

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

24 JUSTICE SOTOMAYOR: I'm sorry --

25 CHIEF JUSTICE ROBERTS: Thank you --

1 thank you, counsel.

2 Justice Thomas, anything further?

3 Justice Alito?

4 Justice Sotomayor?

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

7 MS. FLYNN: Mm-hmm.

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 Justice Kavanaugh?

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

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

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

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

1 come out of the other discretionary funding?

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

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

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

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

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

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

18 MS. FLYNN: Yes.

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

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

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

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

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

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

1 the receipt of third-party income.

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

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

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

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

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

23 MS. FLYNN: Mm-hmm.

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

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

4 MS. FLYNN: Mm-hmm.

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

11 MS. FLYNN: Yes.

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

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

24 Do I have that right?

25 MS. FLYNN: Yes.

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

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

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

14 JUSTICE BARRETT: No.

15 MS. FLYNN: Or sorry.

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

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

25 JUSTICE BARRETT: But aren't these

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

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

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

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

25 JUSTICE BARRETT: Okay, thanks.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

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

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

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

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

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

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

8 I'm not sure --

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

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

18 JUSTICE JACKSON: What about an amend
19 --

20 MS. FLYNN: -- authority section --

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

1 ballooning and a problem that arises from that.

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

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Unikowsky.

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

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

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

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

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

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

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

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

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

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

5 I welcome the Court's questions.

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

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

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

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

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

1 Congress goes out of its way --

2 JUSTICE THOMAS: Where does it say
3 that?

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

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

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

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

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

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

16 JUSTICE JACKSON: Can I just ask you
17 --

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

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

25 MR. UNIKOWSKY: Well, I mean, it does

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

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

23 CHIEF JUSTICE ROBERTS: Well, but, I
24 mean, if you add the direction to interpret the
25 statutory language in favor of the tribes, that

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

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

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

21 Non- -- Northern Arapaho does serve
22 non-beneficiaries but only if they're employees
23 of Northern Arapaho's healthcare program, and
24 that's less than 3 percent of the total number
25 of users of Northern Arapaho's program. So, if

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

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

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

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

1 That's not a question raised in this case.

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

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

10 JUSTICE KAGAN: And is that true for
11 all tribes?

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

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

1 MR. UNIKOWSKY: So, historically,
2 Northern Arapaho hasn't done that just because
3 it's such a tiny percentage. That's a question
4 that's not raised in this case.

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

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

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

24 MR. UNIKOWSKY: Okay. So the
25 argument -- the alternative argument we have

1 made is that every single penny of program
2 income that we receive under these contract
3 years, we spend it on services enumerated in the
4 scope of work for Indians only, okay?

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

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

21 JUSTICE ALITO: Well, put aside --

22 JUSTICE BARRETT: But you're saying
23 you should get --

24 JUSTICE ALITO: -- put aside the
25 question of what you are doing and focus on the

1 question of what the statutory language means.
2 So what exactly are the general purposes of the
3 contract under 5325(m)(1)?

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

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

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

1 further Indian health?

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

4 JUSTICE ALITO: No?

5 MR. UNIKOWSKY: -- Your Honor.

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

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

16 JUSTICE KAGAN: So it's easier to say
17 --

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

21 MR. UNIKOWSKY: Yeah. So --

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

1 within the general purposes of the contract?

2 MR. UNIKOWSKY: I probably would say
3 no. This question has never come up. It's
4 never been litigated a single time for a
5 practical reason.

6 JUSTICE ALITO: Yeah. Well, now it's
7 being litigated.

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

12 JUSTICE ALITO: But we have to say
13 what "general purposes" means.

14 MR. UNIKOWSKY: I don't think so, Your
15 Honor. I think --

16 JUSTICE ALITO: No?

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

22 The reason this has not -- never been
23 litigated, what "general purposes" means, is
24 that the amount of money that the tribe gets is
25 the sum of these two funding streams, and

1 Congress understands that that sum is necessary
2 just to serve the services under the contract.
3 Like --

4 JUSTICE GORSUCH: Mr. Unikowsky?

5 MR. UNIKOWSKY: Yes?

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

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

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

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

24 MR. UNIKOWSKY: One hundred percent I
25 agree, Your Honor.

1 JUSTICE GORSUCH: And in your
2 contract, in terms of what's enumerated as the
3 general purposes, include outpatient ambulatory
4 medical care and primary care, nursing, mental
5 health, the clinical medical laboratory,
6 radiology, physical therapy, the pharmacy,
7 optometry, dental care, and community health.
8 You'd agree it has to be limited to those things
9 too?

10 MR. UNIKOWSKY: Yes, Your Honor,
11 absolutely, 100 percent.

12 JUSTICE KAVANAUGH: If a --

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

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

25 JUSTICE SOTOMAYOR: What do you do

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

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

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

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

24 The other thing is it's not like
25 Congress doesn't like construction. It's just

1 there's two separate appropriations provisions.
2 Like there's one to the Indian Health Service
3 for services, and then there's a separate stream
4 for -- for construction. And so Congress has
5 just ensured that there's no mixing, that a
6 certain amount of money is for services and a
7 certain amount is for --

8 JUSTICE KAVANAUGH: On -- on --

9 JUSTICE SOTOMAYOR: So to -- to the
10 extent that the government doesn't pay for
11 certain things or they're not included in the
12 program, you're not getting reimbursed contract
13 --

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

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

21 How do you respond to that?

22 MR. UNIKOWSKY: All right. If I can
23 offer a couple responses. So, first of all, the
24 liberal construction provision in the
25 self-determination contract says that the

1 provisions of the statute and contract will be
2 construed liberally for the benefit of the
3 contractor. So that's the -- that's not all
4 tribes in general. That's for the contractor in
5 particular. So I think the Court should --
6 should remain focused on the contractor's
7 interests when applying that.

8 Second of all, I -- I think it's going
9 --

10 JUSTICE SOTOMAYOR: It's a nice
11 answer, but it doesn't answer --

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

14 (Laughter.)

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

25 JUSTICE KAVANAUGH: And the risk is

1 if -- just so I understand it, if Congress
2 doesn't change the discretionary funding cap
3 that applies to IHS generally and you prevail in
4 this case, it necessarily will mean less funding
5 for other tribes that IHS directly provides
6 healthcare for? Is that the -- that's the
7 issue?

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

13 JUSTICE KAVANAUGH: Right. I -- I
14 said if.

15 MR. UNIKOWSKY: Yeah, if.

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

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

23 JUSTICE KAVANAUGH: Exactly. That's
24 why it's -- we've got -- we've got to think
25 about this more generally than just -- I mean,

1 your first answer to Justice Sotomayor was a bit
2 narrow. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

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

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

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

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

1 2012, for this Court to hold that the tribes
2 actually are entitled to all of the contract
3 support costs under the statute, and that's when
4 these lawsuits started being brought.

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

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

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

22 MR. UNIKOWSKY: Correct.

23 JUSTICE ALITO: And if the government
24 is right that the annual costs of accepting your
25 reading could be \$2 billion, then the first year

1 bill could be more than \$12 billion?

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

4 JUSTICE ALITO: Why not? Why would
5 that not be the case?

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

12 JUSTICE ALITO: Well, what numbers do
13 you have?

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

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

24 And also, the other thing is, I mean,
25 it's true there's a six-year statute of

1 limitations, but I don't think every single
2 tribe in the country is going to necessarily
3 bring these suits. I mean, I can't -- I can't
4 predict.

5 JUSTICE ALITO: Why would they not?

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

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

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

24 JUSTICE ALITO: Well, if it has such
25 -- if your reading has such severe consequences,

1 does that say something about the plausibility
2 of the reading?

3 MR. UNIKOWSKY: I don't think -- I
4 just respectfully disagree.

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

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

20 JUSTICE ALITO: Thank you, thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch?

25 JUSTICE GORSUCH: I just want to make

1 sure I got it right with respect to why this
2 happened. You brought suit in 2011, I think, is
3 that right, somewhere in there? One of you did.

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

6 JUSTICE GORSUCH: 2017?

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

8 JUSTICE GORSUCH: All right, all
9 right. Okay. I think one was 2011.

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

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

15 MR. UNIKOWSKY: No. No.

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

19 MR. UNIKOWSKY: Right.

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

23 MR. UNIKOWSKY: Right. Plus, tribes
24 weren't -- I mean, again, like before 2012,
25 tribes were getting much less than they were

1 entitled to under the statute because of these
2 appropriations caps which have been lifted by
3 Congress after this Court's decision in Salazar
4 versus Ramah Navajo Chapter. That's what got a
5 lot of this litigation started.

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

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

11 JUSTICE GORSUCH: One point five
12 million dollars?

13 MR. UNIKOWSKY: About that, yes.

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

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

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

24 MR. UNIKOWSKY: That it cycles, that's
25 right.

1 JUSTICE GORSUCH: -- health spas for
2 non-Indians.

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

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

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

20 JUSTICE GORSUCH: Thank you.

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

24 Do I have it right that the question
25 here is about the pot of money that comes in

1 from third-party payors, from Medicare,
2 insurers, tortfeasors and what have you, and
3 then you take that pot of money which is under a
4 separate statute and you spend that for
5 healthcare services, correct?

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

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

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

24 JUSTICE KAVANAUGH: Okay. And what do
25 you do with -- I don't know that we've mentioned

1 it as much -- 5325(m), the provision that says
2 the third-party income's not a basis for
3 reducing the allocation that comes from IHS,
4 which suggests that Congress was concerned
5 about, oh, because you get this third-party
6 money, maybe the IHS amount should be reduced,
7 and Congress wanted to say no, that's -- that's
8 not correct, and from that, the implication
9 would be surely they were not anticipating, oh,
10 that it would increase. Just want to make sure
11 you can respond to that.

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

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

1 costs that are in connection with the operation
2 of the federal program, which I think includes
3 program income. It's the same word, "program,"
4 in both provisions.

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

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

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

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

22 MR. UNIKOWSKY: Well, I don't agree,
23 Your Honor. In fact, I don't even think it's
24 disputed that we satisfy (A) and (B). I think
25 the government is disputing the -- the earlier

1 part of the statute talking about a contract to
2 ensure compliance.

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

7 JUSTICE BARRETT: You mean like
8 everybody keeps talking about workers' comp?

9 MR. UNIKOWSKY: Yeah. That's -- well,
10 that's not -- that's another thing.

11 JUSTICE BARRETT: That's another
12 thing?

13 MR. UNIKOWSKY: Yeah.

14 JUSTICE BARRETT: Okay.

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

18 JUSTICE BARRETT: Okay.

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

22 JUSTICE BARRETT: Right.

23 MR. UNIKOWSKY: There needs to be an
24 HR person. So, if IHS is running healthcare,
25 OPM, a separate branch of the government, is

1 going to be doing all that HR stuff, putting
2 them on the payroll, making sure they're paid,
3 handling their pensions. So that's an -- that's
4 an (A) cost, okay?

5 JUSTICE BARRETT: Okay.

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

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

20 JUSTICE BARRETT: Okay.

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

1 JUSTICE BARRETT: Right.

2 MR. UNIKOWSKY: And I think we are
3 because we are carrying out our contractual
4 obligations when we perform these services under
5 (A)(i).

6 JUSTICE BARRETT: In the same way that
7 the Secretary would?

8 MR. UNIKOWSKY: Yes.

9 JUSTICE BARRETT: In the same way that
10 IHS would if IHS were spending the third-party
11 income?

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

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

1 of the sort that IHS would also make --

2 MR. UNIKOWSKY: Oh --

3 JUSTICE BARRETT: -- or is it a
4 broader universe?

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

13 JUSTICE BARRETT: Mm-hmm.

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

22 So both -- both the tribe and the IHS
23 has a measure of flexibility in spending this
24 money on healthcare. Individual dollars might
25 be allocated differently, but the types of

1 things we're doing, spending money on
2 healthcare, are exactly the types of things that
3 IHS would be doing with the same money.

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

8 MR. UNIKOWSKY: Absolutely not.

9 JUSTICE BARRETT: So you couldn't
10 stand in their shoes --

11 MR. UNIKOWSKY: No.

12 JUSTICE BARRETT: -- for that purpose.

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

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

24 MR. UNIKOWSKY: So that -- that -- so
25 that's not an issue that's been raised in this

1 case. Just because it's so de minimis, I think,
2 we haven't done that. It's possible in a
3 different case the government can say you have
4 to parse that out, and that -- that's an issue
5 that can be litigated.

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

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

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

21 JUSTICE BARRETT: Mm-hmm.

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

25 JUSTICE BARRETT: Okay.

1 MR. UNIKOWSKY: As I said, we deduct
2 the costs of construction.

3 JUSTICE BARRETT: Okay. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

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

12 MR. UNIKOWSKY: Yes.

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

17 MR. UNIKOWSKY: Yes. So that --
18 that's actually San Carlos's contract.

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

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

22 JUSTICE JACKSON: Yes.

23 MR. UNIKOWSKY: So we spend -- so, I
24 mean, it says "general purposes," which might
25 modify "purposes" a little bit, but as a

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

3 JUSTICE JACKSON: Would you have to?

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

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

11 MR. UNIKOWSKY: Yes.

12 JUSTICE JACKSON: That's a limitation
13 on you?

14 MR. UNIKOWSKY: That's how we
15 understand it, yes.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. MILLER: Maybe I'll --

20 CHIEF JUSTICE ROBERTS: Mr. Miller.

21 ORAL ARGUMENT OF LLOYD B. MILLER
22 ON BEHALF OF THE RESPONDENT IN 23-250

23 MR. MILLER: Mr. Chief Justice, may it
24 please the Court:

25 Maybe I'll begin with Justice

1 Jackson's question about page 51. We have six
2 programs here, including the EMS program, which
3 is a major feature of the government's motion to
4 dismiss that is the subject of this case. The
5 third-party revenue spending has to be anchored
6 to those six programs. It cannot be spent on a
7 dental program. We don't see dental there. It
8 cannot be spent just on general health. Even
9 interpreting that term broadly and generously in
10 light of the Indian canon, it still has to be
11 anchored in these six programs.

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

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

25 Why? Because IHS knew that there was

1 no way this program could be run at even a
2 moderate level without third-party revenues
3 coming into the program and going out into the
4 program, coming in from program income and going
5 out into services. So that's why this clause is
6 such a pivotal element of the contract.

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

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

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

1 That was the positive provision, that
2 program income comes into the contract, but
3 there were a lot of negative provisions in the
4 old sample contract. There were a lot of
5 negative provisions in regulations that IHS had
6 adopted, proposed to adopt in January '94.

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

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

21 And the contract, as we just saw,
22 requires the spending of program income. So we
23 satisfy (a)(3). It's, of course, part of the
24 federal program that we discussed earlier. The
25 federal program includes direct service spending

1 from the secretarial amount and also program
2 income spending. So -- and IHS spends both
3 tranches of money. The tribe spends both
4 tranches of money.

5 CHIEF JUSTICE ROBERTS: You -- you've
6 heard --

7 MR. MILLER: So it's indisputably part
8 of the federal program.

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

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

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

1 pay the leasing costs.

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

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

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

19 And I should note that IHS has a
20 mechanism already for doing this. IHS does this
21 in the leasing arena. If I go to IHS and ask
22 for a lease to compensate for the use of a
23 tribal facility, IHS will ask for data, how many
24 non-beneficiaries do you serve? Zero. Then the
25 they cover the whole lease. Fifty percent,

1 which is unheard of, but 50 -- well, there are
2 examples, I suppose, then IHS will whack off a
3 part of the leasing cost to be sure that they
4 are only supporting services to Indians because
5 this is an Indian healthcare program.

6 I also wanted to address the --

7 JUSTICE KAVANAUGH: Can I ask --

8 MR. MILLER: Yes?

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

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

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

25 JUSTICE KAVANAUGH: But that --

1 MR. MILLER: -- a quarter of a billion
2 dollars, but --

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

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

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

8 MR. MILLER: Right.

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

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

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

1 place for ambulance crews to sleep in between
2 calls, so, yes, reconstructing a new facility to
3 house the ambulance crews, absolutely.

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

9 JUSTICE KAVANAUGH: Yes is the answer
10 to that?

11 MR. MILLER: Yes is that -- is the
12 answer to that question.

13 JUSTICE SOTOMAYOR: Would you ever --

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

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

21 JUSTICE KAVANAUGH: That's what you're
22 seeking, right?

23 MR. MILLER: Yes, but there would be
24 no overhead on it, is what I was about to say,
25 Your Honor. Unless I'm a general contractor

1 building my own house, I hire a company to build
2 a new house. And the tribe hires a company to
3 build that garage. It doesn't build it itself.

4 So the company that hires pays --
5 charges you \$500,000, a million dollars to build
6 that garage. You don't have any overhead. You
7 just procure the contract, but you're not
8 running the contract. So this is why my friend
9 --

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

12 MR. MILLER: Yeah. Justice --

13 JUSTICE SOTOMAYOR: Are you going to
14 include any overhead as contract support?

15 MR. MILLER: No.

16 JUSTICE SOTOMAYOR: Thank you.

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

23 But, if the discretionary cap stays
24 the same, the money here -- and I asked Mr.
25 Unikowsky this -- the money here will

1 necessarily come from other tribes receiving --
2 who don't provide the healthcare services
3 themselves, where IHS provides the healthcare
4 services directly. That's almost logically
5 necessary, right?

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

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

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

25 This cost, let's say it goes up \$500

1 million, I have no idea what it would be. There
2 is no data on that. Then that is an element
3 that the appropriations committee decides in
4 allocating the 13.

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

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

17 JUSTICE KAVANAUGH: Right.

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

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

1 judgment you're making.

2 MR. MILLER: Right. And part of it is
3 because the IHS appropriation was an 8 or \$9
4 billion appropriation inside a \$55 billion
5 appropriation which is inside a \$700 billion
6 discretionary appropriation. So there's just no
7 way really to predict that.

8 JUSTICE GORSUCH: How much money are
9 you seeking in this case?

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

13 JUSTICE GORSUCH: For basically EMS
14 services in Arizona?

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

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

21 MR. MILLER: Contracts can be three
22 years. These were three-year contracts.

23 JUSTICE JACKSON: With the government?

24 MR. MILLER: Yes.

25 JUSTICE JACKSON: With the IHS?

1 MR. MILLER: Yes. And they're
2 recurring. So, after three years, you sign up
3 for another three years if you want to.

4 JUSTICE JACKSON: And they could be
5 renegotiated at that time?

6 MR. MILLER: Absolutely, absolutely.

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

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

12 JUSTICE KAGAN: What -- what services
13 will you provide with that?

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

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

1 most importantly, reduce response times.

2 JUSTICE KAGAN: And do you provide any
3 services to non-Indians?

4 MR. MILLER: No, Your Honor.

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

15 MR. MILLER: The -- well, (a)(2), Your
16 Honor, covers overhead. So, with respect to the
17 first half of your question, the cost of
18 providing the EMS program in the first instance
19 --

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

23 MR. MILLER: Yes.

24 JUSTICE BARRETT: -- and that there
25 was no dispute that collection is covered and

1 that the reason why collection is covered is
2 that it falls under 5325(a)(1) in the
3 secretarial amount and so that what we're trying
4 to find is a home for spending, and you say that
5 home is not 5325(a)(1) but 5325(a)(2)?

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

9 JUSTICE BARRETT: Okay.

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

16 JUSTICE BARRETT: Okay.

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

21 (a)(2) is limited by the terms of the
22 contract, not by the terms of (a)(1). I know
23 the government's brief on page 2, I think, dices
24 and rearranges the words, but the costs are to
25 support the contract and contract compliance

1 costs. So the touchstone for (a)(2), like
2 (a)(3), is what does the contract say.

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

7 And with regard to breaking the bank,
8 by the way, you're only talking about an average
9 indirect cost rate around the United States is
10 25 percent, although my client's rate was
11 17 percent. So they lost out on about
12 17 percent of the program income spending they
13 should have had.

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

25 But, when the tribe comes in, if it

1 has a 25 percent indirect cost rate and we had 5
2 million from one source, 5 million from another
3 source, 10 million total, 2 and a half billion
4 dollars required for indirect costs, we have to
5 fund some of that 2 and a half million out of
6 the program revenue that came into the tribe.

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

11 JUSTICE BARRETT: But is that part --

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

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

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

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

25 MR. MILLER: Yes.

1 JUSTICE BARRETT: -- medical facility.

2 Well, I'll -- I'll finish that up during the --

3 CHIEF JUSTICE ROBERTS: Thank you --

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

5 CHIEF JUSTICE ROBERTS: -- counsel.

6 Go ahead.

7 MR. MILLER: If a hospital got paid

8 Medicare and Medicaid money, the hospital can do

9 anything it wants with it. It's not required --

10 it's not limited by any federal statute in its

11 use of the money. And if a doctor the same. If

12 the doctor receives money from Medicare and

13 Medicaid, it can use it to pay the -- the

14 scholarship of its son.

15 CHIEF JUSTICE ROBERTS: Thank you,

16 counsel.

17 Justice Thomas?

18 Justice Alito?

19 JUSTICE ALITO: Well, just to follow

20 up on a few questions that were asked earlier,

21 in assessing what Congress thought this whole

22 scheme would amount to, do you think it is

23 illegitimate to consider how much it will cost?

24 MR. MILLER: I -- I don't -- I don't

25 think anything is illegitimate in terms of

1 considering what Congress might have expected,
2 but I -- I do think we have to look at what
3 Congress did in 1994 --

4 JUSTICE ALITO: All right.

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

6 JUSTICE ALITO: So it's not
7 illegitimate -- that wasn't an illegitimate line
8 of inquiry.

9 And the government has been accused of
10 making up a number and trying to smuggle it into
11 the case without record support. I take it you
12 disagree with their number?

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

19 JUSTICE ALITO: Do you have a number?

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

21 JUSTICE ALITO: Thank you.

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

25 JUSTICE ALITO: Well, do you think in

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

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

15 JUSTICE ALITO: All right.

16 MR. MILLER: -- was part of the
17 contract, and it wrote the contract support cost
18 provision to be key to the contract.

19 JUSTICE ALITO: Thank you.

20 MR. MILLER: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 Justice Gorsuch?

24 Justice Kavanaugh?

25 Justice Barrett?

1 Justice Jackson?

2 Great. Thank you, counsel.

3 MR. MILLER: Thank you.

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

6 REBUTTAL ARGUMENT OF CAROLINE A. FLYNN

7 ON BEHALF OF THE PETITIONERS

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

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

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

1 be an eligible contract support cost. That is
2 too extended of a chain to fit within "directly
3 attributable" and so payment of these funds is
4 independently barred.

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

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

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

1 and not decide whether that amount of income can
2 include that kind of income stream.

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

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

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

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

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

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

1 limitations.

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

15 I would say also, though, that (m)(1)
16 has to be read consistently with 1641(d)(2).
17 This is the provision of the IHCA that also
18 governs the same reimbursement income, and that
19 provision says that tribes can spend it on any
20 healthcare-related purpose or otherwise to
21 achieve the general objectives of the IHCA.

22 You have to read those consistently.
23 It can't be that (m)(1) permits -- forbids uses
24 that this other provision permits, and so that's
25 why I do think that the -- the idea that tribes

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

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

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 The case is submitted.

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

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