No. 23-253

IN THE
Supreme Court of the United States

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

NORTHERN ARAPAHO TRIBE,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF RESPONDENT

GEOFFREY D. STROMMER
STEPHEN D. OSBORNE
CAROLINE P. MAYHEW
HOBBS, STRAUS, DEAN & WALKER LLP
215 SW Washington St.,
Suite 200
Portland, OR 97204
(503) 242-1745
gstrommer@hsdwor.com

ADAM G. UNIKOWSKY
Counsel of Record
KEITH M. HARPER
CHARLES W. GALBRAITH
LEONARD R. POWELL
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

QUESTION PRESENTED

The Indian Self-Determination and Education Assistance Act ("Self-Determination Act") authorizes Indian Tribes to enter into contracts with the Indian Health Service ("IHS"), under which the Tribes provide services that IHS would otherwise be obligated to provide. The Self-Determination Act authorizes Tribes to recover "contract support costs," which include, among other costs, "any … administrative" and "any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." 25 U.S.C. § 5325(a)(3)(A)(ii).

Respondent Northern Arapaho Tribe contracted with IHS to provide health care services. The contract requires Northern Arapaho to undertake activities related to generating, collecting, monitoring, and spending revenues from third parties such as Medicare and Medicaid. The Self-Determination Act requires Northern Arapaho to use those third-party revenues "to further the general purposes of the contract." 25 U.S.C. § 5325(m).

The question presented is:

Whether, under the Self-Determination Act, a Tribe is entitled to contract support costs for those portions of its health care program that IHS deems to be funded by third-party revenues, when the Tribe generates those third-party revenues pursuant to its contract with IHS and uses them to further the contract's purposes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

Both this petition and the petition in *Becerra v. San Carlos Apache Tribe*, No. 23-250, present the question whether Tribes are entitled under the Indian Self-Determination and Education Assistance Act ("Self-Determination Act") to contract support costs for portions of the Tribes' health care programs that the Indian Health Service deems to be funded by third-party revenues. The government asks this Court to grant plenary review in *San Carlos* and hold this petition.

Northern Arapaho agrees that the question presented warrants Supreme Court review. Northern Arapaho respectfully submits, however, that the Court should grant certiorari in this case and hold *San Carlos*.

This case is the better vehicle. In *San Carlos*, the government preserved a threshold argument that regardless of the proper interpretation of the Self-Determination Act, the particular language of the parties' contract foreclosed San Carlos from recovering. Although the government lost on that argument in the Ninth Circuit, this threshold issue might interfere with this Court's review. In this case, by contrast, no such argument is available to the government: as the government conceded in the Tenth Circuit, the parties' contract explicitly requires the government to pay contract support costs in accordance with the Self-Determination Act. Thus, in this case, there is no barrier to reaching the question presented.

On the merits, the Court should affirm the judgment of the Tenth Circuit. Northern Arapaho's contract

explicitly contemplated that it would collect money from third parties, and Northern Arapaho is statutorily required to spend that money in accordance with the contract's purposes. Contract support costs incurred in connection with expenditures of those funds thus unambiguously qualify as expenses "incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." 25 U.S.C. § 5325(a)(3)(A)(ii). At a minimum, the liberal-construction canon and canon requiring ambiguities to be construed in favor of tribes—which are expressly codified in the Self-Determination Act and the parties' contract—require this Court to rule in favor of Northern Arapaho.

STATEMENT

A. The Self-Determination Act

The Self-Determination Act authorizes the Indian Health Service ("IHS") to enter into contracts with Tribes to assume responsibility for programs that IHS would otherwise be required to provide. The Self-Determination Act's purpose is to establish "a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 5302(b). The Self-Determination Act affirms the United States' commitment to "supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality

programs and developing the economies of their respective communities." *Id.*

"As originally enacted," the Self-Determination Act "required the Government to provide contracting tribes with an amount of funds equivalent to those that the Secretary 'would have otherwise provided for his direct operation of the programs.'" *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 186 (2012); *see* 25 U.S.C. § 5325(a)(1). That amount is commonly referred to as the "Secretarial amount."

"It soon became apparent," however, that this amount "failed to account for the full costs to tribes of providing services." 567 U.S. at 186. The problem was that Tribes had to spend money carrying out administrative activities that IHS did not need to carry out when running tribal health care programs directly—thus penalizing Tribes for entering into contracts under the Self-Determination Act. For example, when IHS runs tribal health care programs, some administrative activities are carried out by other federal agencies, such as the Office of Personnel Management and the General Services Administration. IHS does not need to spend appropriated funds on those resources, so those costs are not included in the Secretarial amount. By contrast, Tribes do not have access to those resources, so they were forced to pay those administrative expenses out of pocket—reducing the funds available to spend on health care. In addition, Tribes incur costs that IHS does not incur by virtue of its status as an agency of the federal government, such as the cost of audits, certain taxes, and state-mandated workers' compensation insurance.

In 1988, to ensure that Tribes were not "required to pay a penalty for the right to contract for the administration of Federal programs," H.R. Rep. No. 100-393, at 4 (1987), Congress amended the Self-Determination Act to require IHS to pay "contract support costs." According to the 1988 amendment, contract support costs consist of:

> [A]n amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which --
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. § 5325(a)(2). In 1994, Congress added the following provision to the Self-Determination Act:

> The contract support costs that are eligible costs for the purposes of receiving funding under this [Act] shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—
>
> (i) direct program expenses for the operation of the Federal program that is the subject of the contract; and
>
> (ii) any additional administrative or other expense incurred by the ... tribal contractor in

> connection with the operation of the Federal program, function, service, or activity pursuant to the contract,
>
> except that such funding shall not duplicate any funding provided under [section 5325(a)(1)].

25 U.S.C. § 5325(a)(3).

In 1997, the Tenth Circuit concluded that a tribal plaintiff was statutorily entitled to recover contract support costs from the Bureau of Indian Affairs for indirect costs allocable to other federal agencies and state agencies. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1458-59 (10th Cir. 1997). In response, Congress added the following provision to the Self-Determination Act:

> [N]otwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the ... Self-Determination Act and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

25 U.S.C. § 5326.

B. Third-Party Revenues

Tribal health care programs—whether operated directly by IHS or by Tribes via Self-Determination Act contracts—are funded not only by funds directly appropriated by Congress, but also by funds received from third parties, such as Medicare, Medicaid, and private insurers. In 1976, as part of the Indian Health Care Improvement Act, Congress enacted legislation providing for Medicare and Medicaid reimbursement for IHS and tribally operated facilities. *See* 42 U.S.C. §§ 1395qq, 1396j. Later, Congress made IHS and Tribes eligible for reimbursement of services under Medicare Part B. 42 U.S.C. § 1395qq(e)(1)(A). When it amended and reauthorized the Health Care Improvement Act, Congress enacted additional reforms designed to increase tribal access to third-party funds, such as facilitating the purchase of health insurance for tribal members. 25 U.S.C. §§ 1642, 1647b.

Third-party collections "represent a significant portion of the IHS and Tribal health care delivery budgets." Dep't of Health & Human Servs., *Fiscal Year 2021 Indian Health Service: Justification of Estimates for Appropriations Committees*, at CJ-188 (Feb. 5, 2020). Indeed, in Fiscal Year 2021, IHS collected approximately $1.194 billion from third-party insurers. *Id.*

The Self-Determination Act states that when a tribal contractor receives third-party health care revenue, that revenue does not reduce federal funding, but the Tribe must spend those receipts on health care:

> The program income earned by a tribal

> organization in the course of carrying out a self-determination contract—
>
> (1) shall be used by the tribal organization to further the general purposes of the contract; and
>
> (2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

25 U.S.C. § 5325(m). Likewise, the Health Care Improvement Act requires Tribes to use those receipts on facilities and direct services. *Id.* §§ 1621f(a)(1), 1641(c)(1)(B), 1641(d)(2)(A).

C. This Dispute

The Northern Arapaho Tribe is a federally recognized tribe located on the Wind River Reservation in Wyoming. In 2016, Northern Arapaho contracted with IHS to provide health care services on the Wind River Reservation. The parties' agreement consists of a statutory "model agreement," 25 U.S.C. § 5329(c), as well as an Annual Funding Agreement and a Scope of Work Attachment incorporated into the Annual Funding Agreement.

The Scope of Work expressly contemplates that Northern Arapaho will collect funds from third parties, including Medicare and Medicaid:

> The Tribe's Business Office ... will maintain accreditation standards in order to qualify for funds through third party-payers [sic]. Medicare and Medicaid numbers for billing purposes will be secured in order to meet the requirements of the Centers for Medicaid and Medicare Services (CMS) and Medicaid contracts with Managed

> Care Organizations (MCOs). Other requirements will be met for periodic renewal of accreditation or certification in order to continue to maintain eligibility for these funds.

10th Cir. App. 105-06. The Scope of Work further requires the Tribe to "'[u]se [IHS's] third-party billing system' until the Tribe is able to "set up its own functioning ... billing system"; "coordinate benefits to perform alternate resource determinations"; "ensure necessary certifications are maintained"; "manage claims"; and "conduct '[q]uality assurance and all third-party billing process.'" Pet. App. 16a (alterations in original); *see* 10th Cir. App. 105-06.

In Self-Determination Act contracts, contract support costs are typically calculated by applying a negotiated indirect cost rate to a direct cost base. *See* Indian Health Serv., *Indian Health Manual, Pt. 6, Ch. 3 – Contract Support Costs*, § 6-3.2E(1) (Aug. 6, 2019), https://www.ihs.gov/ihm/pc/part-6/p6c3/. In this case, the parties do not dispute the indirect cost rate. Pet. App. 41a n.3.

The parties' contract expressly addresses the subject of contract support costs. It states that "the parties' estimate of the Tribe's full CSC requirement … is $619,978.62 including $0 for direct CSC and $619,978.62 for Indirect CSC." 10th Cir. App. 84. It then states that the estimate "shall be recalculated as necessary … to reflect the full [contract support costs] required under" the Self-Determination Act, "to the extent not inconsistent with" the Self-Determination Act, "as specified in IHS Manual Part 6, Chapter 3." *Id.*; *see* Pet. App. 17a.

The contract further provides: "Each provision of the [Self-Determination Act] and each provision of this Contract shall be liberally construed for the benefit of [Northern Arapaho] …." 10th Cir. App. 72. This provision parallels the Self-Determination Act itself, which states that "each provision of this [Act] and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe." 25 U.S.C. § 5321(g).

This dispute concerns whether Northern Arapaho is entitled to recover contract support costs for those portions of its health care program funded by third-party revenues. Northern Arapaho took the position that it was entitled to recover these revenues, and that its direct cost base should therefore include those third-party revenues. IHS, however, refused to pay.

Northern Arapaho therefore filed this breach-of-contract suit under the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.*, alleging that IHS had failed to pay contract support costs to which Northern Arapaho was entitled. The District of Wyoming dismissed Northern Arapaho's suit, finding that "the [Self-Determination Act] and the Tribe's contract entitle the Tribe to receive [contract support cost] funding on expenditures of funds received under the contract with IHS, which does not include expenditures of third-party income." Pet. App. 42a.

The Tenth Circuit reversed by a 2-1 vote. The two judges in the majority wrote separately. Judge Moritz concluded that the Self-Determination Act is ambiguous, which "triggers the Indian canon of construction," under

which Northern Arapaho prevailed. Pet. App. 14a. She observed that the Scope of Work "plainly contemplate[s] that the Tribe will engage in third-party billing to generate revenue." Pet. App. 16a. Further, "once the Tribe establishes this infrastructure and collects third-party revenue, the Self-Determination Act requires the Tribe to deploy its program income 'to further the general purposes of [its] contract' with IHS." *Id.* (quoting 25 U.S.C. § 5325(m)(1)). Because Northern Arapaho "seeks reimbursement for administrative costs associated with services it provided pursuant to its self-determination contract with IHS," Judge Moritz concluded that "the Self-Determination Act entitles the Tribe to reimbursement for those administrative costs." Pet. App. 20a. Judge Moritz also rejected IHS's argument that Northern Arapaho's claim was barred by 25 U.S.C. § 5326. She explained that Northern Arapaho was contractually required to collect funds from third parties, and then statutorily required to spend those funds to advance its health care program. Hence, "the costs associated with collecting and expending this program income are 'directly attributable to' the Tribe's contract with IHS, not 'associated with' non-IHS agreements." Pet. App. 25a.

Judge Eid concluded that the Self-Determination Act is unambiguous in Northern Arapaho's favor. In her view, "the Tribe presents the only reasonable construction because the government's interpretation vitiates much of the statutory scheme." Pet. App. 26a-27a. Judge Eid emphasized that "the term 'contract support costs' has a broad meaning." Pet. App. 30a. "Additionally, the government cannot pay less because

of program income, which the statute requires to be injected back into the Tribe's program and which itself only exists because of the IHS contract." *Id.* Moreover, Judge Eid agreed with Judge Moritz that the Tribe's contract requires the Tribe to engage in third-party billing. *Id.* Hence, "[b]ased on the plain meaning of both the contract and § 5325, the Tribe must be reimbursed for these contract support costs." *Id.* Judge Eid also rejected the government's interpretation of § 5326, finding that "[c]ontract support costs incurred when collecting and spending program income are both 'directly attributable' to the IHS contract and 'associated with' the IHS contract—not contracts with other entities—for purposes of § 5326." Pet. App. 34a.

Judge Baldock dissented. Judge Baldock agreed with the majority that, were it not for § 5326, Northern Arapaho would be "entitled to the funds it seeks." Pet. App. 36a. He concluded, however, that § 5326 unambiguously favored the government, finding it acted as a "superseding provision that bars the Tribe from receiving the funds it seeks even though § 5325 would otherwise allow it." Pet. App. 38a.

ARGUMENT

The Court should grant certiorari in this case and hold the petition in *Becerra v. San Carlos Apache Tribe*, No. 23-250. On the merits, the Tenth Circuit's judgment is correct and should be affirmed.

I. THE COURT SHOULD GRANT THE PETITION IN THIS CASE AND HOLD THE PETITION IN *SAN CARLOS APACHE.*

Northern Arapaho agrees the question presented in this case warrants Supreme Court review. The decision below, as well as *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236 (9th Cir. 2023), *pet'n for cert. filed*, No. 23-250 (U.S. Sept. 15, 2023), conflict with *Swinomish Indian Tribal Community v. Becerra*, 993 F.3d 917 (D.C. Cir. 2021). Moreover, this issue has great practical significance to numerous Tribes nationwide.

The government suggests granting certiorari in the *San Carlos* case and holding this case. The Court should instead grant certiorari in this case and hold *San Carlos* because this case is a better vehicle.

In *San Carlos*, the government preserved a threshold objection to San Carlos's claim based on the idiosyncratic language of the parties' contract in that case. San Carlos's contract stated that San Carlos would receive "direct CSC in the amount of $135,203, and indirect CSC in the amount of $423,731." *San Carlos* Pet. App. 4a. It also provided: "These amounts were determined using … the San Carlos Apache direct cost base and indirect rate as of December 7, 2010," and further provided that these amounts "may be adjusted as set forth in the IHS CSC Policy (IHM 6-3) *as a result of changes in program bases, Tribal CSC need, and available CSC appropriations*." *San Carlos* Pet. App. 4a-5a (emphasis added).

Notably, the contract did not expressly provide that the direct cost base could be expanded via any other

mechanism, yet San Carlos argued that the direct cost base should include third-party payments. As a result, in *San Carlos*, IHS took the position that "the language of the contract … forecloses the Tribe's claim." *San Carlos* Pet. App. 4a. Specifically, IHS argued that "the Contract sets out an agreed-upon CSC amount and provides for adjusting this amount," and "the Tribe's claims are meritless because the Tribe received the amount of CSC specified by the Contract, a properly calculated amount that 25 U.S.C. § 5325(a)." *San Carlos* Pet. App. 5a.

The Ninth Circuit rejected this argument, finding that it "ignores the flexibility written into the Contract, which allows those amounts to be adjusted in the event of changes to 'program bases, Tribal CSC need, [or] available CSC appropriations.'" *San Carlos* Pet. App. 5a (alteration in original). In the Ninth Circuit's view, "[a] determination that the Tribe is owed CSC by statute for third-party-revenue-funded portions of its health-care program would fall under this umbrella." *Id.*

Northern Arapaho agrees with the Ninth Circuit's resolution of this issue, and believes that if the Court grants certiorari in *San Carlos*, the Ninth Circuit's judgment should be affirmed. Nevertheless, this issue may complicate this Court's review. Having expressly preserved this argument in the Ninth Circuit, the government may pursue it in this Court. Even if the government does not, a member of this Court may conclude that the Court cannot resolve the statutory question until it resolves the contract-interpretation question—injecting a case-specific threshold issue into the case.

In this case, by contrast, that argument is unavailable to the government because Northern Arapaho's contract explicitly provides that the amount of contract support costs will be calculated in accordance with the Self-Determination Act. In particular, Northern Arapaho's contract states that the parties' "estimate" of contract support costs is "$619,978.62 for Indirect CSC." 10th Cir. App. 84. It further provides that this estimate "shall be recalculated as necessary ... to reflect the full [contract support costs] required under [§ 5325], and, to the extent not inconsistent with [the Self-Determination Act], as specified in IHS Manual Part 6, Chapter 3." *Id.*

Quoting this contractual language, the government's Tenth Circuit brief expressly conceded that Northern Arapaho could recover any contract support costs to which it was entitled by statute. 10th Cir. Gov't Br. 23 (agreeing that the Tribe could succeed in its claim if "it could establish that it was entitled, by statute, to a larger amount" than specified in the contract, and quoting contractual language that contract support costs shall be calculated "'to the extent not inconsistent with the [Self-Determination Act]'" (citation omitted)). Similarly, Judge Moritz's opinion relied on this language in finding that Northern Arapaho was contractually entitled to all funds available under the Self-Determination Act. She went as far as to italicize the relevant contractual language:

> Yet the annual funding agreement—which again, forms part of the contract—states that the parties' agreed-upon calculation of contract support costs is an "estimate" that "shall be

> recalculated as necessary ... to reflect the full [contract support costs] *required under* [*§ 5325*] and, *to the extent not inconsistent* with the [Self-Determination Act], as specified in [the] IHS [m]anual." App. 84 (emphasis added). And that's the rub.

Pet. App. 17a (emphasis in original) (alterations in original). Thus, unlike in *San Carlos*, the government here cannot argue that the contract bars Northern Arapaho's claim irrespective of the statute.

The government offers no sound reason for its suggestion that the Court grant certiorari in *San Carlos* rather than this case. The government states that *San Carlos* "was decided earlier and the Ninth Circuit's reasoning is reflected in a single majority opinion, which will facilitate this Court's review." Pet. 14. But the timing of the two decisions is irrelevant as to which is the better vehicle. And to the extent lower-court reasoning is relevant, that point cuts the other way: The Tenth Circuit's wide-ranging analysis will assist the Court. There are three options on the table: the Court could rule that the statute is (1) unambiguous in the Tribes' favor, (2) ambiguous, or (3) unambiguous in the government's favor. All three perspectives are helpfully analyzed in the decision below. Moreover, given the divisions among the panel, the Tenth Circuit's judges explored the issues in far more detail than the Ninth Circuit. For example, in *San Carlos*, the Ninth Circuit devoted only a paragraph of analysis to explain why § 5326 did not prevent a tribe from collecting the additional contract support costs. *San Carlos* Pet. App. 14a-15a. By contrast, that argument was discussed at

length by all three judges in Northern Arapaho. Pet. App. 23a-25a, 31a-34a, 36a-37a. Indeed, Judge Baldock's dissent criticized the San Carlos panel for its incomplete analysis of that statutory provision. *Id.* at 37a n.1.

To sum up, in *San Carlos*, the government preserved a case-specific threshold argument that the contractual language barred San Carlos's claim, whereas in this case, the government conceded that this argument was unavailable because the contract expressly tracks the statute. Moreover, the question presented received more thorough treatment in this case than in *San Carlos*. This case is therefore a better vehicle than *San Carlos*.

II. THE COURT SHOULD AFFIRM THE JUDGMENT OF THE TENTH CIRCUIT.

The Tenth Circuit correctly concluded that under the Self-Determination Act, Tribes are entitled to contract support costs for those portions of their health care programs that are funded by third-party revenues.

The plain text of the Self-Determination Act, as applied to the unambiguous contractual language, resolves this case in Northern Arapaho's favor. Under the Self-Determination Act, Tribes are entitled to administrative expenses incurred "in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." 25 U.S.C. § 5325(a)(3). Northern Arapaho's contract contemplates that it will collect funds from third-party payors, and Northern Arapaho is statutorily required to use those funds to further the contract's purposes—*i.e.*, spend that money on health care. *Id.* § 5325(m)(1). Therefore, when

Northern Arapaho spends that money and incurs expenses, those expenses are "in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." *Id.* § 5325(a)(3).

To the extent the Court has doubt, it is resolved by the Indian canon. As this Court has long held, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Consistent with those principles, the contract expressly recites that "[e]ach provision of the [Self-Determination Act] and each provision of this Contract shall be liberally construed" in the Tribe's favor. 10th Cir. App. 72. The Self-Determination Act itself includes the requirement that "each provision of this [Act] and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe." 25 U.S.C. § 5321(g). Thus, to prevail in this case, the government "must demonstrate that its reading is clearly required by the statutory language." *Ramah Navajo Chapter*, 567 U.S. at 194. The government cannot come close to making that showing.

The government offers no sound argument to the contrary. It argues that the term "activity" in § 5325(a)(3) refers only to "those activities necessary to operate the programs and services transferred under the contract and funded by the Secretarial amount." *San Carlos* Pet. 15-16. This assertion reflects an impermissible effort to rewrite the statutory text, particularly in view of the Indian Canon. The

government also cites a blizzard of statutory provisions generally stating that the Tribes are entitled to third-party funds over and above the Secretarial amount, *San Carlos* Pet. at 16-18, but none of those provisions addresses Tribes' entitlement to contract support costs. Section 5325(a)(3) addresses that issue, and it supports the Tribes. The government also relies on § 5326. *San Carlos* Pet. 18-19. Although it quotes Judge Baldock's dissent, *San Carlos* Pet. at 19, it does not engage with the detailed reasoning of Judge Moritz and Judge Eid, each of whom explained why § 5326 requires reimbursement for funds that the Tribe is *required* to collect and spend pursuant to its contract with IHS.

Northern Arapaho's position also aligns with the statutory purpose. Congress authorized Tribes to receive contract support costs so as to ensure a level playing field: Tribes who contract with IHS under the Self-Determination Act should not be worse off than Tribes whose health care services are directly provided by IHS. It is undisputed that when IHS provides direct services to Tribes, its services are funded by third-party providers such as Medicare and Medicaid. And when IHS spends money provided by those sources, administrative services are provided using other resources within the federal government. Thus, Tribes should similarly be entitled to contract support costs when they expend funds derived from third parties, rather than spending money out of pocket. The government also insists that the statutory purpose supports denying reimbursement, *San Carlos* Pet. 19-21, but its arguments largely boil down to the proposition that ruling in the Tribes' favor would cause

them to get too much money. Particularly in view of the Indian Canon, which is codified in the contract and the Self-Determination Act, the Court should not deny payments to which Tribes are entitled based on non-specific concerns regarding excessive cost.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEOFFREY D. STROMMER
STEPHEN D. OSBORNE
CAROLINE P. MAYHEW
HOBBS, STRAUS, DEAN & WALKER LLP
215 SW Washington St., Suite 200
Portland, OR 97204
(503) 242-1745
gstrommer@hsdwor.com

ADAM G. UNIKOWSKY
Counsel of Record
KEITH M. HARPER
CHARLES W. GALBRAITH
LEONARD R. POWELL
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com