No. 22-2271

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEAN S. SENECA,

Plaintiff-Appellant,

vs.

GREAT LAKES INTER-TRIBAL
COUNCIL, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 21-cv-204-wmc
Hon. William M. Conley, District Judge

RESPONSE BRIEF OF DEFENDANT-APPELLEE
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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court : 22-2271
Short Caption: Seneca v. Great Lakes Inter-Tribal Council, Inc.

1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

   Great Lakes Inter-Tribal Council, Inc.

2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Husch Blackwell LLP

3) If the party or amicus is a corporation:

   (i) Identify all its parent corporations, if any; and

   Not applicable.

   (ii) List any publicly-held company that owns 10% or more of the party's or amicus' stock:

   Not applicable.

Attorney's Signature: s/ Dieter J. Juedes Date: 12/02/2022

Attorney's Printed Name: Dieter J. Juedes

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ☒ No ☐

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Not applicable.

(iv) List any publicly-held company that owns 10% or more of the party's or amicus' stock:

Not applicable.

Attorney's Signature: s/ Samuel M. Mitchell Date: 12/02/2022

Attorney's Printed Name: Samuel M. Mitchell

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒

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JURISDICTIONAL STATEMENT

The brief of Plaintiff-Appellant Dean Seneca ("Seneca" or "Appellant"), filed on November 2, 2022, contains no "Statement of Jurisdiction." Therefore, Appellant has not provided a jurisdictional statement that is either complete or correct.

Pursuant to Fed. R. App. P. 28(a)(4), Defendant-Appellee Great Lakes Inter-Tribal Council, Inc. ("GLITC" or "Appellee") hereby submits its Jurisdictional Statement.

A. Jurisdiction of the District Court

In this appeal, Seneca appeals the judgment of dismissal entered in Western District of Wisconsin Case Number 21-CV-304-WMC, the action Seneca filed against GLITC. The court has subject matter jurisdiction over the case under 28 U.S.C. § 1331 because Seneca asserts claims arising under the laws of the United States, including Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act of 1990 ("ADA"), the Age Discrimination in Employment Act of 1967 ("ADEA"), and the Genetic Information Nondiscrimination Act of 2008 ("GINA").

B. Jurisdiction of the Court of Appeals

The United States Court of Appeals has jurisdiction in this appeal under 28 U.S.C. § 1291. Seneca's appeal is taken from the final decision of the U.S. District Court for the Western District of Wisconsin entered on May 23, 2022, by the Honorable William M. Conley granting GLITC's motion to dismiss and dismissing this action. On May 23, 2022, the clerk entered judgment dismissing the action.

The Notice of Appeal was filed with the district court on July 19, 2022.

C. Remaining Requirements Under Circuit Rule 3(c)(1)

This is a civil case with no criminal proceedings. There is no prior litigation in a district court that is related to this appeal that, although not appealed, (a) arises out of a criminal conviction, or (b) has been designed by the district court as satisfying the criteria of 28 U.S.C. § 1915(g).

STATEMENT OF THE ISSUES

There are two issues on appeal:

1. Whether GLITC, an entity wholly owned and operated by 11 federally-recognized Indian Tribes, is entitled to tribal sovereign immunity.

The district court answered this question "yes," and dismissed this action.

2. Whether GLITC meets the definition of "Indian tribe" under Title VII, the ADA, the ADEA, and GINA and, therefore, is not an employer subject to liability under those statutes.

The district court declined to answer this question because it answered "yes" to the question of whether GLITC is entitled to tribal sovereign immunity.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is not appropriate under Fed. R. App. P 34(a) because the parties' briefs and the record adequately present the facts and legal arguments, and oral argument will not significantly aid the court's decisional process.

STATEMENT OF THE CASE

Seneca's brief does not contain a Statement of the Case setting forth the facts relevant to the issues on appeal with appropriate references to the record. Fed. R. App. P. 28(a)(6). Seneca does not provide record citations to support his allegations and assertions throughout his brief.

A. GLITC

GLITC is a Wisconsin non-profit corporation. (D.Ct. Doc.#11: 1). It is a consortium of federally recognized Indian tribes in Wisconsin and the Upper Peninsula of Michigan. (D.Ct. Doc.#11: 1). The consortium includes: the Bad River Band of Lake Superior Tribe of Chippewa Indians, Forest County Potawatomi Community, Ho-Chunk Nation, Lac Courte Oreilles Band of lake Superior Chippewa Indians of Wisconsin, Lac du Flambeau band of Lake Superior Chippewa Indians, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Menomonee Indian Tribe of Wisconsin, Oneida Nation, Red Cliff Band of Lake Superior Chippewa Indians, Saint Croix Chippewa Indians, Sokaogon Chippewa Community, and Stockbridge-Munsee Community. (D.Ct. Doc.#11: 1-2).

GLITC's mission is "to enhance the quality of life for all Native people." GLITC's sole purpose is to support its member tribes by providing services and assistance to them. (D.Ct. Doc.#11: 2).

GLITC is headquartered at 2932 Highway 47 North, Lac du Flambeau, Wisconsin 54538. (D.Ct. Doc.#11: 2). GLITC's headquarters is located on the lands of the Lac du Flambeau Band of Lake Superior Chippewa Indians, which was established by the Treaty of 1954. (D.Ct. Doc.#11: 2). Nearly all GLITC's operations

occur within these tribal boundaries. (D.Ct. Doc.#11: 2). Likewise, the vast majority of GLITC's employees work on these tribal lands. (D.Ct. Doc.#11: 2).

GLITC's primary operations include providing government service systems and technical assistance to its member tribes to address the needs of tribal members living on or near reservations and tribal lands. (D.Ct. Doc.#11: 3). GLITC offers the following programs for the benefit of its member tribes: (1) Economic Development Programs; (2) Family and Child Services; (3) Aging and Disability Services; (4) Elder Services; (5) Health and Epidemiology; (6) Prevention Programs; and (7) Vocational Training and Rehabilitation Services. (D.Ct. Doc.#11: 3).

GLITC receives funds through a combination of (1) dues paid by member tribes; and (2) federal, state, and private grants. GLITC does not generate its own revenue. (D.Ct. Doc.#11: 3). GLITC is a tax-exempt section 501(c)(3) non-profit organization. (D.Ct. Doc.#11: 3). GLITC funnels all money it obtains into programs for its member tribes. (D.Ct. Doc.#11: 3).

B. <u>The Complaint</u>

Seneca generally alleges that GLITC discriminated against him by terminating him based on his race, color, national origin, age, sex, gender identity, and sexual orientation. (D.Ct. Doc.#1-1: 1). Specifically, Seneca alleges that GLITC staff members "conspired heavily together" in violation of Title VII "with intent to inflict career ending damage" on Seneca pre-dating his start date with GLITC. (D.Ct. Doc.#1-1: 1). Seneca also alleges that GLITC staff members harassed him and created a hostile work environment. (D.Ct. Doc.#1-1: 1). In addition, Seneca alleges that GLITC retaliated against him after his termination. (D.Ct. Doc.#1-1: 3).

Seneca alleges that GLITC does not enjoy tribal sovereign immunity because, in part, GLITC is a "corporate citizen" of Wisconsin and subject to state civil rights laws. (D.Ct. Doc.#1-1: 2). Seneca alleges that the absence of published case law involving GLITC is further evidence that GLITC is subject to the "Wisconsin Fair Employment law." (D.Ct. Doc.#1-1: 2).

C. The Motion to Dismiss

On October 5, 2021, GLITC moved to dismiss the Complaint under Fed. R. Civ P. 12(a)(1) and 12(a)(6). (D.Ct. Doc.#9: 1). GLITC first argued that the action is barred by tribal sovereign immunity and must be dismissed. (D.Ct. Doc.#10: 6-12). GLITC also argued that the Complaint failed to state a claim for relief because GLITC meets the definition of "Indian tribes" under Title VII, the ADA, the ADEA, and GINA and is therefore not an "employer" subject to liability under these statutes. (D.Ct. Doc.#10: 12-13).

On October 27, 2021, Seneca filed a brief in opposition to GLITC's motion to dismiss. (D.Ct. Doc.#14). On November 8, 2021, GLITC filed a reply brief in support of its motion. (D.Ct. Doc.#15).

D. The District Court's Decision and Judgment

In a decision and order dated May 23, 2022, the district court granted GLITC's motion to dismiss. (D.Ct. Doc.#18). In so holding, the court ruled that GLITC is entitled to tribal sovereign immunity because it is an "arm" of the federally recognized Indian Tribes that own and operate GLITC. (D.Ct. Doc.#15: 1, 11-12). Accordingly, the court entered judgment on the same day dismissing the action. (D.Ct. Doc.#19).

SUMMARY OF ARGUMENT

1. This Court should affirm the dismissal of the Complaint because tribal sovereign immunity bars Appellant's claims. Because federally recognized Indian tribes are sovereign entities, they are immune from suit absent waiver or congressional abrogation. An action against a tribal enterprise is, in essence, an action against the tribe itself. Therefore, GLITC, a tribal entity wholly-owned and operated by multiple federally recognized Indian Tribes, is entitled to tribal sovereign immunity. Accordingly, tribal sovereign immunity bars Appellant's claims against GLITC.

2. Appellant asserts that GLITC waived tribal sovereign immunity. Appellant has the burden of proving that there has been a clear, unequivocal, and express waiver of tribal sovereignty. Appellant fails to carry this burden. There is no clear, express, and unequivocal waiver of tribal sovereign immunity by GLITC.

3. Appellant's due process argument fails because the Fifth and Fourteenth Amendments do not apply to GLITC. Those constitutional provisions only limit federal and state authority – they do not constrain Indian tribes, which are separate sovereigns pre-existing the Constitution.

4. The Court should alternatively affirm the judgment because the Complaint fails to state a claim upon which relief can be granted against GLITC under Title VII, the ADA, the ADEA, or GINA. GLITC meets the statutory definition of "Indian tribe" and, therefore, it is not a covered "employer" under these anti-discrimination statutes. Thus, GLITC is not subject to liability under these statutes.

ARGUMENT

I. The Complaint Was Properly Dismissed as Barred by Tribal Sovereign Immunity.

This Court should affirm the judgment of dismissal because tribal sovereign immunity bars Appellant's claims against GLITC. Appellant argues that tribal sovereign immunity extends only to federally recognized tribes and not to nonprofit tribal entities like GLITC. Nothing in the record or case law supports Appellant's erroneous contention. Under controlling case law, as a non-profit entity composed of and operated solely by multiple federally recognized Indian tribes, GLITC is entitled to tribal sovereign immunity the same as an individual tribe.

A. GLITC is Entitled to Tribal Sovereign Immunity.

It is well-settled that Indian tribes possess common-law sovereign immunity from suit in federal and state court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) ("Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government.") (citation omitted); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993) ("Indian tribes are considered 'domestic dependent nations' which 'exercise inherent sovereign authority over their members and territories.'"). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Altheimer*, 983 F.2d at 812 ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.").

GLITC, a non-profit entity composed of and operated solely by multiple federally recognized Indian tribes (*see infra*, pp. 7-8) is entitled to immunity the same as an individual tribe. Case law makes clear that tribal corporate and economic entities created by Indian tribes – like GLITC – maintain tribal sovereignty and cannot be sued absent a clear waiver by the tribe or congressional abrogation. *See, e.g., Kiowa*, 523 U.S. at 753; *Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 686 (7th Cir. 2011); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393 (E.D. Wis. 1995); s*ee also Weeks Const., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986); *Stathis v. Marty Indian School Board, Inc.*, 560 F. Supp. 3d 1283 (N.D. SD 2021).

The U.S. Supreme Court has held that the arm of a federally recognized Indian tribe benefits from tribal sovereign immunity the same as the tribe. In *Kiowa*, a company sued the Kiowa Tribe after the Tribe defaulted on a promissory note concerning a tribal entity's purchase of certain stock. 523 U.S. at 753. The Tribe moved to dismiss the suit. *Id.* The Court held that the Tribe was entitled to tribal sovereign immunity as against a claim asserting its default on the financing of its tribal entity's stock purchase. *Id.* at 753, 760; *see Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056, 1061 (W.D. Wis. 2010) ("In the absence of a clear waiver, suits against tribes (and tribal corporations) are barred by sovereign immunity.") (citing *Kiowa*, 523 U.S. at 753).

Courts dismiss lawsuits against tribal enterprises because tribal sovereign immunity bars suits against "arms of the tribe." For example, in *Barker*, a

terminated employee sued his former employer, a tribal casino, the tribal gaming commission, and the tribal legislature for wrongful discharge. 897 F. Supp. at 391-92. The court granted the tribal defendants' motions to dismiss, holding that the legislature and its "subordinate economic enterprises" (*i.e.*, the casino and the gaming commission) were immune from suit in federal court. *Id.* at 393-94. The court reasoned that "because 'an action against a tribal enterprise is, in essence, an action against the tribe itself,'" the commission and the casino, both wholly owned and operated tribal entities, were entitled to tribal sovereign immunity absent waiver or legislative abrogation. *Id.* (quoting *Local IV-302 Int'l Woodworkers Union of Am. v. Menomonee Tribal Enters.*, 595 F. Supp. 859, 862 (E.D. Wis. 1984) (action against an incorporated tribal enterprise was barred by tribal sovereign immunity)).

Tribal corporate and economic entities created by Indian tribes like GLITC maintain tribal sovereignty and cannot be sued absent a clear waiver. Business entities owned and operated by Indian tribes enjoy the same tribal sovereign immunity as the Indian tribes themselves. Thus, tribal sovereign immunity applies unless it is expressly waived. *See, e.g.*, *Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians, et al.*, 807 F.3d 184, 202 (7th Cir. 2015) (holding that language in tribal and bond resolutions operated as waivers of sovereign immunity, including as to tribal economic development corporation); *Wells Fargo Bank,* 658 F.3d at 686 (holding that the Lake of the Torches Economic Development Corporation, a tribal corporation wholly owned by a federally recognized Indian tribe, did not waive tribal sovereign immunity because the

subject indenture was void under the Indian Gaming Regulatory Act); *Altheimer*, 983 F.2d at 812 (noting that a provision of the Sioux Tribe's tribal charter creating a subsidiary tribal manufacturing subdivision included an express waiver of the tribal enterprise's sovereign immunity).

Other federal appellate circuits also uniformly hold that entities functioning as arms of an Indian tribe share in tribal sovereign immunity just as the tribe itself. *See, e.g.*, *Alabama v. PCI Gaming Authority*, 801 F.3d 1278, 1287-88 (11th Cir. 2015) ("[W]e agree with our sister circuits that have concluded that an entity that functions as an arm of a tribe shares in the tribes immunity"); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) ("When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe"); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 29 (1st Cir. 2000) ("The Authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (holding that entity that "serves as an arm of the tribe…is thus entitled to tribal sovereign immunity.").

GLITC, composed of and operated solely by federally recognized tribes and its members, with its sole purpose being to support its member tribes through service and assistance. Because GLITC is an arm of the tribes which own and operate the organization, it is entitled to tribal sovereign immunity.

GLITC is a Wisconsin non-profit, tax-exempt corporation owned and controlled by a consortium of federally recognized Indian tribes located in Wisconsin and the

Upper Peninsula of Michigan. (D.Ct. Doc.#11: 1-3). These tribes include: the Bad River Band of Lake Superior Tribe of Chippewa Indians, Forest County Potawatomi Community, Ho-Chunk Nation, Lac Courte Oreilles Bank of Lake Superior Chippewa Indians, Lac Vieux Bank of Lake Superior Chippewa Indians, Menomonee Indian Tribe of Wisconsin, Oneida Nation, Red Cliff Bank of Lake Superior Chippewa Indians, Saint Croix Chippewa Indians, Sokaogon Chippewa Community, and Stockbridge-Munsee Community. (D.Ct. Doc.#11: 1-2). Governed by a Board of Directors composed of a delegate from each of the member tribes (typically, a tribe's Chairperson or President), GLITC is funded by a combination of dues from member tribes and federal, state, and private grants. (D.Ct. Doc.#11: 2-3). Beyond member dues, GLITC does not generate revenue on its own, and all money GLITC receives through grants or other sources is directed into programs for its member tribes. (D.Ct. Doc.#11: 3). Indeed, GLITC's stated purpose is to support its member tribes by providing services and assistance to them. (D.Ct. Doc.#11: 3).

Accordingly, under controlling case law, GLITC functions as an arm of these tribes and, therefore, it is entitled to tribal sovereign immunity.

B. Appellant's Arguments Against GLITC's Entitlement To Tribal Sovereign Immunity Are Unsupported.

Appellant challenges GLITC's entitlement to tribal sovereign immunity, arguing that as a matter of policy, GLITC should not have such immunity because it is a nonprofit formed under Wisconsin law. No authority supports these arguments. As an initial matter, Appellant contends that tribal sovereign immunity can only be "granted to Tribal Nations and/or by Tribal Council Resolution provided by each of

the 11 Tribes in Wisconsin." (App.Br. at 3). This is incorrect. Tribal sovereign immunity is a quality inherent to tribes as autonomous political entities, retaining their original natural rights regarding self-governance. *See Santa Clara Puebla*, 436 U.S. at 55; *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994) (observing that tribal sovereign immunity "predates the birth of the Republic."). Immunity is not "granted."

1. GLITC is Properly Treated as an Indian Tribe for Purposes of Tribal Sovereign Immunity.

Appellant also argues that GLITC is not entitled to tribal sovereign immunity because GLITC "is not an Indian Tribe." (App.Br. at 3). This is also incorrect. Courts uniformly hold that business entities owned and operated by Indian tribes enjoy the same tribal sovereign immunity as the Indian tribes themselves. *Barker*, 897 F. Supp. at 393; *Local IV-302*, 595 F. Supp. at 859; s*ee also Weeks Const.,* 797 F.2d 668; *Stathis*, 560 F. Supp. 3d 1283; *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131 (N.D. Okla. 2001); *accord Stifel,* 807 F.3d at 202; *Wells Fargo Bank,* 658 F.3d at 686; *Altheimer*, 983 F.2d at 812. Appellant argues the law as he wishes it to be, but he does not cite any authority supporting his conclusion.

Appellant cites *Yellen v. Confederated Tribe of Chehalis Reservation*, 141 S. Ct. 2434 (2021) for the proposition that GLITC is not entitled to tribal sovereign immunity because it is not a federally recognized Indian tribe. (App.Br. at 5, 8). *Yellen* does not support Appellant's position. In *Yellen*, the Supreme Court answered the question of whether Alaska Native Corporations (ANCs) were "Indian

tribe[s]" under the Indian Self-Determination and Education Assistance Act (ISDA), and therefore eligible to receive CARES Act relief. *Id.* at 2438. The *Yellen* court held that while ANCs are not federally recognized tribes, they met the definition of "Indian tribes" under the ISDA and, therefore, they were eligible to receive monetary relief under the CARES Act. *Id.* Critical here, *Yellen* never addressed the issue of tribal sovereign immunity whatsoever, meaning Appellant's reliance on *Yellen* to support his position misses the mark entirely.[1]

Appellant also argues that tribal sovereign immunity does not apply to "multiple tribes under the cloak of one corporation." (App.Br. at 13). Appellant cites no authority to support this contention. In fact, case law is contrary to this argument. For example, in *Amerind Risk Management Corporation v. Malaterre*, the Eighth Circuit held that an administrator of a self-insurance risk pool for Indian housing authorities was entitled to tribal sovereign immunity as "an arm of the tribe" where the administrator was incorporated by three charter tribes and issued a federal charter. 633 F.3d 680, 685 (8th Cir. 2011) (citing *Hagen*, 205 F.3d at 1043). Likewise, in *Taylor v. Alabama Intertribal Council Title IV*, the Eleventh Circuit held that tribal sovereign immunity barred a 42 U.S.C. § 1981 employment

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[1] Appellant makes several references to ANCs throughout his appellate brief, essentially arguing that because "no court has ever found that these corporations or associations [ANCs] possess sovereign immunity from suit," GLITC is not entitled to tribal sovereign immunity. (App.Br. at 9-11). Again, Appellant is incorrect. GLITC and ANCs are not the same. *See Yellen*, 141 S. Ct. at 2438-2440 (summarizing the "unique circumstances" of Alaska and its indigenous population). Whether ANCs are entitled to tribal sovereign immunity does not answer the question of whether GLITC – an entity wholly owned and operated by federally recognized Indian tribes – is entitled to tribal sovereign immunity. Therefore, the Court should disregard Appellant's references to ANCs.

discrimination claim against an intertribal consortium, reasoning that subjecting the counsel to suit would contradict congressional intent and interfere with tribal self-government. 261 F.3d 1032, 1034-36 (11th Cir. 2001). *Taylor* specifically explained: “AIC is an intertribal consortium, with a Board dominated by tribal chiefs and tribe members, organized to promote business opportunities for and between tribes; as such, we conclude that it is entitled to the same protections as a tribe itself.” *Id.* at 1036.

This same description applies to GLITC, which is composed of and operated *solely* by federally recognized tribes and its members, having the sole purpose of supporting its member tribes. (*See, infra,* pp. 7-8). Like the tribal entities in *Amerind* and *Taylor*, GLITC is entitled to tribal sovereign immunity.

Appellant cites *Dille v. Council of Energy Resource Tribes* to argue that because GLITC is not a federally-recognized Indian tribe, it is not entitled to tribal sovereign immunity. (App.Br. at 4) (citing 801 F.2d 373 (10th Cir. 1986)). *Dille* does not support Appellant’s argument. In *Dille*, the “sole issue” presented on appeal was whether a consortium of federally-recognized Indian tribes qualified for the Indian tribe exemption in section 701(b) of Title VII. *Id.* at 374. The Tenth Circuit answered “yes,” the Indian tribe exemption did exclude the consortium from the definition of covered employer. *Id.* The *Dille* court did not consider tribal sovereign immunity whatsoever. Therefore, Appellant’s reliance on *Dille* is misplaced.

2. The Wisconsin *McNally* Case is Irrelevant and Does Not Change the Analysis.

Appellant argues that what constitutes an "arm of the tribe" for purposes of tribal sovereign immunity is unclear under case law. App.Br. at 13. That is incorrect, as shown above. Entities that provide services or support to an Indian tribe or consortium of tribes are treated as an Indian tribe for purposes of tribal sovereign immunity. Together, Seventh Circuit cases like *Stifel*, *Wells Fargo*, *Barker*, and *Local IV-302*, and sister circuit cases like *Alabama*, *Allen*, *Ninigret*, and *Hagen*, demonstrate that tribal sovereign immunity extends to a nonprofit organization like GLITC created by more than one federally recognized tribe.

Rather than this clear federal case law, Appellant argues that the Court should refer to *McNally CPA's & Consultants, S.C. v. DJ Host, Inc.*, 2004 WI App 221, 277 Wis. 2d 801, 692 N.W.2d 347 to determine whether GLITC is entitled to tribal sovereign immunity. (App.Br. at 13-15). Plaintiff's contention is erroneous for multiple reasons.

McNally dealt with the narrow question of whether a for-profit non-tribal corporation can escape liability for its debt after an Indian tribe purchased all its shares. The Wisconsin Court of Appeals noted that normally an Indian tribe's purchase of a corporation's stock does not confer tribal immunity on the corporation. *McNally*, 2004 WI App 221, ¶ 6. The court considered nine factors to answer the "narrow question" of "whether tribal immunity is conferred on a corporation when all of the shares of that corporation are purchased by an Indian tribe." 2004 WI App 221, ¶ 7. The nine factors are:

(1) whether the corporation is organized under the tribe's laws or constitution;
(2) whether the corporation's purposes are similar to or serve those of the tribal government;
(3) whether the corporation's governing body is comprised mainly or solely of tribal officials;
(4) whether the tribe's governing body has the power to dismiss corporate officers;
(5) whether the corporate entity generates its own revenue;
(6) whether a suit against the corporation will affect the tribe's fiscal resources;
(7) whether the corporation has the power to bind or obligate the funds of the tribe;
(8) whether the corporation was established to enhance the health, education, or welfare of tribe members, a function traditionally shouldered by tribal governments; and
(9) whether the corporation is analogous to a tribal governmental agency or is more like a commercial enterprise created to generate profits for its owners.

McNally, 2004 WI App 221, ¶ 12.

Subsequent Wisconsin case law has confirmed that *McNally* is a limited holding and does not set out any test for determining tribal sovereign immunity outside the context of a non-tribal for-profit entity whose shares are purchased by an Indian tribe. *Koscielak v. Stockbridge-Munsee Cmty.*, 2012 WI App 30, ¶¶ 12-14, 340 Wis. 2d 409, 811 N.W.3d 451 (*McNally* is a "narrow holding," applicable only when an Indian tribe purchases all shares of an existing, for-profit corporation; eschewing the nine-factor analysis in *McNally* as having "virtually no applicability" outside of those specific case facts). In *Koscielak*, the court noted that *McNally* derived its nine factors from foreign cases, all of which "concluded that the tribal entity was an arm of the tribe and entitled to immunity." 2012 WI App 30, ¶¶ 11-13 (citing, *e.g.*, *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 86 N.Y.2d 553, 658 N.E.2d

989 (1995)). Noting that *McNally* also does not develop these "nonexclusive" factors, the Wisconsin Court of Appeals held that "[b]ecause we do not view the *McNally* factors as a controlling test, we instead follow the general rule of immunity for tribal businesses." *Id.*, ¶¶ 11, 13, 15.

As a decision of the Wisconsin Court of Appeals, *McNally* is not binding on this Court or reflects federal law. It would not even control the analysis in state court because the present case deals with different facts. Indeed, if anything, *McNally* and *Koscielak* support GLITC's entitlement to tribal sovereign immunity because these cases confirm that tribal sovereign immunity is the general rule for tribal businesses, absent facts not present in this case. *See Id.*, ¶ 12 ("*McNally* did not purport to abrogate *the general rule of immunity* outside its specific facts.") (emphasis added).

GLITC does not involve the same facts as *McNally*, which dealt with the different situation of an Indian tribe purchasing all the shares of a for-profit entity that was not originally a tribal entity. Thus, *McNally*'s multi-factor analysis has no bearing on GLITC's sovereign immunity.

Even if the *McNally* factors applied to this case, as the district court held, "all factors adopted in *McNally* point to immunity." (D.Ct. Doc.#18: 8). Applying the *McNally* factors, tribal sovereign immunity properly extends to GLITC. Appellant focuses his disagreement on the first factor, arguing that GLITC is organized under Wisconsin law, not tribal law. (App.Br. at 14-15). This distinction is immaterial. Each constituent member of GLITC is organized under the laws and constitutions of

federally recognized tribes. (D.Ct. Doc.#11: 1-2). The fact that GLITC is a nonprofit under state law does not deprive GLITC – or any of the federally recognized tribes owning and operating GLITC – of tribal sovereign immunity.

Courts have held that tribal sovereign immunity applies to a non-profit tribal entity organized under state law. *See, e.g., McCoy v. Salish Kootenai Coll., Inc.*, 785 F. App'x 414 (9th Cir. 2019) (holding that tribal college incorporated under state law was entitled to tribal sovereign immunity); *Stathis*, 560 F. Supp. 3d 1283 (school board administering a school that was a tribal entity entitled to tribal sovereign immunity; entity was incorporated under state law); *Cain v. Salish Kootenai Coll., Inc.*, CV-12-181-M-BMM, 2018 WL 2272792 (D. Mont. May 17, 2018) (holding that college incorporated under tribal and state law was entitled to tribal sovereign immunity); *Rassi v. Fed. Prgm. Integrators, LLC*, 69 F. Supp. 3d 288 (D. Me. 2014) (holding that a Maine LLC enjoyed tribal sovereign immunity where it was owned by an Indian Reorganization Act § 17 corporation and formed to advance governmental objectives); *Ransom*, 86 N.Y.2d 553 (holding that a nonprofit corporation formed by a tribe under the law of the District of Columbia had tribal sovereign immunity).

In support of his position, Appellant cites to *Somerlott v. Cherokee Nation Distribs.*, 686 F.3d 1144 (10th Cir. 2012) and *Cash Advance and Preferred Cash Loans v. State of Colorado, et al.,* 242 P.3d 1099 (Colo. 2010). Appellant's reliance on these cases is misplaced. In *Somerlott*, the Tenth Circuit in dicta stated that incorporation under state law can preclude a for-profit tribal entity from sharing in

a tribe's sovereign immunity. 686 F.3d at 1149-50. The dicta in *Somerlott* is distinguishable from the present case because GLITC is a non-profit organization.

The Colorado *Cash Advance* decision also does not support Appellant's position. *Cash Advance* did not answer the question of whether a tribal entity — for-profit or non-profit – created under state law by a federally-recognized Indian tribe shares tribal sovereign immunity. Rather, the Colorado Supreme Court reviewed case law on the "arm-of-the-tribe" analysis and remanded the case to the trial court with instructions to conduct the analysis to determine whether two tribal entities shared the immunity of their tribal parents. *Cash Advance*, 242 P.3d at 1111. If anything, the *Cash Advance* court's analysis supports finding that GLITC is entitled to tribal sovereign immunity.

Appellant cites to multiple state and federal court cases applying the "subordinate economic entity analysis" or "arm-of-the-tribe" test. (App.Br. at 17) (citing *J.L. Ward Associates, inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163 (D.S.D. 2012); *Wright v. Prairie Chicken*, 579 N.W.2d 7 (S.D. 1998); *Gayle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996); *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort, et al.*, 629 F.3d 1173 (10th Cir. 2010); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019)). Appellant suggests that the non-exhaustive factors of subordinate economic entity test are appropriate for courts to decide whether non-profit corporations created by multiple Indian tribes enjoy sovereign immunity.

Appellant fails to cite to any Seventh Circuit case adopting the subordinate economic entity test. Indeed, as Appellant concedes, the Seventh Circuit has not established a test to determine whether an organization is entitled to tribal sovereign immunity. (App.Br. at 17). Further, there is conceptual overlap between the *McNally* test and the subordinate economic entity analysis. Therefore, even if the subordinate economic entity analysis controlled this Court's analysis, like the *McNally* test, the balance of factors would weigh in favor of GLITC having tribal sovereign immunity.

Appellant also asserts that *McNally*'s "tribal liability" factor is the "most important" factor. (App.Br. at 15). Appellant argues: "The *McNally* court itself was 'particularly persuaded' by the fact that, when a tribe purchases stock in an existing corporation, the tribe can choose to limit its risk to its investment in the stock." (App.Br. at 15) (quoting *McNally*, 2004 WI App 221, ¶ 13). This quote from *McNally* is irrelevant to this case. Here, there is no question of an investment in an existing non-tribal corporation and the ability to limit risk upon investment. This factor has no bearing in this case.

As noted, *McNally* has been limited to its facts, namely the situation where an Indian tribe purchases all shares of a non-tribal, for-profit corporation. *Koscielak*, 2012 WI App 30, ¶ 12. Further, the *McNally* factors are not a controlling test for determining tribal sovereign immunity. *Id.*, ¶ 15.[2] Thus, there is no authority for

[2] Notably, as *McNally* relates to federal law, the Wisconsin Court of Appeals expressed significant doubt about whether *McNally* can be reconciled with the U.S. Supreme Court's *Kiowa* decision. *Koscielak*, 2012 WI App 30, ¶ 14 (citing *Kiowa*, 523 U.S. at 754-55 (holding

Appellant's assertion that the "tribal liability" factor deserves the most weight.[3] Appellant's reliance on the *McNally* factors does not overcome GLITC's showing that it is entitled to tribal sovereign immunity under controlling federal case law.

C. GLITC Did Not Waive Its Tribal Sovereign Immunity.

Appellant argues that even if GLITC has immunity, GLITC waived its tribal sovereign immunity. (App.Br. at 19-22). Appellant fails to carry his heavy burden of proving waiver of tribal sovereign immunity.

The party claiming waiver of tribal sovereign immunity has the burden of proving a clear and unequivocal waiver applicable to the asserted claims. "As a matter of law, Plaintiff [fails] to meet the high burden of proving the required express, unequivocal, unmistakable, and unambiguous waiver." *In re Greektown Holdings, LLC*, 559 B.R. 842, 856 (Bankr. E.D. Mich. 2016), *aff'd sub nom. Buchwald Capital Advisors, LLC for Greektown Litig. Tr. v. Sault Ste. Marie Tribe of Chippewa Indians*, 584 B.R. 706 (E.D. Mich. 2018), a*ff'd sub nom. In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019). *See also Anderson v. Duran*, 70 F. Supp. 3d 1143, 1151 (N.D. Cal. 2014) ("As the party asserting waiver,

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no distinction for immunity purposes between governmental and commercial activities of a tribe)).

[3] The district court reasoned that "[e]ven assuming these factors apply here, *and* this court is required to weigh the impact of tribal liability to a greater degree than the other factors….GLITC has detailed the adverse impact of a judgment against it: a decrease in funding available for tribal services due to the costs of litigation and a potential judgment against it. Plaintiff makes no effort to dispute this adverse impact." (D.Ct. Doc.#18: 9). (emphasis in original). The same is true on appeal.

it is Anderson's burden to prove the Tribal entities have 'unequivocally expressed' their consent to suit.") (citing *Santa Clara Pueblo*, 436 U.S. at 58).

The bar to prove waiver of tribal sovereign immunity is extremely high. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754; *Altheimer*, 983 F.2d at 812 ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.") (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 508 (1991)). For Congress to abrogate tribal sovereign immunity, it must "unequivocally express[]" that purpose. *Anderson*, 70 F. Supp. 3d at 1151. Likewise, the Supreme Court instructs that "[t]o relinquish its immunity, a tribe's waiver must be clear." *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001); *Barker*, 897 F. Supp. at 394 (explaining that, to be effective, any waiver of tribal sovereign immunity must be unequivocally expressed) (citing *Santa Clara Pueblo*, 436 U.S. at 58-59).

Here, Appellant does not contend that Congress abrogated immunity. Rather, Appellant contends that GLITC waived its sovereign immunity by accepting federal funds. (App.Br. at 19-20). This assertion does not establish a clear waiver of tribal sovereign immunity. Indeed, it is contrary to controlling case law. It is well established that the acceptance of federal funding, even with an agreement not to discriminate in violation of federal law, does not constitute a waiver of tribal sovereign immunity. *See, e.g.*, *Dillon*, 144 F.3d at 583; *Sanderlin v. Seminole Tribe*

of Florida, 243 F.3d 1282, 1289 (11th Cir. 2001) (Even if tribe accepts federal funds in exchange for an implicit promise not to discriminate, the exchange "in no way constitute[s] an express and unequivocal waiver of sovereign immunity and consent to be sued."); *Hagen*, 205 F.3d at 1044 n. 2 ("Nor did the College waive its immunity by executing a certificate of assurance with the Department of Health and Human Services in which it agreed to abide by Title VI of the Civil Rights Act of 1964."); *accord Altheimer*, 983 F.2d at 812 (requiring a tribe to expressly limit its immunity in contract before waiver of the same).

The Eighth Circuit has rejected the argument that Appellant advances here, holding that acceptance of federal funding does not waive tribal sovereign immunity when coupled with the requirement that the recipient comply with federal civil rights law:

> In its agreement with HUD, the contract signed by the Authority specifically provides that "[a]n Indian Housing Authority established pursuant to tribal law shall comply with applicable civil rights requirements, as set forth in Title 24 of the Code of Federal Regulations." *There is no provision in these regulations, however, mandating a waiver of sovereign immunity when a tribal housing authority enters into an agreement with HUD. Because the Authority did not explicitly waive its sovereign immunity, we lack jurisdiction to hear this dispute.*

Dillon, 144 F.3d at 584 (emphasis added).

Likewise, none of the statutes under which Appellant sues GLITC contain express waivers of tribal sovereign immunity. In fact, as GLITC further explains in part III, below, all these anti-discrimination statutes specifically exempt Indian Tribes from coverage. Therefore, contrary to Appellant's assertion, GLITC has not

waived tribal sovereign immunity by allegedly accepting federal grant money and agreeing to abide by federal anti-discrimination laws.

Appellant also argues that GLITC waived its tribal sovereign immunity in its job announcements by its statements affirming that it is an equal opportunity employer and it intends to comply with federal and state laws. (App.Br. at 21-22). Again, Appellant fails to cite to any authority to support his position. As the district court noted, the cited language in the job announcement does not mention, much less explicitly waive, its tribal sovereign immunity. (D.Ct. Doc.#18: 10-11). Courts have held that a statement affirming the intent to comply with federal law does not constitute a waiver of tribal sovereign immunity. *See Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150 (10th Cir. 2011) (rejecting argument that a tribe waived its sovereign tribal immunity because the tribe's handbook indicated the tribe's intent to comply with Title VII).

Appellant has failed to carry his burden of proving a clear and unequivocal waiver of tribal sovereign immunity by GLITC. There is no proof that GLITC made any waiver of tribal sovereign immunity.

II. <u>The Fifth and Fourteenth Amendments' Due Process Clauses Do Not Apply to Tribal Entities.</u>

Appellant argues that applying tribal sovereign immunity to bar his claims against GLITC "amounts to a violation of the due process clause." (App.Br. at 22). Again, Appellant cites no authority to support this conclusion.

Indeed, federal courts have rejected this argument. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained

by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo*, 436 U.S. at 56. The Fifth and Fourteenth Amendments limit only state and federal authority, not the authority of other sovereign governments. *Suarez v. Confederated Tribes & Bands of Yakima Indian Nations*, No. 91-36025, 1993 WL 210727 at *1 (9th Cir. 1993). Further, that Appellant is left without recourse is not a reason to ignore tribal sovereign immunity. *Miller v. Coyhis*, 877 F. Supp. 1262, 1266-67 (E.D. Wis. 1995) (holding that defendant was entitled to tribal sovereign immunity despite no available means for plaintiff to challenge defendant's conduct).

In conjunction with his due process argument, Appellant argues that Public Law 280 preempts tribal sovereign immunity in this case. (App.Br. at 23-26). Again, the Supreme Court has rejected Appellant's argument. *See, e.g.*, *Three Affiliated Tribes of the Fort Berthold Reservation v. World Engineering*, 476 U.S. 877, 892 (1986) ("We have never read Pub.L.280 to constitute a waiver of tribal sovereign immunity, nor found Pub.L.280 to represent an abandonment of the federal interest in guarding Indian self-governance."); *Bryan v. Itasca Cty.*, 426 U.S. 373, 387-388 (1976). Congress passed Public Law 280 to create civil and criminal jurisdiction for the resolution of private disputes between individual Indians or between Indians and non-Indians, not to claim jurisdiction over tribal entities. Therefore, Appellant's reliance on Public Law 280 is misplaced. Accordingly, the district court correctly rejected Appellant's argument under Public Law 280 and held that tribal sovereign immunity bars this action against GLITC.

III. The Judgment Should be Affirmed Alternatively Because the Complaint Fails to State a Claim Upon Which Relief Can be Granted Under Title VII, the ADA, the ADEA, and GINA.

In addition to tribal sovereign immunity, GLITC moved to dismiss this action because it fails to state a claim upon which relief can be granted against GLITC for violation of Title VII, the ADA, GINA, and the ADEA. The district court did not reach this alternative argument because the court dismissed this action based on tribal sovereign immunity. The district court observed that GLITC's alternative argument appears meritorious. (D.Ct. Doc.#18: 6 fn. 3).

Appellant asserts claims against GLITC under Title VII, the ADA, GINA, and the ADEA. (D.Ct. Doc.#1-1: 1-3). These statutes, however, all exclude "Indian tribes" from coverage, specifying that tribes are not "employers" subject to liability. For example, Title VII defines an "employer" as:

> [A] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person**, *but such term does not include…an Indian tribe.***

42 U.S.C. § 2000e(b)(1) (emphasis added).

The ADA, the ADEA, and GINA also exclude Indian tribes from their coverage, providing they are not "employers" subject to liability. *See* 42 U.S.C. § 12111(5)(B)(i) (explicitly excluding Indian tribes from the definition of "employer" under the ADA); 42 U.S.C. § 2000e(b) (explicitly excluding Indian tribes from the definition of employer under GINA); *Reich v. Great Lakes Indian Fish and Wildlife Com'n*, 4 F.3d 490, 496 (7th Cir. 1993) (reading the Indian tribal exemption into the ADEA as "rectifying an oversight.").

It is well established that Title VII's Indian tribe exemption extends to tribal entities. *See, e.g.*, *Jim v. Shiprock Associated Schs., Inc.*, 833 F. App'x 749, 750-52 (10th Cir. 2020); *Thomas v. Choctaw Management/Services Enterprise*, 313 F.3d 910, 911-12 (5th Cir. 2002). Courts have held that an organization formed by a group of tribes fell within the "Indian tribe" exemption of Title VII. *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998); *Dille v. Council of Energy Res. Tribes*, 801 F.2d 373 (10th Cir. 1986).

In *Pink*, a former employee of the Modoc Indian Health Project ("Modoc") sued for alleged violations of Title VII. 157 F.3d at 1187. Like GLITC, Modoc was a nonprofit corporation created by multiple federally recognized Indian tribes for the purpose of providing services to tribal members. *Id.* The Ninth Circuit held that Modoc was an Indian tribe for purposes of Title VII and therefore was not an employer subject to liability. *Id.* at 1188. The Court explained: "Modoc served as an arm of the sovereign tribes, acting as more than a mere business. Modoc's board of directors consisted of two representatives from each…tribal government…Modoc was organized to control a collective enterprise and therefore falls within the scope of the Indian Tribe exemption of Title VII." *Id.*; *see also Hagen*, 205 F.3d at 1043 (explaining that *Pink* effectively "held that a nonprofit health corporation created and controlled by Indian tribes is entitled to tribal immunity…").

The Tenth Circuit likewise has dismissed a discrimination claim against a council of Indian tribes under the Indian tribe exemption. *Dille*, 801 F.2d at 374. In *Dille*, former employees sued the Council on Energy Resource Tribes ("CERT"),

alleging violations of Title VII. *Id.* Like GLITC, CERT was a council comprised of 39 Indian tribes that joined together to manage collectively their energy resources on behalf of their tribal members. *Id.* Also like GLITC, CERT's board of directors was composed of designated representatives of each tribe, and the tribes maintained exclusive control over CERT's operations. *Id.* The Tenth Circuit held that the employees' Title VII claims failed because CERT falls within the Indian tribe exemption to Title VII. *Id.* The Court reasoned that CERT was "entirely comprised of the member tribes and the decisions of the council are made by the designated representatives of those tribes, CERT falls directly within the scope of the Indian tribe exemption…" *Id.* at 376. CERT is the sort of activity that Congress sought to promote when it exempted Indian tribes from Title VII. *Id.* at 375.

GLITC is entirely composed of federally recognized Indian tribes and, therefore, it qualifies as an "Indian tribe" for purposes of claims under the cited federal laws. As an Indian tribe, GLITC is thus not an employer subject to liability under Title VII, the ADA, GINA, or the ADEA. Accordingly, this action fails to state a claim against GLITC upon which relief can be granted. For this alternative reason, the judgment of dismissal should be affirmed.[4]

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[4] Appellant also cites to *State ex rel. Dept. of Human Services v. Jojola*, 660 P.2d 590, 593 (N.M. 1983), *cert. denied*, 464 U.S. 803 (1983), in connection with the statement: "No law or policy concern exists that is more compelling than the protection of the civil rights of American citizens." (App.Br. at 26). The citation to *Jojola*, a case involving jurisdictional disputes related to a paternity petition, does not support Appellant's statement.

CONCLUSION

For the reasons above, this Court should affirm the judgment of the district court dismissing this action.

Dated this 2nd day of December, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record the Defendant-Appellee, furnishes the following in compliance with Fed. R. App. P. 32(g)(1):

I certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,423 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) and Circuit Rule 32 because this brief has been prepared in a proportionally-spaced serif typeface using Microsoft Word in 12-Point Century Schoolbook font.

Date: December 2, 2022. HUSCH BLACKWELL LLP

By: s/Dieter J. Juedes
Dieter J. Juedes

CERTIFICATE OF SERVICE

I certify that on December 2, 2022, pursuant to the Court's Electronic Case Filing Procedures, I electronically filed the foregoing Response Brief of Defendant-Appellee with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I further certify that duplicate paper copies will be mailed so that they will be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the electronic Brief.

Pursuant to Rule 25(d), I certify that on December 2, 2022, the foregoing Response Brief of Defendant-Appellee was sent via United States Mail to:

Dean Seneca, Pro Se
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Date: December 2, 2022.

HUSCH BLACKWELL LLP

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