

**United States Court of Appeals  
For the Eighth Circuit**

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Bird Industries, Inc,  
A South Dakota Corporation, and  
Laura Bird, Individually,

*Appellant,*

v.

The Tribal Business Council of the  
Three Affiliated Tribes of the Fort  
Berthold Indian Reservation

*Appellee.*

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ON APPEAL FROM JUDGMENT IN CIVIL CASE OF THE UNITED  
STATES DISTRICT COURT FOR THE DISTRICT OF NORTH  
DAKOTA

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**Brief of Appellant**

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## **SUMMARY OF THE CASE**

Plaintiffs/Appellants, Bird Industries Inc. and Laura Bird, individually, (hereafter “Bird Industries”) filed a RICO action in Federal District of North Dakota against Defendant, Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation in North Dakota (hereafter “Tribal Business Council”) The Tribal Business Council filed a Rule 12 (b) (1) Motion to Dismiss that was granted based on the lower Court’s determination that the Tribal Business Council was entitled to sovereign immunity.

Plaintiffs/Appellants waive oral argument. The issue on appeal is limited to whether as a matter of law the lower court’s dismissal based on sovereign immunity was plain error and an abuse of discretion.

### **RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the 8<sup>th</sup> Circuit R.26.1A, Bird Industries, Inc., a South Dakota Corporation, in good standing with an office located at 504 West 8<sup>th</sup> Street South, Brookings, South Dakota, 57006-3533. Bird Industries is authorized to do business in South Dakota and North Dakota. All public stock in Bird Industries, Inc. is solely owned by Laura Bird, individually.

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## **JURISDICTIONAL STATEMENT**

Bird Industries appeal from the Judgment in Civil Case of the United States District Court for the District of North Dakota dismissing its action. This case was commenced with Bird Industries' Complaint of three (3) Claims against the Three Affiliated Tribes, including violation of 18 U.S.C. § 1341 and 1343, 18 U.S.C. § 1962 (d), and Fraud on March 30, 2021. An Amended Complaint (App. 001, R. Doc. 10) was filed on July 1, 2021. The District Court had original jurisdiction pursuant to 28 U.S.C. § 1332, 28 U.S.C. § 2314, 18 U.S.C. § 1962 and a specific grant in 18 U.S.C. § 1964. The District Court entered an Order Granting Defendant's Motion to Dismiss (App. 084, R. Doc. 30) on July 11, 2022. Plaintiffs'/Appellants' Notice of Appeal was timely filed on July 26, 2022 (App. 097, R. Doc. 32). This Court has jurisdiction over Bird Industries' appeal pursuant to 28 U.S.C. Fed. R. App. P. Rule 4.

## **STATEMENT OF ISSUES – APPOSITE CASES**

Did the District Court err when it dismissed Plaintiff's Complaint based on Sovereign Immunity?

### Apposite cases:

*C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001)

*Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011)

*Shingobee Builders, Inc v. North Segment Alliance*, 350 F. Supp.  
3d 887 (D.N.D. 2018)  
*Dillon v. BMO HARRIS BANK, NA*, No. 16-mc-5-CVE-TLW  
(N.D. Okla. Feb. 4, 2016)

## **STATEMENT OF THE CASE**

The lower Court's BACKGROUND statement on pages 2 through 6 of its decision is in large part accurate. There are two factual errors and one critical omission in the decision's statement of BACKGROUND. These are identified below in italics in what is otherwise an accurate statement of the facts given by the lower court in its decision.

Bird Industries Inc. is a South Dakota corporation with its principal place of business located in Brookings, South Dakota. Laura Bird is the sole owner and president of Bird Industries, Inc. Laura Bird is an enrolled member of the Three Affiliated Tribes. She resides in Brookings, South Dakota.

The Defendant is the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation in North Dakota. The Tribal Business Council is the governing body of the federally recognized Three Affiliated Tribes. For purposes of political representation, the Fort Berthold Indian Reservation is divided into six geographic segments. The Tribal Business Council consists of six elected councilmen, one from each segment, and a chairman elected at large. The Tribal Business Council is vested with the authority to manage all the economic affairs and enterprises of the Three

Affiliated Tribes. The Tribal Business Council is responsible for all actions taken on behalf of the Three Affiliated Tribes including those taken in the name of any of its officers, arms, segments, employees, department managers, commissions, corporate entities, and sub-entities.

On April 22, 2015, one of the 6 segments, the Four Bears Segment, entered into a “Joint Venture” agreement with Bird Industries in which Bird Industries agreed to provide funds, equipment, management, and manufacturing knowledge to produce aggregates and ready-mix products for sale. The Tribe created Lakeview Aggregates, LLC, a North Dakota Limited Liability Company, to accomplish the purposes of the Joint Venture. The joint venture agreement provided that Bird Industries would receive 40% of the net income generated by sales from the aggregate businesses and 49% of the net income generated by sales from the ready-mix operation. Both parties were to contribute 50% of the first quarter’s cost of goods and services.

In June of 2015, Bird Industries began excavating aggregate and development of a ready-mix plant to process aggregate and manufacture concrete. In the following months, the Tribal Business Council defaulted on its agreement to contribute 50% toward the cost of goods and services for the project. As a result, Bird Industries advanced \$3,007,888.98 to cover the cost of goods and services for the project. One half of this was chargeable to the Tribal

Business Council.

In June of 2016, the Tribal Business Council advised Bird Industries it was being removed from all day-to-day activities of the aggregate and ready-mix operations. A statement on page 3 of the Court's decision adds that this was being done by the Tribal Business Council, "*in the belief that Bird mismanaged the project, The Tribal Business Council demanded that Bird Industries sell its interest in the Joint Venture.*" This statement is not true. Other than a comment in a statement by counsel there is not one scintilla in this massive record to support the allegation that Bird was removed because of mismanagement. (ADD. 015, R. Doc. 29) In a letter dated August 22, 2016, Frank Grady, the Tribal Business Council councilman who masterminded the RICO crimes, extolled the virtues of Bird Industries and Laura Bird. (App. 083, R. Doc. 25-1) Instead, removal was accomplished by the Tribal Business Council making a series of buy-out offers using false representations to the effect that the aggregate and concrete project were not making any money, were failing, and were about to become defunct. In its decision, the Court goes on to find that when the parties began negotiating the buyout, to assess the value of its interest, Bird requested financial and sales information, and the request was denied. In the course of the negotiations, the Tribal Business Council provided Bird Industries with information concerning the project's past income and expenses



which Bird Industries contends was false and misleading. Bird Industries contends that the records relating to assets, production, sales, financial disbursements, accounts receivable, and work in progress went undisclosed or were distorted in order to give Bird Industries the impression the operation had little or no monetary value and little to no chance for success.

In May of 2017, Bird Industries accepted a \$320,000.00 offer to sell its interest in the Joint Venture and Lakeview Aggregates LLC to an arm or entity of the Tribal Business Council called the Four Bears Segment d/b/a Four Bears Economic Development Corporation. This was a Tribal Business Council's chartered, not-for-profit Corporation. *Omitted from the Court's decision is the fact that the check for \$320,000.00 paid to Laura Bird was drawn directly on the Tribal Business Council's bank account and was signed by the Tribal Business Council's Chairman.*

*The court decision also errs in saying that after Bird Industries sold its interest in the project, a company from Texas, Focus Energy, was hired to do marketing and perform some management functions for the aggregate and ready-mix operation. In fact, the hiring of Focus Energy took place months prior to the buyout. It was disclosures by employees of Focus Energy to Bird Industries a year and a half after the buyout that exposed the fraud and theft that had taken place by the Tribal Business Council.*

As the Court states in its decision in October of 2018, Laura Bird was informed by an employee of Focus Energy, Brandon Bentley, that the Tribal Business Council had established numerous bank accounts in North Dakota, Texas, and other states to enable it to hide millions of dollars in income from the sale of aggregate and ready-mix owed to Bird. Bentley informed Laura Bird that money was being disbursed to persons who were not entitled. Bentley told Laura Bird that Tribal Business Councilman, Frank Grady and Jolene Lockwood had conspired to get Laura Bird and Bird Industries removed from the project in order to gain control over the project's funds and assets. Bentley also told Laura Bird, owner of Bird Industries, that there were bank records from bank accounts at Cornerstone Bank that had not been disclosed to Laura Bird or Bird Industries that would confirm his accusations. Bird Industries was able to obtain these records from another Focus Energy employee, Kirk Bailey. The records confirmed Bentley's accusations.

In the Amended Complaint, Bird Industries allege other instances of fraud and theft by the Tribal Business Council including interstate transportation and sale of equipment in which Bird Industries had an interest. The Amended Complaint claims there were withholdings of millions of dollars of profits owed to Bird Industries from the aggregate and concrete project. In support of its assertion of a continuing criminal enterprise, Bird Industries alleged in its

Amended Complaint specific instances where the Tribal Business Council has committed similar acts of fraud and theft of money owed to contractors who the Tribal Business Council had hired to do construction work on reservation projects and who were not paid for their work. The Amended Complaint alleges these predicate acts violate 18 U.S.C. § 2314 which also prohibits wire fraud and the interstate transportation of stolen property.

Bird Industries did not learn of these unlawful activities until a year and a half later. On October 23, 2019, Bird Industries filed a Demand for Arbitration with the American Arbitration Association as required for dispute resolution in the Buyout Agreement. (App. 071, R. Doc. 22, at 5). The Demand for Arbitration named both the Three Affiliated Tribes and its Four Bears Segment Economic Development Corporation as Respondents. The parties selected former federal Magistrate Judge Karen Klein as the arbitrator. On November 12, 2019, the Respondents filed a Motion to Dismiss. Discovery was permitted only on the issue of sovereign immunity and waiver thereof. The Arbitrator dismissed the case on December 28, 2020. The arbitrator said the Tribal Business Council was immune from suit based on tribal sovereign immunity. The arbitrator found that no waiver had occurred.

The Plaintiffs commenced this action in Federal Court on March 30, 2021. The Complaint contains two claims. The first claim is a civil RICO action

(18 U.S.C. § 1962(c)) by Bird Industries against the Tribal Business Council. The second claim is made by Laura Bird, individually, against the Tribal Business Council for theft, fraud, and interference with business advantage.

The Tribal Business Council filed a Rule 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction. The Court granted the Motion on July 11, 2022, based on a finding of sovereign immunity. Bird Industries and Laura Bird have appealed the dismissal. In its decision of July 11, 2022, the Court acknowledges the Tribal Business Council made three contentions for entitlement to dismissal. These were (1) this was an “internal tribal dispute”, (2) there was a “failure to exhaust tribal court remedies”, and (3) the defendants were entitled to Sovereign Immunity.” (App. 084, R. Doc. 30 at 6, Para III).

### **SUMMARY OF THE ARGUMENT**

The trial court abused its discretion and committed plain error by refusing to apply U.S. Supreme Court and the 8th Circuit law that says inclusion of a mandatory arbitration clause in a Contract with an Indian Tribe constitutes a waiver of the Tribe’s sovereign immunity.

The Standard of Review is *De Novo*, for abuse of discretion and plain error. In *Central Improvement Co. v. Cambria Steel Co.*, 210 F. 696 (1913), the Court said, “an appeal in equity in the federal courts results in a trial de

novo, the appellate court is not, in our opinion, so powerless that it is compelled to affirm an unjust decree.”

### **ARGUMENT**

As to the issue (1), whether this case presents an internal tribal dispute, the Court found, “This case does not involve any of the internal tribal affairs such as Tribal Membership, politics, or domestic relations to which the intra-tribal dispute doctrine typical applies. Thus, the intra-tribal dispute doctrine does not apply.” (App. 084, R. Doc. 30, at 7).

As to issue (2), whether there was a failure to exhaust tribal court remedies the Court stated, “No provision of the RICO statute authorizes tribal court jurisdiction. Because of this the Court concluded the tribal courts lack jurisdiction”. (App. 084, R. Doc. 30, at 7).

As to issue (3), dismissal was granted based upon the trial Court’s determination that the Tribal Business Council was entitled to sovereign immunity. (App. 084, R. Doc. 30, at 9-10).

Bird Industries’ rebuttal is that sovereign immunity was waived by inclusion of a mandatory arbitration clause in a contract between Bird Industries and one of the sub-entities of the Tribal Business Council called Four Bears Economic Development Corporation. The Court’s response to this rebuttal argument is that the Articles of Incorporation of the Development

Corporation require that a waiver of sovereign immunity must (1) be explicit, (2) be contained in a written contract, and (3) be specifically approved by the Tribal Business Council. (App. 084, R. Doc. 30, at 9).

The Court found the Tribal Business Council's Motion to Dismiss was "a factual attack by citing to numerous documents outside the pleadings in support of its contention the Court lacks subject matter jurisdiction." (App. 084, R. Doc. 30, at 6).

On page 5 of its decision, the Court recites *Osborn v US*, 918 F.2d 724 (8<sup>th</sup> Cir 1990). Bird Industries concedes that a motion to dismiss for lack of subject matter jurisdiction per Rule 12 (b) (1) may challenge the factual truthfulness of the plaintiff's jurisdictional allegations. The Osborn court explained factual attacks saying that in a factual attack based on a 12 (b) (1) motion a trial court has the power to decide whether to hear the case and is free to weigh the evidence to satisfy itself on whether it has the power to hear the case. The trial court can evaluate for itself the merits of jurisdictional claims, and the plaintiff has the burden of proof that jurisdiction does exist.

Bird Industries accepts that burden and relies on decisions of the U.S. Supreme Court, decisions of the 8<sup>th</sup> Circuit Court of Appeals, findings made by the District Court in its decision of July 11, 2022, and in findings of the lower court in its previous decisions.

As for support provided by U.S. Supreme Court decisions, Bird Industries relies on *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001). In *C & L Enterprises, Inc.* the U.S. Supreme Court held that a mandatory arbitration clause in a contract with an Indian Tribe is a waiver of the Tribe's sovereign immunity. There is no requirement for a statement that sovereign immunity be explicitly stated in the contract in order that there be a waiver of sovereign immunity.

A dispute between the majority and a dissenter in *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011) is instructive. In *Amerind* Justice Kermit Bye dissented because he felt the majority had not adhered to the U.S. Supreme Court's directive in *C & L Enterprises, Inc.*, *supra*. Justice Bye stated:

“[W]e believe it is clear that *any dispute arising from a contract* cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity...The arbitration clause...would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed.”

Justice Bye went on to state he objected to the majority's lack of clarity. He wrote:

“The Eighth Circuit had addressed this same issue prior to *C & L Enterprises*, also deciding a tribe clearly waived its immunity "with respect to claims under the contract" by entering into an

agreement containing an arbitration clause, concluding "[b]y definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense.... The parties clearly manifested their intent to resolve disputes by arbitration, and the Tribe waived its immunity with respect to any disputes under the contract." Citing *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.*, 50 F.3d 560, 562-63 (8<sup>th</sup> Circ. 1995) (emphasis added)

Prompted by Justice Bye's dissent in *Amerind* (see footnote # 9) the majority clarified its decision with this comment:

"Although we need not decide whether ARMC was amenable to suit, we disagree with the dissent's assertion that ARMC waived its immunity through the Scope of Coverage agreement's arbitration provision. The provision in question is housed under the heading "Non-Binding Arbitration" and provides: "If [TMHA] and [ARMC] do not agree whether coverage is provided by the Scope of Coverage document, then either party may make a written demand for arbitration." (emphasis added). This provision is readily distinguishable from the arbitration provisions that operated as express waivers of tribal immunity in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001), and *Rosebud*, 50 F.3d 560 (8th Cir.1995). Unlike the provision in the present case, the arbitration provisions in those cases expressly required *binding* arbitration and *judicial enforcement* of arbitration awards. *C & L*, 532 U.S. at 414-15, 121 S.Ct. 1589; *Rosebud*, 50 F.3d at 562-63. Also, unlike the plaintiffs in the present case, the plaintiffs in both *C & L* and *Rosebud* were parties to the contracts containing the arbitration provisions at issue. *C & L*, 532 U.S. at 414, 121 S.Ct. 1589; *Rosebud*, 50 F.3d at 563." (emphasis added)

In *Dillon v. BMO HARRIS BANK, NA*, No. 16-mc-5-CVE-TLW (N.D.

Okla. Feb. 4, 2016) the Court also cited *C & L Enterprises, Inc.*, *supra*. It observed that *C & L Enterprises, Inc.*, *supra*, was a case in which waiver was



found because of the language in the contract. Specifically, the waiver language referred to in the contract was a mandatory arbitration clause. The *Dillon* decision supports the assignment of liability to the Tribal Business Council in this case and does not support that it has sovereign immunity.

*Shingobee Builders, Inc v. North Segment Alliance*, 350 F. Supp. 3d 887 (D.N.D. 2018), should also be accepted as authority supporting Bird Industries in this case. In *Shingobee*, the same Tribal Business Council as is being sued here was deeply involved in the activity of one of its sub-entities that gave rise to its liability. Sovereign immunity was found to have been waived. While the facts of the case may have been different, the fact that the actions of a sub-entity of the Tribal Business Council gave the Council liability is the same principal that should be applied here.

If *Shingobee*, *id*, were not enough, the lower Court's findings recited in its decision of July 11, 2022, expressly contradict any claim of sovereign immunity because the unlawful RICO activities were committed by sub-entities, arms, and corporations created by the Tribal Business Counsel and not by the Counsel itself. The Tribal Business Counsel tries to distance itself from the actions of its segments, sub-entities, arms, and corporations. But the Council should recognize that because of its Constitution and its intimate involvement and authority it holds over these sub-entities, the Council itself

is liable for the actions of these sub-entities. The following quotes from the lower court's decision in this case give an interesting perspective of the Court's own view after having access and review of the entire record. These are direct quotes:

“The Tribal Business Council is vested with the authority to manage all the economic affairs and enterprises of the Three Affiliated Tribes. The Tribal Business Council is responsible for all actions taken on behalf of the Three Affiliated Tribes including those taken in the name of any of its officers, arms, segments, employees, department managers, commissions, corporate entities, and sub-entities.” (emphasis added)

“In the course of the negotiations, the Tribal Business Council provided Bird Industries with information concerning the project's past income and expenses Bird Industries contends were misleading. Bird Industries contends that records relating to assets, production, sales, financial disbursements, accounts receivable, and work in progress went undisclosed or were distorted in order to give Bird Industries the impression the operation had little or no monetary value and little chance for success.” (emphasis added)

“In June of 2015, Bird Industries began excavating aggregate and the development of a ready-mix plant to process aggregate and manufacture concrete. In the following months, the Tribal Business Council defaulted on its agreement to contribute 50% toward the cost of goods and services for the project. As a result, Bird Industries advanced \$3,007,888.98 to cover the cost of goods and services for the project, one half of which was chargeable to the Tribal Business Council. (emphasis added)

“In June of 2016, the Tribal Business Council, in the belief that Bird mismanaged the project, advised Bird Industries that it was being removed from all day-to-day activities of the aggregate and ready-mix operations. The Tribal Business Council demanded that Bird Industries sell its interest in the Joint Venture. The parties began negotiating a buyout. To assess the value of its interest, Bird

Industries requested financial and sales information. The request was denied. In the course of the negotiations, the Tribal Business Council provided Bird Industries with information concerning the project's past income and expenses which Bird Industries contends were misleading." (emphasis added). (*As previously noted, aside from an assertion made by legal counsel, there is no evidence whatsoever in the massive record below that the removal of Bird Industries was related to mismanagement*). (ADD. 015, R. Doc. 29)

On page 5 of its decision, even the lower Court states:

"Bentley told Bird that councilman Frank Grady and Jolene Lockwood had conspired to get Laura Bird and Bird Industries removed from the project in order to gain control over the project's funds and assets. Bentley also told Bird that there were bank records from bank accounts at Cornerstone Bank that had not been disclosed to her or Bird Industries that would confirm his accusations. Bird was able to obtain these records from another Focus Energy employee, Kirk Bailey, and which she contends confirm Bentley's accusations".

"After Bird Industries sold its interest in the project, a company from Texas, Focus Energy, was hired to do marketing and perform some management functions for the aggregate and ready-mix operation. In October of 2018, Laura Bird was informed by an employee of Focus Energy, Brandon Bentley, that the Tribal Business Council had established numerous bank accounts in North Dakota, Texas, and other states to enable it to hide millions of dollars in income from the sale of aggregate" and ready-mix owed to Bird Industries and make disbursements to persons who were not so entitled. (emphasis added). (*As previously noted, the hiring of Focus Energy took place months before Bird Industries was ever removed from the project*).

The Court said the allegations of facts of the case were "deeply troubling" but said it was deferring to Congress to decide whether sovereign immunity should be abrogated. (App. 084, R. Doc. 30, at 12). It is not

necessary that sovereign immunity be abrogated to comply with the U.S. Supreme Court decision in *C & L Enterprises*, supra before justice can be delivered in this case.

On page 10 of the decision, the Court makes these disconcerting statements. It says:

“Even if the arbitration agreement was deemed a valid waiver it is limited to the arbitration of disputes arising out of the purchase agreement.” (emphasis added)

“While an arbitration clause can certainly constitute a waiver of sovereign immunity a waiver cannot be implied and the arbitration clause in this case only contemplates arbitration proceedings related to the purchase agreement.” (emphasis added)

“The waiver does not pertain to the Joint Venture agreement or any of the other instances of fraud alleged in the complaint which form the basis for the Plaintiff’s RICO action.”

What is so disturbing about these statements is the fact that the arbitration case presented to the Arbitrator was all about the fraud, theft, and conspiracy that was committed by the Tribal Business Council to get Laura Bird’s signature on the purchase/buyout agreement. The dispute that should have been arbitrated was whether the Tribal Business Council, through its sub-agencies, arms, employees, or corporations lied to Laura Bird to induce her into entering into a purchase agreement in which she would sell her multi-million-dollar interest in the Joint Venture and Lakeview Aggregates. That inducement was conducted by lying to Laura Bird about the projects past

success and convincing her that the aggregate and concrete ventures were a failure, that it was doomed, and had no future projected value. The provision of the purchase agreement proposed by the Tribal Business Council was based on fraud, conspiracy, deception, and refusal to provide records of the aggregate and concrete project's true financial history. The deception resulted in a payment to Laura Bird of \$320,000.00 which was pennies on the millions of dollars the project was really worth and what the Tribal Business Council, directly and through its arms and sub-entities, had cheated her out of in the past. The pay-out was not much more than the contribution to costs of goods and services the Tribal Business Council had defaulted in paying. As the Court found in its decision:

“In the following months, the Tribal Business Council defaulted on its agreement to contribute 50% toward the cost of goods and services for the project.” (App. 084, R. Doc. 30, at 2). (Emphasis added)

Saying that the purchase/buyout agreement did not involve the theft, fraud, and conspiracy upon which the RICO claims are based is Plain Error.

### CONCLUSION

The trial court abused its discretion and committed plain error in determining that sovereign immunity was not waived by a mandatory arbitration clause in a contract that was entered into with sub-entities of the Tribal Business Council.

Respectfully submitted this 22<sup>nd</sup> day of August, 2022.

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## CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface (Times New Roman, Size 14) using Microsoft Word for Microsoft 365 Apps for Business (for Windows). As required by Fed. R. App. P. 32(a)(7)(B), I further certify that Appellant's Brief contains 4,856 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).

Dated: August 22, 2022

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## **CERTIFICATE OF SERVICE**

I hereby certify that on August 22, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that in this case are registered CM/ECT users and that service will be accomplished by the CM/ECF system.

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