No. 25-____

IN THE

Supreme Court of the United States

ALICIA STROBLE,

Petitioner,

v.

OKLAHOMA TAX COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Oklahoma may tax the income of a Muscogee (Creek) Nation citizen who lives and works within the Muscogee (Creek) Reservation that *McGirt v. Oklahoma*, 591 U.S. 894 (2020), held remains Indian country.

RELATED PROCEEDINGS

Oklahoma Supreme Court:

Stroble v. Oklahoma Tax Commission, No. 2025 OK 48 (July 1, 2025)

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Petitioner Alicia Stroble respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Supreme Court in this case.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court (Pet. App. 1a-126a) is not yet published in the Pacific Reporter but is available at 2025 WL 1805918. The final order of the Oklahoma Tax Commission (Pet. App. 127a-52a) is not reported.

JURISDICTION

The judgment of the Oklahoma Supreme Court was entered on July 1, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Section 1151 of Title 18 of the United States Code provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

INTRODUCTION

This case involves a critically important question of state taxing jurisdiction in Indian country following this Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020). In an unbroken line of precedent, this Court has recognized a "*per se* rule" prohibiting States from imposing taxes on Indians who live and work within their Tribes' Indian country absent express authorization from Congress. *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 267 (1992) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987)). And in *McGirt*, the Court held that the Muscogee (Creek) Reservation is Indian country. Those two holdings dictate the outcome of this dispute: Oklahoma may not tax the income of Muscogee (Creek) Nation citizens, like

petitioner Alicia Stroble, who reside and earn income within the Creek Reservation.

Yet in defiance of *McGirt* and decades of precedent considering state taxing authority, the Oklahoma Supreme Court declined to recognize petitioner's immunity from Oklahoma's income tax. Asserting that *McGirt*'s recognition of the Creek Reservation was "unprecedented," the state high court ruled that *McGirt* should not be given effect "beyond the Major Crimes Act." Pet. App. 10a.

That was error. *McGirt* interpreted and applied a statute, 18 U.S.C. § 1151, that defines the statutory term "Indian country." *McGirt* acknowledged that the definition can matter in civil contexts as well as in criminal ones. And one such civil context is "the special area of" taxation, where the Court's cases constrain States' taxing power over tribal citizens within the Indian country identified in Section 1151. *Yakima*, 502 U.S. at 267 (quoting *Cabazon*, 480 U.S. at 215 n.17).

This Court should grant review to correct the Oklahoma Supreme Court's departure from these binding precedents. Neither the decision below nor any alternative theories presented in various concurring opinions accord with *McGirt* or with the Court's Indian law jurisprudence generally. And the Oklahoma Supreme Court's decision runs counter to federal and state rulings throughout the country about how to determine when States have the power to tax Indians in Indian country.

The question presented is also exceptionally important. By rejecting the settled rule that States categorically cannot tax the income of Indians like petitioner absent express congressional authorization, the

decision below destabilizes the clear rules that govern States' jurisdiction in this context. Left unreviewed, that approach could have dramatic consequences, emboldening States and localities to attempt new taxation of Tribes and their citizens. And unless the Court intervenes, Oklahoma will continue to levy tens of millions of dollars in income taxes on Indians working and living within their Tribes' reservations—which, in turn, will limit Oklahoma-based Tribes' ability to provide critical governmental services to Indians and non-Indians alike.

Most fundamentally, this Court should correct the Oklahoma Supreme Court's refusal to faithfully apply *McGirt* because it thinks that opinion "unprecedented." Pet. App. 10a. That reasoning led the state court to abandon this Court's long line of precedent regarding state taxation in Indian country and thus to "nullify the promises made" to the Muscogee (Creek) Nation and its citizens "in the name of the United States." *McGirt*, 591 U.S. at 903. The Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. Factual Background

1. In 1833, the United States entered into a treaty with the Muscogee (Creek) Nation, promising the Nation a "permanent home" in modern-day Oklahoma to induce its members to leave their ancestral lands. *McGirt v. Oklahoma*, 591 U.S. 894, 900 (2020) (quoting Treaty With the Creeks, pmbl., 7 Stat. 418 (Feb. 14, 1833)). Three decades later, the government "entered yet another treaty with the Creek Nation," reducing the Nation's lands but promising that the remaining territory would "be forever set apart as a home for said Creek Nation." *Id.* at 901 (quoting Treaty Between the

United States and the Creek Nation of Indians, Art. III, 14 Stat. 786 (June 14, 1866)). For nearly 200 years, the Nation's citizens have lived and worked on those lands. *See id.* at 927. And for the same period, Congress has recognized a "tribal government" exercising "sovereign functions" over the area. *Id.* at 909-11.

In *McGirt*, this Court recognized that Congress had "never disestablished" the Creek Reservation, such that the land granted to the Nation by treaty "remains an Indian reservation" today. 591 U.S. at 897, 932. *McGirt* further observed that the federal statute defining "Indian country" includes "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." *Id.* at 906 (quoting 18 U.S.C. § 1151(a)) (alteration in original). Consequently, "private land ownership within reservation boundaries" does not affect the land's reservation status. *Id.*; *see id.* at 907 n.3 ("[T]his Court long ago rejected the notion that the purchase of land by non-Indians is inconsistent with reservation status.").

2. Petitioner Alicia Stroble is an enrolled citizen of the Muscogee (Creek) Nation. Pet. App. 132a. She is an employee of the Nation and works on land owned by the Nation. *Id*. She lives on privately owned fee land that lies within the boundaries of the Creek Reservation. *Id*.

After the Tenth Circuit recognized the continued existence of the Creek Reservation, and while that issue was pending in *McGirt*, petitioner filed a 2019 tax return with the Oklahoma Tax Commission. Pet. App. 133a. The return asserted that petitioner was exempt from state income taxation because she was a Muscogee (Creek) Nation citizen who lived and worked within the Creek Reservation. *Id*. Eight months later, after the Court decided *McGirt*, petitioner filed 2017

and 2018 tax returns that likewise asserted her exemption from state income taxation. *Id.*; *see* Okla. Stat. tit. 68, § 227(B)(1) (permitting refund claims within three years of date of payment). The amount of state income tax at issue for the 2017, 2018, and 2019 tax years was $2,150, $2,661, and $2,724, respectively. Pet. App. 129a.

The Commission's Audit Services Division denied petitioner's claimed exemption. Pet. App. 133a. Relying on an Oklahoma regulation, *see* Okla. Admin. Code § 710:50-15-2, the division explained that "[t]o qualify" for an exemption from state income tax, an individual must "be a tribal member [and] live and work on Indian land to which the member belongs." Pet. App. 133a. Petitioner protested the division's conclusion that she did not satisfy those criteria. *Id.* at 133a-34a. An Oklahoma administrative law judge held a hearing and recommended granting petitioner's protest. *Id*. at 131a.

3. Following en banc review, the Commission vacated the administrative law judge's ruling and denied petitioner's protest. Pet. App. 127a-50a. The Commission recognized that petitioner is an enrolled citizen of the Muscogee (Creek) Nation and that she earned all of her income "from sources within Indian Country." *Id*. at 137a. But the Commission concluded that petitioner's residence—although located in the Creek Reservation recognized in *McGirt*—was not "within Indian country." *Id.* at 149a.

In determining that Oklahoma had jurisdiction to tax petitioner's income, the Commission stated that a contrary ruling would "hinge[] entirely upon an unauthorized expansion of the recent decision of the U.S. Supreme Court in [*McGirt*] to state taxation matters." Pet. App. 142a. The Commission believed that "*McGirt*

. . . has very limited application" and "[t]here is no preemption for taxation established under *McGirt*, or otherwise." *Id.* at 146a.

In reaching those conclusions, the Commission disregarded a report it issued in the wake of *McGirt*. Pet. App. 141a. That report explained that "United States Supreme Court precedent establishes that . . . Oklahoma . . . is without jurisdiction to tax certain income earned by tribal citizens while residing in their tribe's Indian country" and *McGirt* therefore affects "the geographical area in which the [Commission] has jurisdiction to levy and enforce the State's taxes." Okla. Tax Comm'n, *Report of Potential Impact of McGirt v. Oklahoma* 2 (Sept. 30, 2020), https://perma.cc/H3FD-79TF ("*Report of Potential Impact of McGirt*"). "Consequently," the report continued, "the State may not tax the income of individual Creek Nation citizens who reside within the Reservation boundaries, to the extent that the income is generated within those boundaries." *Id.* at 8. The Commission's order in this case declared that the report did not represent "[a] formal position taken by the Commission," Pet. App. 142a, even though its executive director issued it "[o]n behalf of the Oklahoma Tax Commission" in response to a request from the Governor and even though the report attests that it "represented the Oklahoma Tax Commission's interpretation of *McGirt*," *Report of Potential Impact of McGirt*, *supra*, at 1.

B. Judicial Proceedings

1. Petitioner sought judicial review of the Commission's decision. She contended both that she was entitled to an income-tax exemption under Oklahoma law and that "federal law" independently "preempts States from taxing Indian income derived within the boundaries of Indian country." Brief-in-Chief of

Appellant, No. 120,806, 2023 WL 2603108, at *7 (Okla. Feb. 13, 2023); *see* Brief of Appellee, No. 120,806, 2023 WL 5311481, at *10-18 (Okla. Apr. 17, 2023) (arguing that "federal law does not preempt the State's authority to tax income earned by" petitioner") (capitalization altered). The Muscogee (Creek) Nation, Seminole Nation, Cherokee Nation, Chickasaw Nation, and Choctaw Nation filed amicus briefs supporting petitioner. Pet. App. 4a.

2. In a per curiam opinion, the Oklahoma Supreme Court affirmed the Commission's order. Pet. App. 1a-10a. As to petitioner's state-law claim, the court upheld the Commission's conclusion that petitioner's "residence was not located within a formal reservation" within the meaning of the Oklahoma regulation governing tax exemptions "because the land was neither owned by the Tribe nor held in trust for the Tribe by the federal government nor subject to any restrictions." *Id.* at 8a.

The court then turned to the question whether, as a matter of federal law, "the State has jurisdiction to impose income taxes on a tribal member who resides and works for the tribe within the boundaries of the tribe's reservation as recognized in *McGirt*." Pet. App. 9a. The court acknowledged that "*McGirt* declared the reservation status of the land at issue." *Id*. But it concluded that *McGirt* was "limited . . . to the narrow issue" of what constitutes "'Indian country' for purposes of the Major Crimes Act." *Id.*; *see id.* at 9a-10a ("[W]hile *McGirt* expanded the popular understanding of the extent of 'Indian Country' in Oklahoma under the Major Crimes Act, it stopped there."). The court declined "to extend *McGirt* to civil and regulatory law" and hence to find that "the State is without jurisdiction to tax the

income of a tribal member living and working on the tribe's reservation." *Id.* at 9a.

The court concluded by stating that "[t]he United States Supreme Court's declaration—113 years after statehood—that nearly half of Oklahoma is a reservation is unprecedented." *Id.* at 10a. It accordingly declared that any application of *McGirt* to "the State's civil or taxing jurisdiction" would have to come from "the United States Supreme Court," as it was not "th[e] [state court's] place to" give *McGirt* that effect. *Id*.

3. Every member of the six-justice majority authored or joined a concurring opinion expanding on the per curiam's federal-law analysis. Pet. App. 11a-73a.

a. Justice Kane, joined by Justice Jett, echoed the per curiam's view that "any decision extending *McGirt* to preempt Oklahoma from taxing the income of tribal members . . . must come from the United States Supreme Court." Pet. App. 11a. He recognized that this Court's cases have repeatedly held that "a State is without jurisdiction to subject a tribal member living on the reservation, and whose income is derived from reservation sources, to a state income tax absent an express authorization from Congress." *Id.* at. 18a (quoting *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993)) (alterations adopted; emphasis removed). But he criticized decisions that had adopted that "categorical approach." *Id.* at 24a-25a (quoting *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 258 (1992), and discussing perceived "problem[s] with Justice Scalia's analysis" in his majority opinion in that case). Justice Kane also urged that the "'categorical approach' . . . does not dictate the same result in every case." *Id.* at 29a.

Justice Kane additionally would have concluded that petitioner's claim is "barred by the doctrines of laches, acquiescence, and impossibility," Pet. App. 33a, pointing to this Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). *See* Pet. App. 34a-35a. Justice Kane recognized that "because the Creek Reservation was never disestablished, it never lost its sovereignty over the area," but he "disagree[d] that this factual distinction renders *Sherrill* irrelevant." *Id*. at 39a.

c. Chief Justice Rowe, Vice Chief Justice Kuehn, Justice Winchester, and Justice Darby each filed solo concurrences. As to the federal question, Chief Justice Rowe "agree[d] with the per curiam's holding" but disagreed with Justice Kane's reliance on equitable doctrines, observing that laches, acquiescence, and impossibility are inapplicable given that Oklahoma Tribes had consistently "sought to maintain self-governance and self-determination." Pet. App. 52a, 57a. Vice Chief Justice Kuehn would have "acknowledge[d] the *McGirt* ruling regarding reservation status but f[ou]nd that it does not resolve the issue before this Court." *Id.* at 60a. Justice Winchester "discuss[ed] the practical implications of extending *McGirt* to this case," charging that a ruling in petitioner's favor would "undermine the State's ability to fund schools, roads, and other programs in eastern Oklahoma." *Id.* at 65a-66a. And Justice Darby asserted that the "allotment" of the Creek Reservation "change[d] the nature of the land" such that it "is not Indian Country generally." *Id.* at 72a.

4. Three justices dissented. Pet. App. 74a-126a. The dissent emphasized that *McGirt* had recognized that the Creek Reservation is "Indian country" under Section 1151—and had specifically contemplated that this status would have a "wider impact on civil issues,"

including "income tax exemptions within Indian country." *Id.* at. 78a-79a. The dissent canvassed opinions from this Court establishing a "categorical approach" that States may not tax the income of Indians who live and work within the Indian country governed by their Tribes. *Id.* at 95a; *see id.* at 87a-97a (collecting additional cases). Those decisions, the dissent explained, had "aligned" the "definition of 'Indian country'" for preemption of state income taxation with the Section 1151 definition. *Id.* at 82a. The dissent accordingly would have found petitioner's "victory in this income tax protest" to be "predetermined" by this Court's precedents. *Id.* at 80a.

The dissent also responded to the concurring opinions' reliance on *Sherrill*. It observed that "*Sherrill* was of no concern to any of the justices in *McGirt*'s analysis of whether the Muscogee (Creek) Nation had been disestablished." Pet. App. 112a-13a. And it further explained that there were critical factual differences between the Oneida Indian Nation's history and litigation conduct and the Muscogee (Creek) Nation's. *Id.* at 113a-18a.

The dissent concluded by emphasizing that it was not "attempting to apply *McGirt*[] . . . wholesale to all civil and criminal cases" to find state jurisdiction preempted. Pet. App. 125a. But, it emphasized, the Oklahoma Supreme Court had erred in declining to give effect to *McGirt* and the long line of this Court's decisions finding that States categorically lack jurisdiction to tax the income of tribal citizens in Indian country. *Id.* at 125a-26a. By holding that it was not the Oklahoma Supreme Court's "place" to apply *McGirt* in this context, the dissent observed, the per curiam had "seemingly advis[ed] the parties they must get the U.S. Supreme Court involved." *Id.* at. 76a.

REASONS FOR GRANTING THE PETITION

This case raises a significant question of Indian law following this Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020). By holding that Oklahoma could continue to tax the income of Muscogee (Creek) Nation citizens who live and work within the Creek Reservation, the Oklahoma Supreme Court disregarded *McGirt* and decades of this Court's taxation case law. Its ruling conflicts with other courts' approach to state taxation authority in Indian country. And if left uncorrected, it will authorize unlawful state taxation of Indian income; deprive Oklahoma-based Tribes of their ability to raise revenue; disturb the settled rules surrounding States' and Tribes' respective authorities; and erode the promises made by the United States to the Muscogee (Creek) Nation and its citizens. This Court should grant review.

I. The Decision Below Flouts This Court's Precedents.

This Court has repeatedly held that, absent congressional approval, States categorically may not tax the income of Indians who live and work within their Tribes' Indian country. And the Court recently held in *McGirt* that the Creek Reservation is Indian country. These decisions in combination dictate the proper outcome here: Oklahoma may not tax the income of Muscogee (Creek) Nation citizens who live and earn income on the Creek Reservation without congressional consent.

The Oklahoma Supreme Court's contrary holding cannot be reconciled with this Court's decisions. Describing *McGirt* as "unprecedented," Pet. App. 10a, the per curiam opinion declined to acknowledge that the Creek Reservation is Indian country for purposes of

state authority to tax. But this Court has held that the same statute analyzed in *McGirt* determines the scope of Indian country for tax purposes. The several concurring opinions, meanwhile, advance no alternative theories that are consistent with this Court's precedents and could support the judgment against petitioner. Review is warranted to correct the Oklahoma Supreme Court's departure from this Court's case law.

A. States may not tax the income of Indians, like petitioner, who live and work within their Tribes' Indian country.

1. "In the special area of state taxation of Indian tribes and tribal members," this Court's cases "have adopted a *per se* rule": Absent express congressional authorization, States may not tax Indians who live and work within their Tribes' Indian country. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). That rule derives from the Constitution, which "vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); *see* U.S. Const. art. I, § 8, cl. 3. "As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from taxation within their own territory." *Montana*, 471 U.S. at 764.

The Court has adhered to this categorical taxation rule for more than 150 years. In 1867, the Court held that allowing a State to tax Indian reservations "is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *In re New York Indians*, 72 U.S. (5 Wall.) 761, 771 (1867). "As long as the United States recognizes their national character," Tribes "are under

the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws" relating to taxation. *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1867).

As Indian law jurisprudence has developed, the Court "has never wavered from the views expressed in these cases." *Montana*, 471 U.S. at 765. Instead, the Court's precedents state the rule again and again. The first modern decision is *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973). There, the Court prohibited Arizona from imposing an income tax on a Navajo member who lived and worked on the Navajo Reservation. The Court reasoned that, "[s]ince appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal government and for the Indians themselves." *Id.* at 179-80.

The same day it issued *McClanahan*, the Court reiterated in a companion case that "in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). The Court stated that *McClanahan* "lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." *Id.* Later, it described "[t]he *McClanahan* principle" as "giv[ing] effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes" and as "draw[ing] support from 'the backdrop of the Indian sovereignty doctrine.'" *Bryan v. Itasca Cnty.*, 426 U.S.

373, 376 n.2 (1976) (quoting *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 475 (1976)).

Subsequent cases confirm that *McClanahan*'s rule is "categorical" and "*per se*." *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 258, 267 (1992) (quoting *Cabazon*, 480 U.S. at 215 n.17). In assessing "state regulation that does not involve taxation," courts can in certain circumstances "balance[]" the "relevant state and tribal interests" to determine whether state law may be imposed in ways that affect Tribes and their citizens. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457-58 (1995); *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980). But the Court has rejected a case-by-case balancing inquiry in the tax context, stating that because "the federal tradition of Indian immunity from state taxation is very strong" and "the state interest in taxation is correspondingly weak," "it is unnecessary to rebalance these interests in every case." *Cabazon*, 480 U.S. at 215 n.17. Instead, the Court's cases flatly prohibit any state attempt to tax the income of tribal citizens who live and work within their Tribes' Indian country. *See* 1 Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 10.03 (Nell Jessup Newton & Kevin K. Washburn eds. 2024) ("States may not impose income taxes on tribal members who work and live in Indian country.").

That categorical rule gives effect to "Chief Justice Marshall's observation that 'the power to tax involves the power to destroy.'" *Yakima*, 502 U.S. at 258 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)). As the Court has recognized, it would "essentially destroy[]" tribal governments "if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation."

Bryan, 426 U.S. at 388 n.14. Thus, "when a State imposes taxes upon reservation members without their consent," the State's actions cannot "be reconciled with tribal self-determination." *McClanahan*, 411 U.S. at 179.

The Court's precedents have further determined the territorial scope of this *per se* approach to taxation jurisdiction. Those "cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country.'" *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). The Court explained that "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments," citing the statutory definition of Indian country found at 18 U.S.C. § 1151. *Id.*; *see Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) ("[W]e have recognized that [Section 1151] also generally applies to questions of civil jurisdiction."); *Cabazon*, 480 U.S. at 207 n.5 (in a civil case, concluding that the Tribes' reservations were "Indian country" using Section 1151's definition because "[t]his definition applies to questions of both criminal and civil jurisdiction"); 1 Cohen, *supra*, § 10.03 & n.22 (observing that "[i]t is now well-established that the categorical prohibition against state taxation of Indians applies in 'Indian country,' broadly defined" by Section 1151, which "is used in civil cases as well").

Thus, a tribal citizen who lives anywhere within her Tribe's Indian country, as defined by Section 1151, is exempt from state taxation on income she earns within that Indian country. Indeed, *Sac & Fox Nation* rebuked the Oklahoma Tax Commission for contesting the scope of Indian country, noting that the Court had

already "rejected precisely the same argument—and from precisely the same litigant." 508 U.S. at 124; *see Okla. Tax Comm'n v. Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) ("Neither *Mescalero* nor any precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges.").

2. In *McGirt*, this Court recognized "the continued existence of the Creek Reservation" and held that the reservation was "Indian country" within the meaning of "the relevant statute," Section 1151. 591 U.S. at 906, 933. In reaching that holding, the Court recognized that Section 1151, although part of the "federal criminal law," could have consequences for "federal civil laws and regulations," which "currently borrow from § 1151 when defining the scope of Indian country." *Id.* at 935. But the Court rejected the argument that "this borrowing into civil law" should "skew [its] interpretation of" Section 1151. *Id.*

The combination of *McGirt* and this Court's categorical rule against state income taxation should resolve this case. Petitioner is an enrolled citizen of the Muscogee (Creek) Nation. Pet. App. 139a. During the relevant tax years, she lived and earned income exclusively within the Nation's Indian country recognized by *McGirt*. *Id*. at 139a-41a. Thus, under *McClanahan*, *Sac & Fox Nation*, and the Court's other taxation precedents, Oklahoma "is without power to tax" petitioner's income absent congressional permission. *Yakima*, 502 U.S. at 258. And no one contends that Congress has authorized Oklahoma to tax income like petitioner's.

Oklahoma itself previously recognized this consequence of *McGirt*. "The State generally lacks the authority to tax Indians in Indian country," Oklahoma told this Court in its *McGirt* brief, "so turning half the State

into Indian country would decimate state and local budgets." Brief for Respondent at 44, *McGirt v. Oklahoma*, No. 18-9526 (U.S. Mar. 13, 2020) (citing *Sac & Fox Nation*, 508 U.S. 114). After this Court's decision issued, the State asked the Environmental Protection Agency to approve the administration of state environmental programs "in areas of the State that are Indian Country," consistent with *McGirt*. Letter from J. Kevin Stitt, Governor, Okla. to Andrew Wheeler, Administrator, EPA (July 22, 2020), https://perma.cc/NMP4-B9V4. And in the taxation context, the Oklahoma Tax Commission's executive director issued a report "[o]n behalf of the Oklahoma Tax Commission" acknowledging that *McGirt* affects "the geographical area in which the [Commission] has jurisdiction to levy and enforce the State's taxes" given that "United States Supreme Court precedent establishes that" Oklahoma "is without jurisdiction to tax certain income earned by tribal citizens while residing in their tribe's Indian country." *Report of Potential Impact of McGirt*, *supra*, at 1-2. In particular, the report recognized that following *McGirt*, "the State may not tax the income of individual Creek Nation citizens who reside within the Reservation boundaries, to the extent that the income is generated within those boundaries." *Id.* at 8. Although Oklahoma has now abandoned that understanding, it is the only one consistent with *McGirt* and this Court's taxation precedents.

B. The Oklahoma Supreme Court gave no plausible basis to disregard this Court's repeated holdings.

The state supreme court nevertheless held that Oklahoma had the power to tax petitioner's income. Neither the per curiam decision nor any of the concurring

opinions provide any justification for that result that can be squared with this Court's cases.

1. The per curiam was mistaken that *McGirt* has no application to "the State's civil or taxing jurisdiction" because that decision "stopped" at the "Major Crimes Act." Pet. App. 10a. *McGirt* recognized that the decision would affect non-criminal contexts because "many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country." 591 U.S. at 935; *see id.* at 971 (Roberts, C.J., dissenting) (observing that *McGirt* would have impact "[b]eyond the criminal law"). And taxation is one area affected by *McGirt* because this Court applies "the *McClanahan* presumption against state tax jurisdiction" throughout the Indian country that "Congress has defined" in "18 U.S.C. § 1151," the very statute at issue in *McGirt*. *Sac & Fox Nation*, 508 U.S. at 123. In short, *McGirt* held that the Creek Reservation is Indian country under Section 1151—and that holding controls for taxation purposes.

The per curiam similarly erred in holding that "it is not" the Oklahoma Supreme Court's "place" to recognize that necessary consequence of *McGirt*. Pet. App. 10a; *see id.* at 11a (Kane, J., concurring) (stating that "any decision extending *McGirt* . . . must come from the United States Supreme Court"); *id.* at 53a (Rowe, C.J., concurring) (similar); *id.* at 63a (Kuehn, V.C.J., concurring) (similar). "[J]ust as binding as [a] holding is the reasoning underlying it." *Bucklew v. Precythe*, 587 U.S. 119, 136 (2019); *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). Lower courts have an obligation to apply this Court's holdings to other cases

where the Court's reasoning dictates a result. They may not decline to do so simply because they find the Court's decision "unprecedented." Pet. App. 10a.

2. Nothing in the five concurring opinions provides any alternative basis to uphold the Oklahoma Supreme Court's judgment.

a. The concurring opinions do not succeed in distinguishing or diminishing this Court's taxation holdings. Justice Kane, for example, contended that the Court's "'categorical approach' . . . does not dictate the same result in every case." Pet. App. 29a. But that is exactly what it means to have a "categorical," "*per se*" rule. *See supra* at 15.[1] And while Justice Kane's concurrence described his perceived "problem with Justice Scalia's analysis" recognizing a "categorical approach" in *Yakima*, he did not deny that this Court's precedents in fact require such an approach. Pet. App. 24a-26a.

Justice Kane further erred in suggesting that this Court's recent decision in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), displaced the Court's taxation precedents. *See* Pet. App. 13a-15a, 24a-26a; *see also id.* at 63a (Kuehn, V.C.J., concurring). *Castro-Huerta* held that the federal government and States "have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country." 597 U.S. at 633. *Castro-Huerta* did not address the "special area of state taxation of Indian tribes and tribal

[1] Justice Kane quoted *Cabazon*'s observation that the Court's cases have not established "an inflexible per se rule precluding jurisdiction over tribes and tribal members in the absence of express congressional consent." Pet. App. 29a (quoting *Cabazon*, 480 U.S. at 214-15). But he ignored the footnote immediately following and qualifying that sentence: "In the special area of state taxation of Indian tribes and tribal members, [the Court] ha[s] adopted a *per se* rule." *Cabazon*, 480 U.S. at 215 n.17.

members," *Cabazon*, 480 U.S. at 215 n.17—let alone purport to overrule the long line of decisions applying a categorical rule in that context.

Nor did *Castro-Huerta* suggest that the general rules of Indian law work differently in Oklahoma. *See* 597 U.S. at 655 n.9 (emphasizing that the Court's recognition of concurrent jurisdiction would apply "throughout the United States"). Indeed, contrary to the Oklahoma Supreme Court's suggestion that *McGirt* has no application here, *Castro-Huerta* specifically reaffirmed *McGirt*'s holding that the Creek Reservation is "Indian country," and recognized that this holding affects the "jurisdictional rules" that apply on the Creek Reservation. 597 U.S. at 633. *Castro-Huerta* provides no basis to disregard this Court's precedents adopting a *per se* jurisdictional rule against state income taxation of Indians who live and work in their Tribes' Indian country.[2]

b. Three justices sought to avoid the "*per se*" rule against state taxation by relying on *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). Pet. App. 33a-43a (Kane, J., concurring); *id*. at 62a (Kuehn, V.C.J., concurring); *id*. at 69a & n.6 (Winchester, J., concurring). *But see id.* at 57a-59a (Rowe, C.J., concurring) (rejecting those opinions' reliance on *Sherrill*). Those opinions' understanding of *Sherrill* is inconsistent with *McGirt*.

Sherrill involved the Oneida Indian Nation's attempt to "unilaterally revive its ancient sovereignty" over

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[2] Justice Darby theorized that the Creek Reservation "is not Indian country generally" because of "allotment." Pet. App. 71a-72a. But this Court has expressly rejected the notion that "allotted lands" are different from other Indian country for taxation purposes. *Sac & Fox Nation*, 508 U.S. at 126.

lands in New York by purchasing property "in open-market transactions." 544 U.S. at 203, 210-11. The Oneidas theorized that, even though they had not exercised governmental functions in the area for over 200 years, *see id.* at 218, these market purchases "unified fee and aboriginal title" and allowed them to "assert sovereign dominion over the parcels," *id.* at 213.

The Court held that the Oneidas could not exercise that sovereign authority because of "[t]his long lapse of time, during which the Oneidas did not seek to revive their sovereign control." *Id*. at 216. The opinion distinguished the Oneidas' circumstances from other cases—including several of the ones discussed above—by noting that the Court's other holdings "concerned land the Indians had continuously occupied." *Id.* at 216 n.10 (citing *Montana*, 471 U.S. 759; *In re New York Indians*, 72 U.S. (5 Wall.) 761; and *In re Kansas Indians*, 72 U.S. (5 Wall.) 737).

McGirt squarely rejects the concurring opinions' reliance on *Sherrill*. Most fundamentally, *McGirt* already held that the Muscogee (Creek) Nation never lost its "sovereignty" over the Creek Reservation. 591 U.S. at 923 n.14; *see id.* at 909. So *McGirt* answers in the Nation's favor the identical question that *Sherrill* resolved against the Oneidas. Indeed, neither the majority opinion nor the dissent even cited *Sherrill*, recognizing the obvious factual differences between the Nation's "nearly 200-year occupancy of these lands," *id*. at 927, and the Oneidas' total absence from the area.

In nonetheless relying on *Sherrill*, the concurring justices pointed to *McGirt*'s statement that "legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a

mistaken understanding of the law." 591 U.S. at 936; *see* Pet. App. 33a-34a (Kane, J., concurring). Any one of those doctrines could come into play in an individual case where a person or business organized their affairs in reliance on the pre-*McGirt* status quo. *See, e.g.*, *Nebraska v. Parker*, 577 U.S. 481, 494 (2016) (suggesting that "equitable considerations" could prevent tribal taxation of non-Indians). But *McGirt* does not allow Oklahoma to intrude upon tribal sovereignty now simply because it has long "overstepped its authority in Indian country" by taxing Indians like petitioner. 591 U.S. at 919. "That would be the rule of the strong, not the rule of law." *Id.* at 924.[3]

c. Turning from doctrine to policy, Justice Winchester expressed concern about "the practical implications" for the State's finances "of extending *McGirt* to this case." Pet. App. 65a-66a. But a ruling for petitioner would not devastate Oklahoma's revenues. The Oklahoma Tax Commission's report projected that *McGirt* would cost the State $72.7 million a year in reduced income taxes from citizens of all five Tribes affected by the decision (while qualifying that this estimate was

[3] Chief Justice Rowe, while rejecting reliance on *Sherrill*, would have ruled against petitioner on the ground that *McGirt* is not "retroactive[]" in the civil context. Pet. App. 57a. The Commission did not defend its ruling on that ground below and so cannot advance the retroactivity argument in this Court. *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course [this Court] do[es] not decide questions neither raised nor resolved below."). In any event, Chief Justice Rowe's retroactivity analysis is wrong. "When this Court applies a rule of federal law to the parties before it, that rule . . . must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993).

"likely high"). *Report of Potential Impact of McGirt*, *supra*, at 15-16. Oklahoma's most recent "state tax collections totaled" $13.6 billion—meaning that the maximum affected income would represent a mere 0.5% of the State's yearly tax base. State of Oklahoma, *Executive Budget Summary FY 2026*, at 2, https://perma.cc/ETH7-QFFR. Notably, Oklahoma's governor has proposed an income tax cut that would reduce state revenue by $202.6 million next year, belying any claims that the taxes at stake here are necessary to the state fisc. *Id.* at 8. And given the vast array of governmental services that the Muscogee (Creek) Nation and its counterparts in eastern Oklahoma provide to benefit Indians and non-Indians alike, there is no basis to charge that the State must tax Indian income to serve these communities. *McGirt*, 591 U.S. at 912; *see* Brief for *Amicus Curiae* Muscogee (Creek) Nation at 36-39, *McGirt v. Oklahoma*, No. 18-9526 (U.S. Feb. 11, 2020); Brief for *Amici Curiae* Tom Cole et al. at 10-13, *McGirt v. Oklahoma*, No. 18-9526 (U.S. Feb. 11, 2020).

Regardless of the outcome of this case, moreover, Oklahoma will have considerable power to levy taxes within the Creek Reservation. The State and its local governments will remain able to impose property taxes on all fee land within the Creek Reservation. *See Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110-11 (1998). Non-Indians—who make up the vast majority of residents of the Creek Reservation, *see McGirt*, 591 U.S. at 933—will continue to owe state income tax. And, as the Commission recognized, Oklahoma will retain the ability to tax the income of Indians who live or work outside of Indian country or in Indian country governed by a Tribe in which they are not enrolled. *Report of Potential Impact of McGirt*, *supra*, at 16. Justice Winchester's practical concern

thus fails on its own terms—and certainly provides no basis to depart from this Court's precedent.

II. The Decision Below Creates a Conflict of Authority.

The glaring inconsistency between the decision below and decades of this Court's precedents would call for certiorari even in the absence of a conflict. And indeed, in the "complex" area of tribal sovereignty, *Bracker*, 448 U.S. at 143, the Court has recently granted certiorari in cases where the petitioners asserted no conflict in the lower courts, *see, e.g.*, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 877 (2022) (No. 21-429); *Denezpi v. United States*, 142 S. Ct. 395 (2021) (No. 20-7622); *Ysleta del Sur Pueblo v. Texas*, 141 S. Ct. 1367 (2020) (No. 20-493). But the case for plenary review here is even stronger because the Oklahoma Supreme Court's decision runs counter to decisions of federal and state courts that recognize the categorical rule against state taxation of Indians in "Indian country" and analyze that question using Section 1151's definition of that term.

One recent example comes from the Seventh Circuit. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, 46 F.4th 552 (7th Cir. 2022), the court of appeals rejected Wisconsin's attempt to "tax Ojibwe lands owned by tribal members," holding that "tribal landowners have a bargained-for tax immunity under an 1854 Treaty." *Id.* at 555. In reaching that conclusion, the court discussed at length the "categorical approach" governing taxation in Indian country, citing to Section 1151's statutory definition and applying it in the taxation context. *Id.* at 557-58. And the court further reasoned that nothing in *Castro-Huerta* upset "the framework articulated in the Court's sizeable body of Indian tax cases." *Id.* at 558.

That methodological approach is irreconcilable with the Oklahoma Supreme Court's decision in this case.

Numerous other decisions tread the same path. They reiterate this Court's holdings that there is a "categorical" rule against state taxation of Indians in Indian country. *See, e.g.*, *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1189-90 (9th Cir. 2008); *Keweenaw Bay Indian Cmty. v. Rising*, 477 F.3d 881, 886-87 (6th Cir. 2007); *United States ex rel. Cheyenne River Sioux Tribe v. South Dakota*, 105 F.3d 1552, 1556 (8th Cir. 1997); *Flat Ctr. Farms, Inc. v. State Dep't of Revenue*, 49 P.3d 578, 580-81 (Mont. 2002); *Goodman Oil Co. of Lewiston v. Idaho State Tax Comm'n*, 28 P.3d 996, 1002-03 (Idaho 2001). And they hold that Section 1151 determines what territory is Indian country for purposes of this Court's taxation case law. *See, e.g.*, *Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Vill. of Copper Ctr.*, 101 F.3d 610, 612-13 & n.2 (9th Cir. 1996); *Thompson v. Cnty. of Franklin*, 15 F.3d 245, 251 & n.5 (2d Cir. 1994); *Dark-Eyes v. Comm'r of Revenue Servs.*, 887 A.2d 848, 863-71 (Conn. 2006); *In re Oyler*, 887 P.2d 81, 83 (Kan. 1994); *see also Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 89 F.3d 908, 916 (1st Cir. 1996) (rejecting argument that "section 1151 only applies in criminal cases").

Those cases reach different conclusions depending on their differing facts. But every one of them is premised on the idea that Section 1151's definition of Indian country determines where this Court's categorical prohibition on state taxation of Indians in Indian country applies. The Oklahoma Supreme Court's contrary view that *McGirt*'s Section 1151 holding does not prohibit state taxation is irreconcilable with those cases.

There is even a divergence of approach between the decision below and a Tenth Circuit opinion concerning land within the Creek Reservation. *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987), "involve[d] the authority of the State of Oklahoma to regulate and tax certain bingo and bingo-related activities conducted on treaty lands still held by the Creek Nation." *Id.* at 970. The State argued (in that pre-*McGirt* case) that the relevant tribally owned lands were not "Indian country," but the Tenth Circuit disagreed, explaining that "section 1151 . . . generally applies to questions of both civil and criminal jurisdiction" and that Section 1151 encompassed the land in question. *Id.* at 973. It followed that the tribal enterprise operating on that tract enjoyed "immunity from state regulation" and thus could not be taxed. *Id*. at 983.

The inconsistency between the Tenth Circuit's approach and the Oklahoma Supreme Court's is unworkable in practice. The Tenth Circuit and the Oklahoma Supreme Court are the two primary tribunals, other than this Court, with the authority to shape Indian law in Oklahoma post-*McGirt*. As long as the Tenth Circuit applies Section 1151 to taxation questions and the Oklahoma Supreme Court does not, the law in Oklahoma will vary depending on whether plaintiffs bring federal actions or state ones. *Cf. Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 470 (1976) (holding that a Tribe could bring a federal "suit[] to restrain Montana's taxing authority" under 28 U.S.C. § 1362). This Court should grant certiorari before that division causes further on-the-ground confusion in Oklahoma. *See McGirt*, 591 U.S. at 899 (noting that the Court had "granted certiorari" because "Oklahoma state courts ha[d] rejected any suggestion that the lands in

question remain a reservation" while "the Tenth Circuit ha[d] reached the opposite conclusion").

III. The Question Presented Is Exceptionally Important.

As the Commission's counsel recognized at oral argument below, "this case presents one of the most consequential questions to arise in the wake of the United States Supreme Court's decision in *McGirt*." Rec. of Oral Arg., No. 120,806, at 43:19 (Okla.), https://vimeo.com/908698272/cc602f4c97. And as he later noted, "there is a very good chance that the federal law issues that are presented in this case are ultimately going to have to be resolved by the United States Supreme Court." *Id.* at 1:30:43.

The Commission's attorney was right. Whether Oklahoma may tax the income of Indians who live and work within the Creek Reservation is exceptionally important to petitioner, to similarly situated Indians, to the Muscogee (Creek) Nation, and to tribal governments throughout the State. The impact of the question extends beyond Oklahoma as well, because the ruling calls into question the long-settled ground rules governing States' and Tribes' respective jurisdictions throughout the country. Finally, whether the Oklahoma Supreme Court improperly disregarded this Court's precedents is a deeply consequential question with implications beyond Indian law.

Most immediately, this case concerns substantial financial obligations levied on individual tribal citizens in Oklahoma. If petitioner is correct that federal law prohibits Oklahoma from taxing her and other Indians who live and work in their Tribes' Indian country, then the State will unlawfully collect tens of millions of dollars every year from roughly 200,000 Indians for as

long as the decision below stands. *Report of Potential Impact of McGirt*, *supra*, at 16 tbl. 1. That money is a drop in the bucket for Oklahoma. *See supra* at 23-24. But it matters a great deal to individual tribal citizens like petitioner.

This case also has profound implications for tribal sovereignty in Oklahoma. The "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). State taxation of Indians living and working in Indian country threatens Oklahoma Tribes' ability to "raise revenue" because it "filter[s]" the tribal "tax base" through "many governmental layers." *Bryan*, 426 U.S. at 388 n.14; *see supra* at 24. Tribes use their revenue to provide "hospitals, health care clinics, . . . police stations, and economic development ventures" that serve Indians and non-Indians alike; any constriction of their revenue base thus risks significant public harm. Brief for *Amicus Curiae* Muscogee (Creek) Nation at 40, *McGirt*, No. 18-9526.

The effects of the decision will extend well beyond Oklahoma. Tribes and States alike benefit from clear and predictable rules about their respective jurisdictions. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) ("Predictability . . . is a needful characteristic of any law worthy of the name."). From *McClanahan* until the decision below, there was no serious question that States categorically cannot tax income earned by Indians living and working on their Tribes' Indian country. But the Oklahoma Supreme Court's decision disturbs the established understanding that state income taxation in these circumstances is impermissible. And the court did so without offering any coherent alternative

framework for what land it believes constitutes "Indian country" for purposes of States' authority to tax. The decision thus creates intolerable uncertainty for Tribes and tribal citizens who have long relied on this Court's "*per se*" rule, while risking further conflict if other States seek to follow Oklahoma's lead.

At a final—and fundamental—level, this case concerns the enduring vitality of *McGirt*'s recognition of the Creek Reservation and the respect owed to this Court's precedents. The Oklahoma Supreme Court was explicit that, because it thinks *McGirt* "unprecedented," it will not follow the case outside of the precise context in which it arose. Pet. App. 10a; *see id.* ("To date, the United States Supreme Court has not extended its ruling in *McGirt* to the State's civil or taxing jurisdiction. And it is not this Court's place to do so."). This stinting attitude is not a one-off. In a prior post-*McGirt* case, the state high court characterized *McGirt* as determining "the extent of Indian Country under the Major Crimes Act in Oklahoma" for criminal-law purposes only and suggested that courts could find the "potential disestablishment" of reservations in Oklahoma for "civil law" purposes. *In re Guardianship of K.D.B.*, 564 P.3d 83, 90 (Okla. 2025); *see id.* at 96 (declining to "find that the Cherokee Nation Reservation has never been disestablished . . . for purposes of civil law generally"). One justice concurred to explain the "state's jurisprudence that for civil purposes reservations have never been recognized." *Id.* at 98 (Rowe, J., concurring).

That "jurisprudence" is wrong. As *McGirt* recognized, "States have no authority to reduce federal reservations lying within their borders." 591 U.S. at 903. Were it otherwise, "[a] State could encroach on the tribal boundaries or legal rights Congress provided,

and, with enough time and patience, nullify the promises made in the name of the United States." *Id.* That concern holds just as true in civil contexts as in criminal ones—indeed, encroachments in the civil arena directly affect Tribes' ability to govern themselves.

Yet the Oklahoma Supreme Court's decision effectuates exactly that kind of nullification here. It denies petitioner the immunity from state income taxation that *McGirt* and this Court's taxation decisions require. And it reaches that result by expressly declining to give a directly on-point decision of this Court its due. The Court should grant certiorari to ensure that Oklahoma and its courts do not override this Court's precedents and the promises they recognize our country made to the Muscogee (Creek) Nation and its citizens.

IV. This Case Is an Ideal Vehicle.

This case presents a perfect vehicle to resolve the question presented. All parties agree that petitioner is an enrolled citizen of the Muscogee (Creek) Nation; that she earns her income on land owned by the Nation; and that she lives within the Creek Reservation recognized in *McGirt*. Pet. App. 139a-42a. No factual issues complicate the Court's review.

Nor are there any procedural obstacles. Both petitioner and the Commission recognized below that the federal-law issues necessarily arise and must be resolved if Oklahoma's regulations do not afford petitioner a tax exemption. *Supra* at 7-8; *see* Rec. of Oral Arg 1:20:48 (counsel for the Commission acknowledging that "federal law issues . . . come into play if the court rules in our favor . . . on the interpretation of state law"). By resolving the state-law question in Oklahoma's favor, *see* Pet. App. 8a, the Oklahoma

Supreme Court has cleanly teed up whether federal law permits Oklahoma to tax petitioner's income. That question deserves this Court's plenary consideration.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 29, 2025

APPENDIX

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 120,806

IN THE MATTER OF THE
INCOME TAX PROTEST OF ALICIA STROBLE,

ALICIA STROBLE,
Protestant/Appellant,

v.

OKLAHOMA TAX COMMISSION,
Respondent/Appellee.

FOR OFFICIAL PUBLICATION

[FILED JULY 1, 2025]

ON APPEAL FROM
THE OKLAHOMA TAX COMMISSION

¶0 This appeal concerns the state income tax exemption under Oklahoma Administrative Code § 710:50-15-2(b)(1).

ORDER OF THE OKLAHOMA
TAX COMMISSION IS AFFIRMED.

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PER CURIAM:

¶1 Protestant/Appellant Alicia Stroble appeals the final order of Respondent/Appellee Oklahoma Tax Commission, which denied her income tax protest. The issue is whether Stroble, a member of the Muscogee (Creek) Nation who lives within the

boundaries of the Creek Reservation recognized in *McGirt v. Oklahoma,* 591 U.S. 894 (2020), and whose income is derived from sources within the Creek Reservation, qualifies for a state income tax exemption under Oklahoma Administrative Code (O.A.C.) § 710:50-15-2(b)(1). We hold she does not.

FACTS AND PROCEDURAL HISTORY

¶2 In December 2020, Stroble filed three Oklahoma Individual Income Tax Returns for the years 2017, 2018, and 2019 claiming her income as exempt. The Audit Services Division of the Oklahoma Tax Commission sent three letters, one for each year, to Stroble notifying her that the "Exempt Tribal Income exclusion has been disallowed or adjusted. To qualify, all three requirements must be met: be a tribal member, live and work on Indian land to which the member belongs." Stroble timely protested the proposed adjustments and requested a hearing.

¶3 In 2022, an Administrative Law Judge (ALJ) conducted a hearing, which included testimony and the admission of several exhibits without objections. Stroble presented evidence establishing that she was an enrolled member of the Muscogee (Creek) Nation; that during the tax years at issue she was employed by the legislative branch of the Muscogee (Creek) Nation; that her office was located on land owned by the United States in trust for the Creek Tribe of Oklahoma; and that she lived in the city of Okmulgee, Oklahoma, which is within the external boundaries the Creek Reservation as defined by the Treaty of 1866. It was also undisputed that Stroble's house was located on unrestricted, non-trust, private fee land, to which she acquired title from a non-tribal grantor in 2008.

¶4 After the hearing, the ALJ recommended the Commission grant the protest. In response, the Division filed an application for *en banc* hearing claiming the ALJ erred in his findings, conclusions, and recommendation. The Commission held the *en banc* hearing and rendered the final order. The Commission found Stroble did not live in "Indian country" for purposes of the state income tax exemption and denied her protest. Stroble appealed, and we retained the case. The Muscogee (Creek) Nation, Seminole Nation, Cherokee Nation, Chickasaw Nation, and Choctaw Nation filed amici curiae briefs in support of Stroble's appeal.

STANDARD OF REVIEW

¶5 An adjudicatory order from the Oklahoma Tax Commission will be affirmed on appeal if the record contains substantial evidence supporting the facts upon which the order is based and the order is free from legal error. *See Raytheon Co. v. Okla. Tax Comm'n,* 2022 OK 32, ¶ 4, 512 P.3d 333, 335 (citing *Am. Airlines, Inc. v. Okla. Tax Comm'n,* 2014 OK 95, ¶ 25, 341 P.3d 56, 62); *Blitz U.S.A., Inc. v. Okla. Tax Comm'n,* 2003 OK 50, ¶ 6, 75 P.3d 883, 885. Whether Stroble qualifies for the state income tax exemption under O.A.C. § 710:50-15-2(b)(1) presents a purely legal question of statutory interpretation, which the appellate court reviews *de novo. Id.* In exercising *de novo* review, we possess plenary, independent, and non-deferential authority to examine the issues presented. *Id.*

ANALYSIS

¶6 The matter before us concerns a state income tax exemption referred to as the "Exempt Tribal

Income Exclusion." Section 710:50-15-2 of the Oklahoma Administrative Code provides, in full:

> (a) **Definitions**. The following words and terms, when used in this Section, shall have the following meaning, unless the context clearly indicates otherwise:
>
> (1) "Indian Country" means and includes formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States. [**See**: 18 U.S.C. § 1151]
>
> (2) "Informal reservations" means and includes lands held in trust for a tribe by the United States and those portions of a tribe's original reservation which were neither allotted to individual Indians, nor ceded to the United States as surplus land, but were retained by the tribe for use as tribal lands.
>
> (3) "Dependent Indian communities" means and refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy the following two requirements:
>
> (A) They have been set aside by the federal government for the use of the Indians as Indian land; and,
>
> (B) They are under federal superintendence.
>
> (b) **Instances in which income is exempt.** The income of an enrolled member of a federally recognized Indian tribe shall be

exempt from Oklahoma individual income tax when:

(1) The member is living within "Indian Country" under the jurisdiction of the tribe to which the member belongs; and, the income is earned from sources within "Indian Country" under the jurisdiction of the tribe to which the member belongs; or,

(2) The income is compensation paid to an active member of the Armed Forces of the United States, if the member was residing within his tribe's "Indian Country" at the time of entering the Armed Forces of the United States, and the member has not elected to abandon such residence.

(c) **Instances in which income is not exempt.** The income of an enrolled member of a federally recognized Indian tribe shall not be exempt from Oklahoma individual income tax when:

(1) The income is derived from sources outside of "Indian Country", regardless of the taxpayer's residence.

(2) The member resides in Oklahoma, but not within "Indian Country", regardless of the source of the income.

(3) Either the source of the income or the place of residence is under the jurisdiction of a tribe of which the taxpayer is not a member.

(4) The member claims residence within "Indian Country" primarily by virtue of various Indian health, social, educational,

> welfare and financial programs. Even though administered by the Tribe within its own service area, these are merely forms of general federal aid, and are not sufficient to support a finding of "Indian Country" for purposes of this Section.
>
> (5) The member claims residence on unrestricted, non-trust property, owned by an Indian Housing Authority. Such property does not fall within the definition of "Indian Country," nor does residence thereon constitute residence within a dependent Indian community.
>
> (d) Part-time residency. If an enrolled member of a federally recognized Indian tribe resides within "Indian Country" for a portion of the year, and resides outside "Indian Country" for a portion of the year, such enrolled member shall be taxed based upon where such enrolled member resided when the income in question was earned.

O.A.C. § 710:50-15-2 (as amended by 21 Okla. Reg. 2571) (effective June 14, 2004).

¶7 Stroble claims she is exempt pursuant to O.A.C. § 710:50-15-2(b)(1). The parties stipulate that Stroble is an enrolled member of the Muscogee (Creek) Nation, a federally recognized Indian tribe. The parties also stipulate that Stroble's income for tax years 2017, 2018, and 2019 was earned from sources within Indian Country under the jurisdiction of the Muscogee (Creek) Nation. [1] The only dispute is

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[1] The meaning of "earned from sources within," O.A.C. § 710:50-15-2(b)(1), and "derived from sources outside of" Indian

whether Stroble was "living within 'Indian Country' under the jurisdiction of the tribe to which the member belongs. . ." O.A.C. § 710:50-15-2(b)(1). In the rule's definition, there are four categories of land which constitute "Indian Country" for purposes of the state income tax exemption: formal reservations, informal reservations, dependent Indian communities, and Indian allotments. O.A.C. § 710:50-15-2(a)(1). Stroble argues her house is located within the boundaries of a formal reservation.[2] The Commission concluded that Stroble's residence was not located within a formal reservation, because the land was neither owned by the Tribe nor held in trust for the Tribe by the federal government nor subject to any restrictions. Rather, Stroble lived on unrestricted, non-trust, private fee land.

¶8 On appeal, Stroble contends the Commission's conclusion is contrary to the United States Supreme Court's decision in *McGirt v. Oklahoma,* 591 U.S. 894 (2020), where the Court determined that the Creek Reservation had never been disestablished by Congress. Stroble argues that fee title is irrelevant. She asserts that the *McGirt* Court affirmed all lands within the boundaries of a reservation, including private fee lands, are "Indian country."

Country, O.A.C. § 710:50-15-2(c)(1), are not issues before the Court today.

[2] Stroble does not claim she lived in a dependent Indian community or Indian allotment. Further, Stroble did not live within an "informal reservation" as the land was not held in trust for the Muscogee (Creek) Nation by the United States nor was the property part of "the tribe's original reservation which [was] neither allotted to individual Indians, nor ceded to the United States as surplus land, but [was] retained by the tribe for use as tribal lands." O.A.C. § 710:50-15-2(a)(2).

¶9 The issue presented is whether the State has jurisdiction to impose income taxes on a tribal member who resides and works for the tribe within the boundaries of the tribe's reservation as recognized in *McGirt*. *McGirt* declared the reservation status of the land at issue. *See id.* at 913, 937. The United States Supreme Court determined that because the land was reservation land, it constituted "Indian country" for purposes of the Major Crimes Act, 18 U.S.C. §§ 1151, 1153. Therefore, the State was without jurisdiction to prosecute certain crimes committed by an Indian on the reservation. Stroble is asking this Court to extend *McGirt* to civil and regulatory law—to find the State is without jurisdiction to tax the income of a tribal member living and working on the tribe's reservation. This we cannot do.

¶10 The United States Supreme Court expressly limited *McGirt* to the narrow issue of criminal jurisdiction under the Major Crimes Act. Justice Gorsuch, writing for the majority, stated:

> [T]he State worries that our decision will have significant consequences for civil and regulatory law. The only question before us, however, concerns the statutory definition of "Indian country" as it applies in federal criminal law under the [Major Crimes Act], and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law.

McGirt, 591 U.S. at 935; *see also Oklahoma v. Castro-Huerta,* 597 U.S. 629, 633 (2022) (noting the reservation status recognized in *McGirt* means that different jurisdictional rules might apply for prosecuting crimes in the area). This Court has previously recognized that, while *McGirt* expanded the popular

understanding of the extent of "Indian Country" in Oklahoma under the Major Crimes Act, it stopped there. *See In re Guardianship of K.D.B.,* 2025 OK 10, ¶ 14, 564 P.3d 83, 90.

¶11 The United States Supreme Court's declaration—113 years after statehood—that nearly half of Oklahoma is a reservation is unprecedented. To date, the United States Supreme Court has not extended its ruling in *McGirt* beyond the Major Crimes Act. To date, the United States Supreme Court has not extended its ruling in *McGirt* to the State's civil or taxing jurisdiction. And it is not this Court's place to do so.[3]

CONCLUSION

¶12 We hold that Stroble does not qualify for a state income tax exemption pursuant to O.A.C. § 710:50-15-2(b)(1) for years 2017, 2018, and 2019.

ORDER OF THE OKLAHOMA TAX COMMISSION IS AFFIRMED.

Concur: Rowe, C.J. (by separate writing), Kuehn, V.C.J. (by separate writing), Winchester (by separate writing), Darby (by separate writing), Kane (by separate writing), and Jett, JJ.

Dissent: Edmondson, Combs (by separate writing), and Gurich, JJ.

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[3] This Court has recognized the reservation status of the land and the State and tribe's concurrent jurisdiction over specific civil matters where expressly required by federal statute. *See In re Guardianship of K.D.B.,* 2025 OK 10, 564 P.3d 83 (guardianship proceeding under 25 U.S.C. § 1911 and intergovernmental agreement made pursuant to 25 U.S.C. § 1919); *In re S.J.W.*, 2023 OK 49, 535 P.3d 1235 (juvenile deprived proceeding under 25 U.S.C. § 1911); *Milne v. Hudson,* 2022 OK 84, 519 P.3d 511 (civil protection order under 18 U.S.C. § 2265).

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 120,806

IN THE MATTER OF THE INCOME TAX PROTEST OF ALICIA STROBLE

ALICIA STROBLE,

Protestant/Appellant,

v.

OKLAHOMA TAX COMMISSION,

Respondent/Appellee.

FOR OFFICIAL PUBLICATION

KANE, J., with whom Jett, J., joins, concurring specially:

¶1 I concur that *McGirt v. Oklahoma,* 591 U.S. 894 (2020), concerned the statutory definition of "Indian country" for purposes of the Major Crimes Act only, and any decision extending *McGirt* to preempt Oklahoma from taxing the income of tribal members residing on unrestricted, non-trust, private fee land must come from the United States Supreme Court.

¶2 I would like to fully address the core issues presented in this case: (1) whether federal law preempts Oklahoma from taxing the income of Alicia Stroble, a tribal member who lives on unrestricted, non-trust, private fee land within the geographic borders of the reservation recognized in *McGirt;* and, if not, (2) whether Stroble is exempt from paying

income tax under Oklahoma law. In my view, Oklahoma's sovereign authority to tax the income of tribal members living on unrestricted, non-trust, private fee land and working within the boundaries of the tribe's reservation has not been preempted by federal law, and no Oklahoma statute or regulation exempts Stroble from paying income tax. The Oklahoma Tax Commission properly rejected Stroble's claimed tax exemption under Oklahoma Administrative Code (O.A.C.) § 710:50-15-2(b) and denied her protest.

I. Federal law does not preempt Oklahoma's sovereign authority to tax Stroble.

¶3 Stroble argues that the federal common law preempts the State's jurisdiction to tax the income of tribal members living and working on the tribe's reservation. She is mistaken. *Oklahoma v. Castro-Huerta,* 597 U.S. 629 (2022), is the United States Supreme Court's most recent decision applying federal preemption to an Oklahoma reservation. We are bound to analyze Oklahoma's jurisdiction under this framework. "[A] State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government." *Id.* at 638.

A. Ordinary principles of preemption

¶4 Stroble has not identified a treaty or federal statute that preempts Oklahoma's taxing authority.[1] Rather, she argues, when it comes to the special area of state taxation of Indians in Indian country, the

[1] Nothing in the Major Crimes Act purports to divest the State of its sovereign authority to tax.

ordinary preemption analysis is reversed. Stroble relies on *Oklahoma Tax Commission v. Sac & Fox Nation,* 508 U.S. 114 (1993), in which the United States Supreme Court said: [a]lthough exemptions from tax laws should, as a general rule, be clearly expressed, the tradition of Indian sovereignty requires that the rule be reversed when a State attempts to assert tax jurisdiction over an Indian tribe or tribal members living and working on land set aside for those members." 508 U.S. at 124 (internal citation and quotations omitted). She contends that instead of searching for a treaty or federal statute showing that Congress has *prohibited or preempted* Oklahoma from exercising its sovereign authority to tax the income of tribal members living and working on the tribe's reservation within the State's territory, the inquiry is whether Congress has *expressly authorized* Oklahoma to tax these tribal members.

¶5 Justice Gorsuch, dissenting in *Castro-Huerta,* sponsored a similar argument with respect to criminal jurisdiction. The majority in *Castro-Huerta* flatly rejected this argument. First, the majority reiterated the State's sovereign authority over reservation lands within the State's territory:

> [T]he Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. See U.S. Const., Amdt. 10. As this Court has phrased it, a State is generally "entitled to the sovereign-

> ty and jurisdiction over all the territory within her limits."

Castro-Huerta, 597 U.S. at 636 (quoting *Lessee of Pollard v. Hagan,* 3 How. 212, 228, 11 L.Ed. 565 (1845)). Then Justice Kavanaugh, writing for the majority, rejected the reversal of the preemption analysis, as urged by Justice Gorsuch and now Stroble:

> As a corollary to its argument that Indian country is inherently separate from States, the dissent contends that Congress must affirmatively authorize States to exercise jurisdiction in Indian country, even jurisdiction to prosecute crimes committed by non-Indians. But under the Constitution and this Court's precedents, the default is that States may exercise criminal jurisdiction within their territory. See Amdt. 10. States do not need a permission slip from Congress to exercise their sovereign authority. In other words, the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is *preempted.* In the dissent's view, by contrast, the default is that States do *not* have criminal jurisdiction in Indian country unless Congress specifically *provides* it. The dissent's view is inconsistent with the Constitution's structure, the States' inherent sovereignty, and the Court's precedents.

Id. at 653 (emphasis in original).

¶6 The United States Supreme Court's most recent statement on preemption in *Castro-Huerta* undermines Stroble's *Sac & Fox* argument. I am persuaded

that, in light of *Castro-Huerta,* the default is the State has jurisdiction *unless that jurisdiction is preempted.*

¶7 Furthermore, in my view, *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973), which dealt with Arizona's authority to tax tribal members living on the widely-recognized and separately administered Navajo Reservation, has been repeatedly miscredited for reversing the preemption analysis when it comes to state taxation of tribal members.[2] Stroble asserts that, in

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[2] Additionally, *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973), is distinguishable because of the significant differences between the Navajo Reservation in that case and the recently declared Creek Reservation at issue in this case. First, in *McClanahan,* there is no indication that the tribal member who lived and worked on the Navajo Reservation lived on private fee land. In the part of the Navajo Reservation located in Arizona, less than 1% is private fee land. As opposed to the Creek Reservation in Oklahoma, where 95% is private fee land. Exempting tribal members from income taxation in *McClanahan* created no risk of "an impractical pattern of checkerboard jurisdiction," which the United States Supreme Court has criticized. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 478 (1976) (citing *Seymour v. Superintendent,* 368 U.S. 351 (1962)); *see County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251, 265 (1992) ("[T]he Tribe's and the United States' favored disposition also produces a 'checkerboard,' and one that is *less* readily administered: They would allow state taxation of only those fee lands owned (from time to time) by nonmembers of the Tribe.") (emphasis in original); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nations,* 492 U.S. 408, 415, 422-425, 430-431 (1989) (recognizing the county had jurisdiction to zone reservation fee lands owned by Indians and non-Indians in a checkerboard pattern).

Second, the tribal member in *McClanahan* was, presumably, not the beneficiary of state-provided goods and services in the

McClanahan, the United States Supreme Court held "absent express authorization from Congress," states are preempted from imposing personal income taxes on tribal members living and working on the tribe's reservation. Brief in Chief, at 12. The United States Supreme Court did not actually write those words in *McClanahan.* The language to which Stroble refers first appeared in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), which was decided at the same time as *McClanahan:*

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way that Stroble is. *See* Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation,* 63 Tax Law. 897, 1211-12 (2010). Whereas the Navajo Reservation in Arizona was widely recognized and under general federal jurisdiction, it was generally believed there were no Indian reservations in Oklahoma from 1907 to 2020 when *McGirt v. Oklahoma,* 591 U.S. 894 (2020), was decided. For 118 years the State has undertaken the provision of infrastructure and public services to all people throughout Oklahoma's entire territory. Unlike the tribal member in *McClanahan,* the state-provided goods and services within the Creek Reservation are no different than state benefits provided in other parts of the State.

The United States Supreme Court rejected a similar argument in *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 476 (1976), finding being the beneficiary of state-provided goods was not grounds for distinguishing the Flathead Reservation in *Moe* from the Navajo Reservation in *McClanahan.* However, Oklahoma's situation is distinguishable from *Moe* not only by the recent, unprecedented declaration of the existence of the Creek Reservation in *McGirt* but also by scope. Half or 625,000 acres of the Flathead Reservation was private fee land. *See id.* at 466. Ninety-five percent or 2,850,000 acres of the Creek Reservation, including most of the city of Tulsa, is private fee land. The entire Flathead Reservation had a much smaller population of approximately 15,116 people with only 19% (2,872) being members of the Tribe. *Id.* One million people live within the Creek Reservation with 10-15% (100,000 to 150,000) of Oklahoma residents being Indian (although not necessarily members of the Muscogee (Creek) Nation).

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. State Tax Commission of Arizona, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible *absent congressional consent.*

Id. at 148 (emphasis added). It should be noted that *Mescalero* concerned taxes imposed on activities outside the boundaries of a reservation. Therefore, *Mescalero's* brief discussion about income from activities carried on within the boundaries of the reservation and reference to *McClanahan* is dicta.[3] None-

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[3] *Mescalero's* word choice may have been gleaned from the *McClanahan* Court's concluding observation that:

> Congress would not have jealously [sic] protected the immunity of reservation Indians from state income taxes [in the Buck Act] had it thought that the States had residual power to impose such taxes in any event. Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes *without special authorization.*

McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 177 (1973) (footnote omitted) (emphasis added). On the other hand, the *McClanahan* Court noted "that *exemptions* from tax laws should, as a general rule, be *clearly expressed." Id.* at 176 (emphasis added). It is more likely the frequently cited language comes from a publication of the United States Department of the Interior, which was cited in *McClanahan:*

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Cong-

theless, the United States Supreme Court has relied on this extrapolation of *McClanahan* in almost every Indian tax case since.[4] From *McClanahan* emerged the principle that "a State [is] without jurisdiction to subject a tribal member living on the reservation, and whose income [is] derived from reservation sources, to a state income tax *absent an express authorization from Congress." Sac & Fox,* 508 U.S. at 123 (citing *McClanahan,* 411 U.S. 164) (emphasis added). This synopsis, however, is inconsistent with the legal analysis applied in *McClanahan.*

> ress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of *express authority conferred upon the State by act of Congress.*

Id. 170-171 (quoting United States Dept. of the Interior, Federal Indian Law 845 (1958)) (emphasis added).

[4] *See, e.g., Okla. Tax. Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458 (1995) (motor fuel excise tax imposed on fuel sold by the tribe on tribal trust land and income tax on tribal member residing outside Indian country); *Yakima,* 502 U.S. at 258 (ad valorem tax on fee land within reservation and excise tax on the sale of fee land within reservation); *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985) (tax on tribe's royalty interests in oil and gas leases); *Bryan v. Itasca County,* 426 U.S. 373, 375-377 (1976) (tax on tribal member's personal property located on tribal trust land); Moe *v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 476 (1976) (tax on personal property located within the reservation; the vendor license fee applied to an Indian operating a tribal smoke shop within the reservation; and cigarette sales tax applied to on-reservation sales by Indians to Indians); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973) (tax on gross receipts on ski resort operated by the tribe but located outside reservation); *see also California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 215 (1987) (state and county gambling laws applied to tribal bingo operations).

¶8 In my view, *McClanahan* actually relegated the tradition of Indian sovereignty to the "backdrop" and brought state sovereignty and federal preemption to the foreground:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.
>
> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "(t)he relation of the Indian tribes living within the borders of the United States . . . (is) an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the

> power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

McClanahan, 411 U.S. at 172-173 (citations and footnotes omitted). *McClanahan,* when read closely, does not begin with a presumption that tribal members living and working on the reservation are immune from state taxation. *McClanahan* begins with an understanding that a State has jurisdiction over all its citizens, including tribal members. State law applies unless the State's jurisdiction is pre-empted by federal law or infringes on tribal self-government. The *McClanahan* Court does not apply a reversed preemption analysis. Rather, the Court undertakes an ordinary preemption analysis "[looking] instead to the applicable treaties and statutes which define ***the limits of state power***." *Id.* at 172 (emphasis added). The *McClanahan* Court examined treaties and federal statutes to discern whether the State's sovereign authority to tax tribal members living and working on the reservation had been pre-empted, not whether immunity from state taxation had been preempted. The Court looked to see if Congress had expressly provided a tax exemption or prohibited Arizona from taxing Indians, not if Congress had expressly authorized Arizona to tax Indians.[5] As one commenter has said:

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[5] *See, e.g., McClanahan,* 411 U.S. at 175 ("It is thus unsurprising that this Court has interpreted the Navajo treaty to *preclude extension of state law*—including state tax law—to Indians on the Navajo Reservation.") (emphasis added); *id.* at 176 ("It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed. But we have in the past construed language far more ambiguous than this as *providing*

> If *McClanahan* actually held that such taxation is not permissible absent congressional consent, there would have been no need to have analyzed the treaty and Enabling Act to determine if they prohibited the tax. Instead, the focus would have been on whether they permitted taxation that was otherwise prohibited. *Worcester* would have been better precedent for Justice White's broad proposition [in *Mescalero*], except that Marshall had gratuitously eviscerated it in *McClanahan.*

See Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation,* 63 Tax Law. 897, 1048 (2010). In *McClanahan,* the Court ultimately determined that Arizona's taxing authority had been preempted by the Treaty of 1868, the Arizona Enabling Act, and the Buck Act. *See McClanahan,* 411 U.S. at 179-180 ("Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves.").

¶9 Therefore, I would not apply a reversed preemption analysis in matters of state taxation. Just as Oklahoma does not need a permission slip from Congress to exercise criminal jurisdiction within its territory, *see Castro-Huerta,* 597 U.S. at 653,

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a tax exemption for Indians.") (emphasis added); *id.* at 177 ("While the Buck Act itself cannot be read as *an affirmative* grant of tax-exempt status to reservation Indians. . . .") (emphasis added); *id.* at 177-178 (noting 25 U.S.C. § 1322(a) "cannot be read as *expressly conferring* tax immunity upon Indians') (emphasis added).

Oklahoma does not need a permission slip from Congress to exercise taxing jurisdiction within its territory. Oklahoma has taxing jurisdiction within the boundaries of a reservation unless that jurisdiction has been preempted by a treaty or federal statute. Again, Stroble has not identified a treaty or federal statute that preempts Oklahoma's taxing authority. Oklahoma's sovereign authority to tax the income of its residents, who are tribal members living and working within the boundaries of the tribe's reservation, has not been preempted under ordinary principles of federal preemption.

B. Infringement on tribal self-government

¶10 The United States Supreme Court has recognized that even when federal law does not preempt state jurisdiction under ordinary preemption, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government. *See Castro-Huerta,* 597 U.S. at 649 (citing *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142-143 (1980)). Under the *Bracker* balancing test, the Court considers tribal interests, federal interests, and state interests. *Id.* (citing *Bracker,* 448 U.S. at 145).

¶11 Stroble objects to the use of the *Bracker* balancing test in this case. Stroble argues the *Bracker* balancing test does not apply when, as here, the State seeks to impose a tax directly on a tribal member inside Indian country. Stroble contends the *Bracker* balancing test applies only when the State imposes taxes on non-Indians inside Indian country. Stroble relies on *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450 (1995). One of the

issues[6] in *Chickasaw Nation* was whether a State could impose its motor fuels excise tax upon fuel sold by the Tribe's retail stores on tribal trust land. *See id.* at 452-453. After assuming Congress had not expressly authorized the imposition of Oklahoma's fuels tax on fuel sold by the Tribe on tribal trust land, the Court turned to whether the state tax was nonetheless permitted because it did not infringe on tribal self-government. *Id.* at 457. The Court denied the State's request to balance the state and tribal interests:

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held, a State is without power to tax reservation lands and reservation Indians.

Id. at 458 (citing *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251, 258 (1992)) (internal quotations and brackets

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[6] Another issue in *Chickasaw Nation,* was whether Oklahoma could tax the income of tribal members who worked for the tribe but resided outside "Indian country." *See Chickasaw Nation,* 515 U.S. at 453. In *Chickasaw Nation,* it was undisputed that the tribal members lived in Oklahoma but outside Indian country. *Chickasaw Nation* was decided 25 years before *McGirt,* when it was generally accepted that the Chickasaw Nation's reservation had been disestablished. It was not until 2021 that the Oklahoma Court of Criminal Appeals, pursuant to *McGirt,* found the Chickasaw Reservation had not been disestablished by Congress. *See Bosse v. State,* 2021 OK CR 30, 499 P.3d 771; *McClain v. State,* 2021 OK CR 38, 501 P.3d 1009 (overruled on other grounds by *Deo v. Parrish,* 2023 OK CR 20, 541 P.3d 833).

omitted). The Court focused on whether the legal incidence of the excise tax rested on the Tribe or tribal members (retailers) or non-Indians (wholesaler or non-Indian consumers). *Id.* at 458-459. Because it rested on the Tribe, the Court applied the categorical rule that the tax cannot be enforced absent clear congressional authorization. *Id.* at 459. The Court explained, "[b]ut if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy . . . ." *Id.* Stroble asserts that, because Congress has not expressly authorized Oklahoma to tax the income of tribal members living and working within the boundaries of the tribe's reservation, the categorical rule that the State is without such power applies. Stroble argues there are no interests to balance, and she is exempt.

¶12 Stroble's argument is premised upon the reversal of the ordinary preemption analysis, which I have rejected. Furthermore, I do not view the categorical approach in *Chickasaw Nation* as foreclosing the use of the *Bracker* balancing test any time the State seeks to impose its laws on tribal members within the boundaries of the tribe's reservation.

¶13 The term "categorical approach" first appeared in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251 (1992). Justice Scalia wrote:

> In the area of state taxation, however, Chief Justice Marshall's observation that "the power to tax involves the power to destroy," has counseled a more categorical approach: "[A]bsent cession of jurisdiction or other

> federal statutes permitting it," we have held, a State is without power to tax reservation lands and reservation Indians. And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has "made its intention to do so unmistakably clear."

Id. at 258 (internal citations omitted). The problem with Justice Scalia's analysis in *Yakima* is that Chief Justice Marshall's counsel is guided by *Worcester*-era notions of Indian sovereignty, which the United States Supreme Court has rejected. In *Castro-Huerta,* the Court explained:

> In the early years of the Republic, the Federal Government sometimes treated Indian country as separate from state territory—in the same way that, for example, New Jersey is separate from New York. Most prominently, in the 1832 decision in *Worcester v. Georgia,* 6 Pet. 515, 561, 8 L. Ed. 483 this Court held that Georgia state law had no force in the Cherokee Nation because the Cherokee Nation "is a distinct community occupying its own territory."
>
> But the "general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia"* "has yielded to closer analysis." *Organized Village of Kake v. Egan,* 369 U.S. 60, 72, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962). "By 1880 the Court no longer viewed reservations as distinct nations." *Ibid.* Since the latter half of the 1800s, the Court has consistently and explicitly held that Indian reservations are "part of the surrounding

> State" and subject to the State's jurisdiction "except as forbidden by federal law." *Ibid.*

Castro-Huerta, 597 U.S. at 636. The *McClanahan* Court also recognized this shift away from the *Worcester* principle that States have no role to play within reservation boundaries toward state sovereignty and federal preemption. *See McClanahan,* 411 U.S. at 168-173.

¶14 The words "instead of a balancing inquiry," used by the United States Supreme Court in *Chickasaw Nation,* could suggest the Court does not apply the *Bracker* balancing test when a State seeks to impose a tax on a tribe or tribal member in Indian country. However, the United States Supreme Court has never said that directly. In fact, in *Castro-Huerta,* the Court indicated the *Bracker* balancing test does apply to state regulation of Indians in Indian country:

> To the extent that a State lacks prosecutorial authority over crimes committed ***by Indians in Indian country*** (a question not before us), that would not be a result of the General Crimes Act. Instead, it would be the result of a separate principle of federal law that, as discussed below, precludes state interference with tribal self-government.

Castro-Huerta, 597 U.S. at 639, n.2 (citing *Bracker,* 448 U.S. at 142-143; *McClanahan,* 411 U.S. at 171-172) (emphasis added). Furthermore, this Court and the Oklahoma Court of Criminal Appeals, thus far, have applied *Bracker* in matters involving only Indians in Indian country. *See Milne v. Hudson,* 2022 OK 84, ¶¶ 17-20, 519 P.3d 511, 515-516 (analyzing whether state jurisdiction to issue civil protection orders in matters involving only Indians in Indian

country infringes on tribal self-government); *Deo v. Parish,* 2023 OK CR 20, ¶¶ 13-16, 541 P.3d 833, 837-838 (applying *Bracker* balancing test in determining that the Oklahoma district court's subject matter jurisdiction over Indians in Indian country had not been preempted); *City of Tulsa v. O'Brien,* 2024 OK CR 31, ¶¶ 31-35, --- P.3d --- (applying *Bracker* balancing test and finding the City's jurisdiction to prosecute non-member Indians for misdemeanor traffic offenses in Indian country did not infringe on tribal self-government); *Stitt v. City of Tulsa,* 2025 OK CR 5, ¶ 8, 565 P.3d 857, 860 (same).

¶15 The *Bracker* balancing test's predecessor was the *Williams* infringement test. In *Williams v. Lee,* 358 U.S. 217 (1959), the United States Supreme Court explained that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. Stroble relies on *McClanahan,* which involved tribal members living and working on the tribe's reservation:

> [W]e reject the suggestion that the Williams test was meant to apply in this situation. It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians. In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The Williams test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

> The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves.

McClanahan, 411 U.S. at 179-180 (citation omitted).

¶16 I am not persuaded that *McClanahan* dispensed with the infringement test for every situation where the State imposes a tax on an Indian in Indian country or limited its application to non-Indians. First and foremost, *McClanahan* did not need to apply the *Williams* infringement test, ***because the State's taxing authority was preempted under ordinary principles of preemption***. The *Williams* infringement test only applied "absent governing Acts of Congress." *Williams,* 358 U.S. at 220. Said another way, the *Williams* infringement test only applied when state authority had not been preempted by federal law. *McClanahan* acknowledged that, previously, the infringement test had been applied in situations involving non-Indians, but the fact *McClanahan* dealt with only Indians is not what made the *McClanahan* case "completely different." What made *McClanahan* "completely different"—and the infringement test unnecessary—was that there were treaties and statutes, i.e. "governing Acts of Congress," that preempted State authority to tax; therefore, the infringement test was not triggered under the facts. *See Pomp,* at 1043-44.

¶17 Second, the *McClanahan* Court indicated that Arizona had no interest when it came to Navajo Indians within the Navajo Reservation. While that may have been true in Arizona, where certain lands

were reserved "for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision," *McClanahan,* 411 U.S. at 174-175, that is not the case here in Oklahoma. In light of *Castro-Huerta's* recent reiteration of state sovereignty with respect to reservations recognized in *McGirt* and its progeny and Oklahoma's unique history with respect to the Creek Reservation, both the State of Oklahoma and the Muscogee (Creek) Nation can "fairly claim an interest in asserting their respective jurisdictions," over Indians in Indian country. *Id.* at 179. The *Williams* infringement test and the *Bracker* balancing test were designed to resolve such conflict by providing that the State can protect its interest up to the point where tribal self-government would be affected. *See id.*

¶18 Finally, even if one employs the "categorical approach," it does not dictate the same result in every case. The categorical approach is not "an inflexible per se rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 214-215 (1987); *see also Mescalero,* 411 U.S. at 147-148 (brackets and quotations omitted) ("At the outset, we reject—as did the state court—the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land."). *Bracker* itself dismissed a rigid rule that state law does not apply to activities of tribal members within the boundaries of the tribe's reservation:

> Long ago the Court departed from Mr. Chief Justice Marshall's view [in *Worcester v. Georgia*] that the laws of a State can have no force *within reservation boundaries.* At the same time we have recognized that the Indian tribes retain attributes of sovereignty over both their members and their territory. As a result, ***there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.***

Bracker, 448 U.S. at 141-142 (internal quotations and citations omitted) (emphasis added). A categorical or per se rule for state regulation of the activities of tribal members within the tribe's reservation is not contemplated in *Bracker.* To the contrary, the Court recognized that *"**any applicable regulatory interest of the State must be given weight**, McClanahan v. Arizona State Tax Comm'n, supra,* at 171, 93 S.Ct., at 1261, and automatic exemptions as a matter of constitutional law are unusual." *Id.* at 144 (citing *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 481, n.17 (1976)) (emphasis added). Under *Bracker,* courts are to balance the state, federal, and tribal interests when the State seeks to regulate on-reservation conduct involving only Indians. The Court merely warned of the reality—in dicta[7]—that upon balancing all the interests, oftentimes, the scales do not tip in favor of the State:

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[7] *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), concerned taxes imposed on a non-Indian business for activities exclusively within the boundaries of an Indian reservation.

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, ***for the State's regulatory interest is likely to be minimal*** and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Bracker, 448 U.S. at 144-145. What is "likely" is not guaranteed. The categorical approach is intended to promote efficiency: "We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case." *Cabazon,* 480 U.S. at 215, n.17.

¶19 Stroble points to other tax cases involving only Indians in Indian country where the Court did not apply the *Williams* infringement test or the *Bracker* balancing test. Like *McClanahan,* those cases did not require balancing, ***because state taxing authority had been preempted based on ordinary principles of preemption***. *See, e.g., Moe,* 425 U.S. at 477 (noting the treaty and statutes that preempted state taxing authority were essentially the same as those involved in *McClanahan); Yakima,* 502 U.S. at 266, 270 (finding statute permitted taxation of the land but did not permit excise tax on sale of the land). Contrary to Stroble's argument, the *Yakima* Court actually hinted at the applicability of the infringement test. The Court found the Yakima Nation's argument "that state jurisdiction over reservation fee land is manifestly inconsistent with the policies of Indian self-determination and self-governance that lay behind the Indian Reorganization Act and subsequent congressional enactments" was "a great exaggeration." *Yakima,* 502 U.S. at 265. The Court surmised that the State's power to assess and collect ad valorem taxes on fee land within the reservation is not "significantly disruptive of tribal self-government." *Id.* at 265.

¶20 For these reasons, I find the *Bracker* balancing test does apply when (1) a State seeks to impose income taxes on tribal members within the tribe's reservation; and (2) the State's authority to tax has not been preempted under ordinary principles of preemption. The cases cited by Stroble involving only Indians in Indian country do not apply the *Williams* infringement test or *Bracker* balancing test *because state authority was preempted by treaties or federal statutes* in those cases, not because the infringement test does not apply to the activities of Indians in

Indian country. The categorical approach does not demand the scales tip in favor of the tribal and federal interests and against the State in every case.

¶21 In this case, tribal interests are not harmed by the State's imposition of income taxes. Tribal members benefit from the services provided by the State's income tax revenue. Furthermore, the State income tax does not prevent the tribes from raising revenues to support their governmental operations by taxing the income of their tribal members to the extent allowed by law. Likewise, the federal interest in protecting Indians is not harmed. The State, on the other hand, has a strong sovereign interest in raising revenues to support its services, particularly in an area that is predominantly non-Indian. The State provides enumerable facilities and services to all Oklahomans, including tribal members, within the reservation's boundaries. I would find the Oklahoma income tax does not unlawfully infringe on the Muscogee (Creek) Nation's right to tribal self-government.

II. Equitable principles recognized in *City of Sherrill v. Oneida Indian Nation* bar Stroble's income tax exemption claim.

¶22 Stroble's claim that federal law exempts her from income taxation because she lives within the boundaries of the Creek Reservation is also barred by the doctrines of laches, acquiescence, and impossibility. In *McGirt,* when Justice Gorsuch was confronted with the potential civil and regulatory consequences of confirming 113 years after statehood that nearly half of Oklahoma's territory is a reservation, he wrote:

> [W]e do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true . . . today, while leaving questions about . . . reliance interest[s] for later proceedings crafted to account for them."

McGirt, 591 U.S. at 936 (internal citation omitted). And now, here we are.

¶23 In *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005), the United States Supreme Court examined a history similar to Oklahoma's history of longtime state sovereign control over the territory. The Oneida Indian Nation of New York's aboriginal homeland was in central New York. *See id.* at 203. In 1788, the Tribe ceded their lands to New York but retained a reservation of 300,000 acres. *Id.* Throughout the 19th century, the Federal Government and State of New York implemented policies to pressure or remove tribes to the west and open reservation lands in New York to white settlement. *Id.* at 205-207. The Tribe sold the subject parcels of land to one of its members in 1805, who then sold the land to a non-Indian in 1807. *Id.* at 211. By 1920, the Tribe had sold all but 32 acres of their reservation. *Id.* at 207. For 200 years, the State of New York and its county and municipal units continuously governed the territory which included the historic Oneida Reservation. *Id.* at 202. Non-Indians owned and dev-

eloped the area that once composed the Tribe's reservation. *Id.* During this time the land converted from wilderness into cities like Sherrill and property values greatly increased. *Id.* at 214-215. New York's sovereignty over the area was generally accepted or a matter of indifference until the 1970s. *Id.* at 214. Over 99% of the area's present-day population is non-Indian. *Id.* at 211.

¶24 In 1997 and 1998, the Tribe purchased fee title to properties located in Sherrill, New York, in Oneida County. *Id.* The properties had been subject to state and local taxation for generations. *Id.* at 214. The Tribe sought declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation. *Id.* at 213-214. The Tribe argued that because the parcels were located within the boundaries of the reservation originally occupied by the Tribe, the properties were exempt from taxation. *Id.* at 211-212.

¶25 Justice Ginsburg, writing for the majority, held the "standards of federal Indian law and federal equity practice preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214 (internal quotations and footnote omitted). The Supreme Court evaluated the Tribe's claims "in light of the long history of state sovereign control over the territory." *Id.* The Court "observed in the different, but related, context of the diminishment of an Indian reservation that '[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use,' may create 'justifiable expectations.'" *Id.* at 215 (quoting *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 604-605 (1977)). The Court found "[s]imilar justifiable expectations, grounded in two centuries of New

York's exercise of regulatory jurisdiction, until recently uncontested by [the Tribe], merit heavy weight here." *Id.* at 216-217.

¶26 The Court explained "[t]his long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the Tribe] from gaining the disruptive remedy it now seeks." *Id.* The Court applied the doctrine of laches, "a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief." *Id.* at 217. The Court also applied the doctrine of acquiescence, analogizing the Tribe's assertion of sovereignty to state sovereignty cases: "When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations." *Id.* at 218 (footnote omitted). The Court explained "[t]he acquiescence doctrine ***does not depend on the original validity of a boundary line***; rather, it attaches legal consequences to acquiescence in the observance of the boundary." *Id.* (emphasis added). The Court found the Oneidas had not exercised regulatory control over the properties for two centuries and, therefore, "[p]arcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor the historic wisdom in the value of repose." *Id.* at 219 (internal quotations and citation omitted).

¶27 Finally, the Court discussed "the impracticability of returning to Indian control land that generations earlier passed into private hands." *Id.* The Court found "these pragmatic concerns about restoring Indian sovereign control over land magnified

exponentially here, where development of every type imaginable has been ongoing for more than two centuries." *Id.* (internal quotations and citation omitted). The Court concluded:

> [U]nilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led this Court in *Yankton Sioux* to initiate the impossibility doctrine. The city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians. A checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at [the Tribe's] behest—would seriously burden the administration of state and local governments and would adversely affect landowners neighboring the tribal patches.

Id. at 219-220 (internal citations and quotations and brackets omitted). The Court further warned: "If [the Tribe] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *Id.* at 220. The Court concluded that "the distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Id.* at 221 (footnote omitted).

¶28 In some respects, Oklahoma's situation parallels that of the city of Sherrill. The Creek Reservation was established in 1832 in Indian Territory in present-day Oklahoma. Pursuant to the Treaty of 1866, the Federal Government bought back some of the reservation lands and the Creeks held fee patent to "the reduced Creek Reservation." In the late 19th century, the allotment era began, and white settlers flooded into Indian Territory. By 1901, alienation restrictions were lifted, and tribal members could freely sell their fee land to Indians and non-Indians. Oklahoma achieved statehood in 1907 and what had been Indian Territory became a part of the State's territory. For more than a century, Oklahoma and its county and municipal units have continuously governed the territory which includes the Creek Reservation recognized in *McGirt*. During this time, the land developed into towns and cities like Tulsa.[8] The Creek Reservation covers roughly 3 million acres where more than 1 million people reside. The property where Stroble resides and tribal members' income and activities thereon have been subject to state and local taxation for generations. Today, the Creek Reservation is predominately non-Indian. Only 10-15% of Oklahoma residents are Indian. *See McGirt,* 591 U.S. at 938 (Roberts, C.J., dissenting).

¶29 Stroble seeks to distinguish this case from *Sherrill* by emphasizing *how* the Oneida Nation of

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[8] At statehood in 1907, Tulsa had a population of 7,298. *See* The Encyclopedia of Oklahoma History and Culture, Oklahoma Historical Society, https://www.okhistory.org/publications/enc/entry?entry=TU003#:~:text=At%20its%20incorporation%20on%20January,had%20a%20population%20of%207%2C298. According to the 2020 census, Tulsa's population is 413,066.

New York sought to regain its ancient sovereignty. The Oneida Nation of New York sought to unite its aboriginal title with its recently acquired fee title. *See Sherrill,* 544 U.S. at 213-214. Stroble argues the Muscogee (Creek) Nation is not trying to unilaterally re-establish sovereign control. Rather, because the Creek Reservation was never disestablished, it never lost its sovereignty over the area. I disagree that this factual distinction renders *Sherrill* irrelevant for our purposes. The critical issue in *Sherrill* was not how the Tribe sought to reacquire reservation status; it was that for a more than 200 years, the area had been governed by the state, counties, and municipalities. It is *Sherrill's* application of the doctrines of laches, acquiescence, and impossibility and holding that recognizing tribal sovereignty for purposes of local taxation would be inequitable that informs our decision today.

¶30 *Sherrill* turned on its unique facts, as does the case before us. The history of Indian reservations in Oklahoma is unlike any other. There is no comparable history where for generations it was generally believed and accepted that such a populous and massive amount of State territory was not a reservation until that changed with the stroke of a pen in 2020.[9] Justice Gorsuch acknowledged that

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[9] There are a handful of other non-Indian communities that exist within reservation boundaries, but none have the population size or land area affected here. *See McGirt,* 591 U.S. at 932 ("But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today."). The Saginaw Chippewa Reservation includes Mount Pleasant, Michigan, which had a population of 21,243 in 2021. The Puyallup Reservation includes sizeable portions of the City of Tacoma, Washington, which has a population of 200,000, and other predominantly non-Indian cities. The Omaha Reservation

upon *McGirt* being released most Oklahomans would be surprised to find out they had been living on an Indian reservation. *See McGirt,* 591 U.S. at 933. Since *McGirt,* several other tribes have had their historic reservations affirmed by the Oklahoma Court of Criminal Appeals.[10] Collectively, "[t]he rediscovered reservations encompass the entire eastern half of the State-19 million acres that are home to 1.8 million people, only 10%-15% of whom are Indians." *Id.* at 938 (Roberts, C.J., dissenting) (accounting for reservations of Muscogee (Creek), Chickasaw, Choctaw, Cherokee, and Seminole tribes only).

¶31 Like *Sherrill,* we must evaluate Stroble's claimed income tax exemption in light of the long history of state sovereign control over the territory. From 1907 until the *McGirt* decision was issued in 2020, the Muscogee (Creek) Nation and its members were subject to Oklahoma's governance of the land in

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includes Pender, Nebraska. *See Nebraska v. Parker,* 577 U.S. 481 (2016). Pender's population was 1,051 in 2021.

[10] The Oklahoma Court of Criminal Appeals has since recognized other reservations in Oklahoma, which collectively encompass nearly half of the state of Oklahoma, where 1.8 million people reside. *See e.g., State v. Fuller,* 2024 OK CR 4, 547 P.3d 149 (Wyandotte Reservation); *State v. Brester,* 2023 OK CR 10, 531 P.3d 125 (Ottawa Reservation and Peoria Reservation); *McClain v. State,* 2021 OK CR 38, 501 P.3d 1009 (overruled on other grounds by *Deo v. Parish,* 2023 OK CR 20, 541 P.3d 833) (Chickasaw Reservation); *State v. Lawhorn,* 2021 OK CR 37, 499 P.3d 777 (Quapaw Reservation); *Bosse v. State,* 2021 OK CR 30, 499 P.3d 771 (Chickasaw Reservation); *Grayson v. State,* 2021 OK CR 8, 485 P.3d 250 (Seminole Reservation); *Spears v. State,* 2021 OK CR 7, 485 P.3d 873 (Cherokee Reservation); *Sizemore v. State,* 2021 OK CR 6, 485 P.3d 867 (Choctaw Reservation); *Hogner v. State,* 2021 OK CR 4, 500 P.3d 629 (overruled on other grounds by *Deo,* 2023 OK CR 20, 541 P.3d 833) (Cherokee Reservation).

question. Not until 2020 did Stroble challenge the State's authority to tax the income of tribal members living and working in the subject area. Oklahoma's longstanding assumption of jurisdiction over an area with a population that is 85-90% non-Indian and land that is 95% private fee land has created justifiable expectations for all people living within the boundaries of the Creek Reservation.[11] Justifiable expectations, grounded in 118 years of Oklahoma exercising taxing jurisdiction over tribal members living and working within the boundaries of the Creek Reservation, merit heavy weight. This long lapse of time, the Muscogee (Creek) Nation and its members' acquiescence to the State's sovereign authority to tax persons within the territory, and the dramatic changes in the character and development of the land preclude Stroble from obtaining the remedy she now

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[11] The *McGirt* Court found historical practices and changing demographics did not disestablish the Creek Reservation. *See McGirt,* 591 U.S. at 913-924. Tax immunity is a separate issue from disestablishment. In *Nebraska v. Pender,* 577 U.S. 481 (2016), Justice Clarence Thomas wrote: "Because petitioners have raised only the single question of diminishment, we express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax the retailers of Pender in light of the Tribe's century-long absence from the disputed lands." *Id.* at 494 (citing *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005)) (footnote omitted). In *Sherrill,* the Supreme Court noted it did not need to decide whether the Oneidas' Reservation had been disestablished by Congress in order to determine whether the doctrine of tribal sovereignty removed the Tribe from local taxation. *See id.* at 215, n.9. "The relief [the Tribe] seeks—recognition of present and future sovereign authority to remove the land from local taxation—is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender." *Id.*

seeks. If the pragmatic concerns about restoring Indian sovereign control were "magnified exponentially" in *Sherrill,* where the Tribe sought sovereign authority over just ***17,000 acres*** scattered throughout Oneida and Madison counties in New York, *see Sherrill,* 544 U.S. at 211, the pragmatic concerns are magnified even larger here, where tribes would have sovereign authority over ***19 million acres*** or half of the entire state of Oklahoma.

¶32 The United States Supreme Court has found "Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area." *Moe,* 425 U.S. at 479. *Sherrill* reminds us the checkerboard applies both ways. When there is a long history of state sovereign control over the territory and the area is overwhelmingly populated with non-Indians, excluding state taxing jurisdiction based on where tribal members live and work would also create an impractical checkerboard of alternating state and tribal jurisdiction that "would seriously burden the administration of state and local governments and would adversely affect landowners neighboring the tribal patches." *Sherrill,* 544 U.S. at 220 (internal quotations and citations omitted).

¶33 Like the Court in *Sherrill,* the doctrines of laches, acquiescence, and impossibility applicable under federal law dictate that members of the Muscogee (Creek) Nation living and working within the boundaries of the Creek Reservation are not exempt from Oklahoma's income tax.

¶34 In summary, applying precedent of the United States Supreme Court, I conclude that federal law does not preempt Oklahoma from imposing income

tax on tribal members who live on unrestricted, non-trust, private fee land within the geographic borders of their reservation in Oklahoma. The Court's most recent decision demonstrating how preemption affects Oklahoma's jurisdiction within reservations makes apparent that Oklahoma may levy income tax on Stroble. *See Castro-Huerta,* 597 U.S. 629. Additionally, *Sherrill* indicates that the tax exemption Stroble claims pursuant to federal law is equitably barred. Federal law provides no basis to reverse the Oklahoma Tax Commission's decision on appeal.

III. Oklahoma law does not exempt Stroble from income taxation.

¶35 According to 68 O.S.Supp.2014 § 2355(A), "[a] tax is hereby imposed upon the Oklahoma taxable income of every resident or nonresident individual." The only statutory exemption from taxation at issue in this case is 68 O.S.Supp.2017, 2018, & 2019 § 2358(A)(2), which allows a taxpayer to deduct "such income that the state is prohibited from taxing because of the provisions of the Federal Constitution, the State Constitution, federal laws or laws of Oklahoma."

¶36 Oklahoma taxes all income except that prohibited by either federal or state law. As demonstrated above, neither the Federal Constitution nor federal law prohibits Oklahoma from taxing Stroble's income. Neither the Oklahoma Constitution nor any state statute prohibits taxing Stroble's income. Rather, Oklahoma is required to tax Stroble's income under § 2355(A) and § 2358(A)(2).

¶37 In their briefs, the parties discuss in detail whether the Commission exempted Stroble from income taxation by promulgating O.A.C. § 710:50-15-

2(a)(1) and (b)(1). This is largely a moot point. Because no federal law prohibits Oklahoma from taxing Stroble's income and state law requires her income be taxed, the Commission does not have authority to exempt Stroble from income tax by administrative regulation. "[A]n agency created by statute may only exercise the powers granted by statute and cannot expand those powers by its own authority." *State ex rel. Dep't of Health v. Robertson,* 2006 OK 99, ¶16, 152 P.3d 875, 880; *see also Champlin Ref. Co. v. Okla. Tax Comm'n,* 25 F. Supp. 218, 221 (W.D.Okla. 1938) ("[W]hile the Oklahoma Tax Commission may devise plans or methods for carrying the statute into execution, it has no authority to modify or enlarge or amend the statute or limit its meaning in any manner."). The Commission cannot unilaterally expand tax exemptions because "[t]ax exemptions and deductions are matters of legislative grace subject to the controlling authority of either the [Federal] Constitution or the Oklahoma Constitution." *R.R. Tway, Inc. v. Okla. Tax Comm'n,* 1995 OK 129, ¶ 26, 910 P.2d 972, 978 (footnote omitted).

¶38 The Commission does not have authority to create income tax exemptions on its own. O.A.C. § 710:50-15-2(b)(1) is void to the extent the regulation creates an income tax exemption beyond what is required by federal law and inconsistent with the Legislature's directive in 68 O.S. § 2358(A)(2). Oklahoma law dictates that we affirm the Commission's decision to deny Stroble's protest.

IV. The Oklahoma Tax Commission did not adopt 18 U.S.C. § 1151 of the Major Crimes Act's definition of "Indian country."

¶39 In my view, even if the Commission could create such an exemption, it did not adopt 18 U.S.C. § 1151 of the Major Crimes Act's definition of "Indian country" in O.A.C. § 710:50-15-2(a)(1). While the Major Crimes Act's definition of "Indian country" is sometimes used in both criminal and civil contexts, no federal or state statute, administrative rule, or United States Supreme Court decision has ever declared that "Indian country" is a legal term of art solely defined by 18 U.S.C. § 1151 of the Major Crimes Act. Furthermore, nothing in the *McGirt* decision mandates that the Major Crimes Act's definition of "Indian country," 18 U.S.C. § 1151, applies to state tax law. To the contrary, the United States Supreme Court limited the scope of its holding to a narrow question of criminal law. The *McGirt* Court held a major crime occurred in "Indian country," as defined by 18 U.S.C. § 1151. That does not mean Stroble lived in "Indian country," as defined by O.A.C. § 710:50-15-2(a)(1).

¶40 Stroble argues the Commission adopted the Major Crimes Act's definition of "Indian country," which includes private fee land. It is well-settled that land within the boundaries of a reservation can be privately owned. That is the case here. Stroble acquired fee title to the property from a non-Indian grantor in 2008. Stroble's property does not have any restrictions on alienation; she can freely transfer ownership of the property.[12] In fact, 95% of the land

[12] "The holder of a fee simple holds property clear of any condition, limitation, or restriction." 28 Am. Jur. 2d Estates § 13.

within the boundaries of the Creek Reservation recognized in *McGirt* is unrestricted, non-trust, private fee land, most of which is not owned by tribal members.

¶41 The Major Crimes Act provides:

> The term "Indian country", as used in this chapter, means
>
> (a) ***all land within the limits of any Indian reservation*** under the jurisdiction of the United States Government, ***notwithstanding the issuance of any patent,*** and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added). But the Commission did not adopt the Major Crimes Act's definition of "Indian country." Instead, the Commission's definition provides:

> "Indian Country" means and includes formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States. [**See**: 18 U.S.C. § 1151].

O.A.C. § 710:50-15-2(a)(1). Notably, the Commission does not define "Indian country" as "however the

term is defined in 18 U.S.C. § 1151" or the like. Congress has demonstrated how to define "Indian country" as synonymous with 18 U.S.C. § 1151, but that is not what the Commission chose to do.[13] For instance, Congress adopted the Major Crimes Act's definition in 18 U.S.C. § 2265(e), which provides that state and tribal courts have concurrent jurisdiction to issue and enforce civil protection orders "in the Indian country of the Indian tribe *(as defined in Section 1151)* . . . ." 18 U.S.C. § 2265(e) (emphasis added); *see Milne v. Hudson,* 2022 OK 84, ¶¶ 11-16, 519 P.3d 511, 513-515 (applying the Major Crimes Act's definition prescribed in 18 U.S.C. § 2265(e)).

¶42 Stroble points to the citation to 18 U.S.C. § 1151 at the end of the Commission's definition and argues the Commission incorporated 18 U.S.C. § 1151's definition into the tax rule's definition. I disagree.

¶43 The language—and citation—in O.A.C. § 710:50-15-2(a)(1) was borrowed from *Sac & Fox.* One of the issues in *Sac & Fox* was whether tribal members were exempt from state income taxes if they worked for the tribe on trust land but did not

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[13] Other federal and state statutes and regulations explicitly adopt the definition from the Major Crimes Act. *See, e.g., Hydro Res., Inc. v. United States E.P.A.,* 608 F.3d 1131, 1134 (10th Cir. 2010) ("EPA chose to define the term 'Indian lands' . . . to be synonymous with 'Indian country,' as that term is defined by 18 U.S.C. § 1151 . . . ."); 18 U.S.C. § 2265(e) ("the Indian country of the Indian tribe (as defined in section 1151) . . . ."); 25 U.S.C. § 1903(10)) ("'reservation' means Indian country as defined in section 1151 of Title 18 and . . . ."); 21 O.S.Supp.2016, § 99a(D) ("in Indian country, as defined in Section 1151 of Title 18 of the United States Code."); 68 O.S.Supp.2014, § 500.3(38) ("'Indian country' means . . . The term shall also include the definition of Indian country as found in 18 U.S.C., Section 1151 . . . .").

live within the boundaries of a formal reservation. The United States Supreme Court held:

> [O]ur cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in "Indian country." Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. See 18 U.S.C. § 1151.

Sac & Fox, 508 U.S. at 123. Upon defining the term "Indian country," the United States Supreme Court included a citation to the Major Crimes Act's definition using the citation "See 18 U.S.C. § 1151." The signal "See" merely means the cited authority supports the proposition stated:

> See Cited authority clearly supports the proposition. "*See*" is used instead of "[no signal]" when the proposition is not directly stated by the cited authority but obviously follows from it; there is an inferential step between the authority cited and the proposition it supports.

The Bluebook: A Uniform System of Citation 62 (Columbia Law Review Ass'n *et al.* eds., 21st ed. 2020). The proposition stated in *Sac & Fox* was that Congress has defined the term "Indian country" broadly. The inferential step between 18 U.S.C. § 1151 and the proposition is that the definition at 18 U.S.C. § 1151, which includes all lands within the limits of any Indian reservation, all dependent Indian communities, and all Indian allotments, is a broad

definition. Therefore, the broad definition in 18 U.S.C. § 1151 clearly supports the proposition that Congress has defined the term broadly.[14]

¶44 *Sac & Fox* did not expressly adopt the definition from 18 U.S.C. § 1151 nor did the United States Supreme Court directly quote the Major Crimes Act's definition followed by a citation to 18 U.S.C. § 1151 with no signal. We know the United States Supreme Court was not incorporating 18 U.S.C. § 1151 because §1151's "broad" definition does not actually include the words "trust land" and "informal reservation." *Sac & Fox* coined the term "informal reservation" when it determined that "trust land" constituted an "informal reservation" and was, therefore, considered "Indian country" for purposes of state taxing authority. *See Sac & Fox,* 508 U.S. at 124-125, 128; *see also Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.,* 498 U.S. 505, 511 (1991) (finding no distinction between tribal trust land and reservations, because trust land has been validly set apart for Indian use under the superintendence of the federal government). In 2004, the Commission promulgated O.A.C. § 710:50-15-2. The rule's definitions of "Indian country" and "informal reservation" are primarily based on *Sac & Fox,* not 18 U.S.C. § 1151.[15]

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[14] Justice Combs, in his dissent, asserts that the Bluebook at the time *Sac & Fox* was decided did not require an inferential step when the signal "See" is used. I disagree. I'm of the opinion signal "See" required an inferential step then, just as it does today. Later editions did not fundamentally change the meaning of "See." They simply provided a more explicit and accurate explanation for what has always been the meaning of the signal "See."

[15] The Commission added to the *Sac & Fox* definition the emphasized language "and Indian allotments, *the Indian titles to which have not been extinguished . . . .*" O.A.C. § 710:50-15-

¶45 Finally, there is a critical difference between the statutory language in 18 U.S.C. § 1151 and the language used in O.A.C. § 710:50-15-2(a)(1). The United States Supreme Court has said the statutory language "notwithstanding the issuance of any patent" in the Major Crimes Act "expressly contemplates private land ownership within reservation boundaries." *McGirt,* 591 U.S. at 906. The Oklahoma tax rule, however, makes no reference to land patents or fee land within a reservation. Unlike the Major Crimes Act, the state tax regulation's definition of "Indian country" does not expressly contemplate unrestricted, non-trust, private fee land within the boundaries of a reservation.

¶46 The *Sac & Fox* case, from which the Commission borrowed its definition, does not mention private fee land within "Indian country" either. In *Sac & Fox,* the lower courts did not consider where the tribal members resided. The Tenth Circuit Court of Appeals and the United States District Court for the Western District of Oklahoma focused solely on the fact the tribal members earned their income on tribal trust land. *See Sac & Fox,* 508 U.S. at 121. After establishing that courts must determine the residence of the tribal members, the United States Supreme Court remanded the case to determine if the tribal members lived in "Indian country," as defined in the opinion itself—formal and informal reservations, allotted lands, or dependent communities. *Id.* at 126. The United States Supreme Court did not, however, offer any guidance as to whether unrestricted, non-trust, private fee land within the boundaries of a reservation would

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2(a)(1) (emphasis added). This language modifying Indian allotments is included in 18 U.S.C. § 1151's definition.

constitute "Indian country" for purposes of state taxation.

¶47 Furthermore, another provision in O.A.C. § 710:50-15-2 supports a finding that "Indian country," for purposes of the state income tax exemption, does not include private fee land. The tax rule provides:

> (c) **Instances in which income is not exempt.** The income of an enrolled member of a federally recognized Indian tribe shall not be exempt from Oklahoma individual income tax when:
>
> . . .
>
> (5) The member claims residence on ***unrestricted, non-trust property***, owned by an Indian Housing Authority. Such property does not fall within the definition of "Indian Country," nor does residence thereon constitute residence within a dependent Indian community.

O.A.C. § 710:50-15-2(c)(5) (emphasis added). Unrestricted, non-trust property owned by the housing authority is private fee land. Stroble contends that her residence on private fee land located within the boundaries of the Creek Reservation is in "Indian country" and, therefore, she qualifies for the income tax exemption. If one applies Stroble's logic to O.A.C. § 710:50-15-2(c)(5), private fee land owned by the Muscogee (Creek) Nation Housing Authority located within the boundaries of the Creek Reservation would not fall within the definition of "Indian country" and, therefore, tribal members living there would not qualify for the exemption. I am persuaded that O.A.C. § 710:50-15-2(c)(5) indicates the Com-

mission intended that all unrestricted, non-trust, private fee land—even land owned by the tribe—is not "Indian country" for purposes of the state income tax exemption.

¶48 For these reasons I will not supplant the definition of "Indian country" in the tax rule with the definition found in 18 U.S.C. § 1151. I am convinced nothing in O.A.C. § 710:50-15-2 provides that a tribal member living on unrestricted, non-trust, private fee land within the boundaries of the tribe's reservation recognized in *McGirt* qualifies for the exemption.

V. Conclusion

¶49 Federal law does not preempt Oklahoma from levying a tax on Stroble's income, and she is not entitled to an income tax exemption under state law. This Court has properly affirmed the Oklahoma Tax Commission's denial of Stroble's protest.

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 120,806

IN THE MATTER OF THE
INCOME TAX PROTEST OF ALICIA STROBLE,

ALICIA STROBLE,

Protestant/Appellant

v.

OKLAHOMA TAX COMMISSION,

Respondent/Appellee.

FOR OFFICIAL PUBLICATION

ROWE, C.J., CONCURRING:

¶1 I agree with the per curiam's holding that the United States Supreme Court has not extended its ruling in *McGirt* to Oklahoma's civil jurisdiction or taxing jurisdiction—nor is it our place to do so. However, I would find the Oklahoma Tax Commission adopted the Major Crimes Act's definition of "Indian country" in its regulation.

¶2 The Oklahoma Constitution vests power with the Oklahoma Legislature to establish executive agencies and to delegate rulemaking authority to state agencies. *See* 75 O.S. § 250.2. The Oklahoma Tax Commission is an executive agency with rulemaking authority. *See* 68 O.S. § 102; 68 0.S. § 203; Okla. Admin. Code 710:1-1-1. Rules promulgated by the Oklahoma Tax Commission are binding on

persons they effect and "shall have the force of law unless amended or revised." 75 O.S. § 308.2(C).

¶3 In 2020, the United States Supreme Court handed down *McGirt v. Oklahoma,* 591 U.S. 894 (2020) where for the first time in our state's history the Court recognized reservation status of the Muscogee (Creek) Nation. More specifically, the United States Supreme Court held the Muscogee (Creek) Nation is considered "Indian Country" for purposes of 18 U.S.C. § 1151(a). The United States Supreme Court expressly limited its finding to the Major Crimes Act. As such, *McGirt's* holding cannot and should not be expanded to civil regulatory law. Nor does the present scenario before us require this Court to expand *McGirt's* holding to civil regulatory law. Instead, the Oklahoma Tax Commission—by its own Code—has chosen to reference and incorporate the Major Crimes Act definition into Oklahoma's tax law.

¶4 The Oklahoma Tax Commission's regulations provide that:

> The income of an enrolled member of a federally recognized Indian tribe shall be exempt from Oklahoma individual income tax when: The member is living within "Indian Country" under the jurisdiction of the tribe to which the member belongs; and, the income is earned from sources within "Indian Country" under the jurisdiction of the tribe to which the member belongs.

Okla. Admin. Code 710:50-15-2(b). The Oklahoma Tax Commission defines "Indian Country" as

> formal and informal reservations, dependent Indian communities, and Indian allotments,

> the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States. [**See**: 18 U.S.C. § 1151].

Okla. Admin. Code 710:50-15-2(a)(1) (emphasis in original).

¶5 The Oklahoma Tax Commission expressly incorporates the Major Crimes Act's definition of "Indian Country" by reference in Oklahoma Administrative Code 710:50-15-2(a)(1). By doing so, the Oklahoma Tax Commission imported the federal definition of "Indian Country" into the Oklahoma Tax Commission's definition—adopting *McGirt's* interpretation of "Indian Country" in 18 U.S.C. § 1151. We followed similar reasoning in *In the Matter of the Guardianship of K.D.B.,* 2025 OK 10, 564 P.3d 83, where I additionally noted that our finding did not alter our state's jurisprudence that for civil purposes reservations have never been recognized. *In the Matter of the Guardianship of K.D.B. and K.M.B.,* 2025 OK 10, ¶ 5, 564 P.3d 83 (Rowe, C.J., concurring).

¶6 The intent to adhere to the federal definition is further evidenced by the Oklahoma Tax Commission's inaction in the wake of *McGirt.* It was not as though the Oklahoma Tax Commission was unfamiliar with the decision—the Oklahoma Tax Commission prepared for its effect with its "Report of Potential Impact of McGirt v. Oklahoma" submitted by the executive director on September 30, 2020. The report specifically noted:

> Although *McGirt* arose from a criminal proceeding, the implications of the decision extend to many other areas of Oklahoma

> law, including the taxes and fees administered by the Oklahoma Tax Commission. . . Although the *McGirt* Court limited its holding to defining the Creek Nation's 'Indian Country' for purposes of the Major Crimes Act, the OTC cannot ignore the Court's clarification of the boundaries of 'Indian Country,' as defined in 18 U.S.C. § 1151(a), **because Oklahoma law relies heavily on Section 1151 to define 'Indian country' for state purposes**.[1]

While the Oklahoma Tax Commission is not required to rely on the federal definition of "Indian country" found in the Major Crimes Act—it chose to do so—despite awareness of *McGirt's* potential impact on state taxation.

¶7 Moreover, the Oklahoma Tax Commission has the statutory authority to promulgate rules that will have the force of law "unless amended or revised."[2] The Oklahoma Tax Commission can amend its definition of "Indian Country" by removing its reference to 18 U.S.C. § 1151 and confining its definition—yet has not done so. Accordingly, I find the Oklahoma Tax Commission intended for the definition of "Indian Country" to include the definition contemplated in the Major Crimes Act—which now includes the Muscogee (Creek) Nation. Unless and until Oklahoma Administrative Code 710:50-15-2(a) is amended, the Oklahoma Tax Commission's definition

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[1] Jay Doyle, Executive Director of Oklahoma Tax Commission, Report of Potential Impact of McGirt v. Oklahoma, 2, 4 (Sept. 30, 2020), available at https://oklahoma.gov/content/dam/ok/en/tax/documents/resources/reports/other/McGirt%20vs%200K%20-%20Potential%20Impact%20Report.pdf. (emphasis added).

[2] 75 O.S. § 308.2(C)

of "Indian Country" imports the definition found in the Major Crimes Act.

¶8 Nonetheless, I would find Ms. Stroble unmeritorious in her appeal. After *McGirt* was decided in 2020, Ms. Stroble filed her tax returns for the years 2017, 2018, and 2019 claiming she fell under the tribal income exemption. By doing so, Ms. Stroble claims *McGirt's* holding extends back in-time to qualify her for the tribal income exemption. The question of retroactivity was presented to the Oklahoma Court of Criminal Appeals, which held *McGirt's* holding did not apply retroactively to criminal convictions that were final prior to the *McGirt* decision. *State ex rel. Matloff v. Wallace,* 2021 OK CR 21, 497 P.3d 686 (holding *McGirt* and any post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction). The United States Supreme Court denied certiorari on the claim of retroactivity, demonstrating its unwellingness to apply *McGirt's* holding retroactively. *See Parish v. Oklahoma, et al.,* 142 S.Ct. 757 (2022). If the United States Supreme Court is not willing to apply *McGirt* retroactively in a criminal context, this Court should not do so in a civil context. As such, Ms. Stroble's request for state income tax exemption for the years prior to 2020 was correctly denied.

¶9 Lastly, the notion that Ms. Stroble's claim fails due to the equitable doctrine of laches, acquiescence, and impossibility is troubling. Prior to statehood, Oklahoma tribes sought to maintain self-governance and self-determination. Any loss of tribal rights was not because the tribes or their people failed to exercise self-determination, it was a result of policies handed down by the federal government.

¶10 To deny Ms. Stroble's claim using the equitable doctrines of laches, acquiescence, and impossibility would be an affront to the progress and advancement that Native-people have accomplished, despite facing century-long policies of opposition. Relying solely on the passage of time to bar Ms. Stroble's claim would write another chapter in our history reflecting that equity has not weighed in favor of Native Oklahomans.

¶11 I am reminded of the words of Chitto Harjo as recorded by Oklahoma's famous historian, Angie Debo. In a statement to United States Congressmen in 1906, Chitto Harjo said:[3]

> He told me that as long as the sun shone and the sky is up yonder these agreements will be kept. . . . He said as long as the sun rises it shall last; as long as the waters run it shall last; as long as the grass grows it shall last. . . He said, 'Just as long as you see light here, just as long as you see this light glimmering over us, shall these agreements be kept, and not until all these things cease and pass away shall our agreement pass

[3] Chitto Harjo was a leader and orator among the traditionalists in the Muscogee (Creek) Nation, specifically the Four Mothers Society. He resisted assimilation and sought to revive traditional practices and solidarity between related tribes that had been relocated to Oklahoma. He is mostly known for a dialogue he delivered to the Special Senate Investigating Committee that visited Indian Territory in 1906 in an attempt to learn more about the issues and why the Muscogee (Creek) people were resisting change. His speech is considered an eloquent statement regarding United States treatment of Indian peoples and is often quoted for the phrase, "as long as the grass grows," used in regard to the promised perpetuity of Indian treaties and agreements with the United States government

> away.' That is what he said, and we believed it. . . . We have kept every turn of that agreement. The grass is growing, the waters run, the sun shines, the light is with us, and the agreement is with us yet, for the God that is above us all witness that agreement.[4]

Although I find Ms. Stroble unmeritorious in her appeal, I resist any adoption of laches to render a decision that can and should be rendered solely on the black letter law.

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[4] Angie Debo, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 55 (Princeton University Press 1973).

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 120,806

IN THE MATTER OF THE
INCOME TAX PROTEST OF ALICIA STROBLE,

ALICIA STROBLE,

Protestant/Appellant,

v.

OKLAHOMA TAX COMMISSION,

Respondent/Appellee.

FOR OFFICIAL PUBLICATION

KUEHN, V.C.J., CONCURRING SPECIALLY:

¶ 1 The *per curiam* opinion holds that Stroble is not exempt from payment of Oklahoma income tax. I also find Stroble is not exempt. I would acknowledge the *McGirt* ruling regarding reservation status but find that it does not resolve the issue before this Court.

¶ 2 I suggest we simply apply existing law to the issue before us: does the *McGirt* pronouncement of reservation status apply when one is determining whether a member of a federally recognized tribe living on a federally created reservation must make an income tax payment. *McGirt's* ruling regarding reservation status must inform our analysis of Stroble's claim. *Milne v. Hudson,* 2022 OK 84, ¶ 6, 519 P.3d 511, 513. In *Milne* we reaffirmed the

unremarkable principle of federal Indian law that "the federal statutory definition of Indian Country in 18 U.S.C. § 1151 applies in both civil and criminal contexts." *Id*., ¶ 11, 519 P.3d at 513-14. But as we demonstrated in *Milne,* that provides a starting place for analysis, not a resolution. When faced with a question involving Indian Country, reservation status governs the law we apply, but it does not dictate the remedy.

¶ 3 To argue otherwise, as Stroble does, is to significantly misunderstand the scope of *McGirt*. *McGirt* applied settled law to conclude that the Muscogee (Creek) reservation was not disestablished. In practice, this (and subsequent decisions flowing from it) significantly expanded the land which constitutes Indian Country in Oklahoma. But no case arises in a vacuum. *McGirt* was concerned with criminal jurisdiction in Indian Country, so the United States Supreme Court looked to settled federal Indian law to determine the remedy. The consequence of reservation status was that the federal government and the tribes, but not the State, had jurisdiction to prosecute in Indian Country. The remedy—lack of jurisdiction—was a consequence of reservation status *in that context.* But remedies will differ depending on the area of law.

¶ 4 We followed this formula in *Milne.* We began with reservation status, then reviewed the applicable federal law to see whether exclusive jurisdiction over civil protection orders had been reserved to the tribe. Applying the facts to that law, we determined that each sovereign had concurrent jurisdiction over civil protection orders. *Milne*, ¶ 21, 519 P.3d at 516. Had we reflexively concluded that, since the Section 1151 definition of Indian Country applied in this civil

context, we must apply the *McGirt* remedy, the holding would be different: we could not have, as we did, conclude that under the law concurrent jurisdiction existed in the context of protection orders. If our only concern was whether Section 1151 removed State action if applied in both civil and criminal cases, the particular legal context would not have mattered at all.

¶ 5 Stroble's claim arises in yet another legal context and in a different procedural posture. Everyone agrees that generally, federal Indian law provides that tribal members working for the tribe and living on reservation land are exempt from state taxation on that income. That is, to loosely continue the *McGirt* factual analogy, the State doesn't have jurisdiction to impose that income tax. Recognizing this general federal law, the Oklahoma Tax Commission promulgated a rule which explains that exemption, defining Indian Country in a way consistent with federal case law and in language similar to Section 1151; it subsequently determined that Stroble does not fall within this exemption.

¶ 6 Stroble essentially argues that this Court must apply the *McGirt* remedy to this civil tax issue and determine that the State can't tax her—that the State doesn't have jurisdiction to impose that tax. But federal Indian law regarding civil taxation is considerably less cut-and-dried than is the comparable law on criminal jurisdiction. The United States Supreme Court has held that under some circumstances a state may impose a tax on parcels of land within reservation boundaries. *City of Sherrill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197, 220-21 (2005). I would apply that law here.

¶ 7 *McGirt* concerned criminal jurisdiction to prosecute crimes under the federal Major Crimes Act. *McGirt,* 140 S.Ct. at 2459-60. The Supreme Court explicitly limited its discussion of the *particular effects*—the consequences—the remedy—of its conclusion regarding reservation status to those jurisdictional issues. *Id.* at 2480; *Oklahoma v. Castro-Huerta,* 597 U.S. 629, 639-40 (refusing to apply *McGirt* analysis to the federal General Crimes Act, 18 U.S.C. § 1153). As both parties concede, there is no case in which the Supreme Court has applied the *McGirt* holding or remedy to civil law. That is what Stroble asks us to do. It is not this Court's place to extend a doctrine beyond the boundaries clearly set by the Supreme Court in *McGirt* itself. But, it is this Court's place to determine whether or not the holding extends to civil law matters in the State of Oklahoma under Oklahoma law.

¶ 8 Let me be clear. I believe the question of reservation status is settled. But this Court neither can nor should apply the *McGirt* criminal remedy—lack of jurisdiction requiring dismissal—to any Oklahoma civil cases. *McGirt* applied that remedy in a criminal law context only. The Oklahoma Supreme Court has the authority to rule that we will not wholesale extend that remedy to civil law matters. Otherwise, we will need to continue our practice of reviewing every civil law matter from here to eternity to discern whether reservation status alone requires Oklahoma courts to apply a remedy dictated by a federal criminal case. I would not continue to do so and find that the remedy does not apply to civil matters. And I note that the doctrines of latches, acquiescence, and impossibility "protect those who have reasonably labored under a mistaken under-

standing of the law." *McGirt,* 591 U.S. at 936 (internal citation omitted).

¶ 9 Again, Stroble wants this Court to find that *McGirt,* not *Sherrill* or similar Indian taxation cases, controls, apply the *McGirt* remedy to this civil taxation issue, and divest the State of its ability to subject her to state income tax. But how would that work? We would have to apply a remedy designed for a specific issue of criminal law to a very different issue of civil law. I believe *McGirt* itself prohibits us from taking this leap. I concur in the decision to uphold the Oklahoma Tax Commission's decision.

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No. 120,806

IN THE MATTER OF THE
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ALICIA STROBLE,

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v.

OKLAHOMA TAX COMMISSION,

Respondent/Appellee.

FOR OFFICIAL PUBLICATION

Winchester, J., concurring:

¶1 I concur with the majority but write separately to discuss the practical implications of extending *McGirt* to this case. As Chief Justice Roberts pointed out in his separate *McGirt* writing:

> Not only does the Court discover a Creek reservation that spans three million acres and includes most of the city of Tulsa, but the Court's reasoning portends that there are four more such reservations in Oklahoma. The rediscovered reservations encompass the entire eastern half of the State-19 million acres that are home to 1.8 million people, only 10%-15% of whom are Indians.

McGirt v. Oklahoma, 591 U.S. 894, 938 (2020) (Roberts, C.J., dissenting). Almost all (around 95%) of this property is fee land, meaning it is not restricted or held in trust. The State of Oklahoma has always assessed a state income tax over tribal members who reside on fee land within treaty territory. Because such a large part of Oklahoma is fee land, divesting the State of its taxing authority over fee land would significantly "undermine the state economy or tax base," and in turn, undermine the State's ability to fund schools, roads, and other programs in eastern Oklahoma.[1] Chief Justice Roberts cautioned about this potential impairment of the State's authority to, for example, collect income taxes:

> In addition to undermining state authority, reservation status adds an additional, complicated layer of governance over the massive territory here, conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses.

McGirt, 591 U.S. at 972 (Roberts, C.J., dissenting).

¶2 The *McGirt* decision created significant uncertainty regarding taxation, prompting Jay Doyle, Executive Director of the Oklahoma Tax Commission, to inform the members of the Oklahoma Commission on Cooperative Sovereignty about its potential impact. He advised:

> The [Oklahoma Tax Commission] estimates a potential per-year revenue impact of $21.5 million, resulting from an increased use of

[1] *Indian Country, U.S.A. v. State ex rel. Okla. Tax Comm'n,* 829 F.2d 967, 986 (10th Cir. 1987).

> the tribal income exclusion in Oklahoma Administrative Code § 710:50-15-2 by members of the Creek Nation. Further, there is a potential additional revenue impact of $64.5 million, reflecting possible Creek National tribal member refund claims for the 2017-2019 tax years, for which the statute of limitations is still open. If *McGirt* is expanded to apply to all Five Civilized Tribes, there is a potential per-year revenue impact of $72.7 million, with an additional $218.1 million estimated for impact for potential refund claims for the 2017-2019 tax years.[2]

The uncertainty created by *McGirt* resulted in this lawsuit. Alicia Stroble (Stroble) believed *McGirt* extended to taxation, along with 11,500 other tribal citizens who requested an exemption from their state income taxes.

¶3 Extending *McGirt to* taxation would greatly impact the essential services provided to the counties, cities, and towns. Each year, on April 15th, the Oklahoma Tax Commission collects the taxes paid by Oklahomans. The Oklahoma Legislature, through its budgeting process, then appropriates the tax revenues. The funds are allocated back to cities and counties for services such as district courts, police

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[2] Jay Doyle, Executive Director of Oklahoma Tax Commission *Report of Potential Impact of McGirt v. Oklahoma,* 2 (Sept. 30, 2020), *available at* https://oklahoma.gov/content/dam/ok/en/tax/documents/resources/reports/other/McGirt%20vs%200K%20-%20Potential%201mpact%20Report.pdf. I note that the Oklahoma Tax Commission prepared *The Report of Potential Impact of McGirt v. Oklahoma* in response to an Executive Order as to any potential impact of the *McGirt* ruling. The Oklahoma Tax Commission did not adopt the report.

protection, road maintenance, and "all the other benefits of an ordered society."[3] The largest portion of income tax revenue—approximately 52%, or around $9.5 billion—is designated for public education, including funding for teachers and educational programs for children. Additionally, retail sales taxes collected in Okmulgee and Tulsa counties are submitted to the Oklahoma Tax Commission and subsequently appropriated back to local governments. In Okmulgee County, the Oklahoma Tax Commission imposes a 10.08% tax on retail sales. From this total, the county retains 1.58%, while the city receives 4%. These revenues are essential for funding local services that benefit all citizens of Okmulgee.[4]

¶4 The State of Oklahoma has had the responsibility to provide governmental services to *all* residents in eastern Oklahoma—tribal and non-tribal members. Stroble receives these services, the same as her non-tribal member neighbors. Today's decision provides some clarity regarding the services the State offers and how the State, counties, and cities share fiscal and management responsibilities for their citizens. To rule otherwise would allow those members of the Muscogee (Creek) Nation (and others similarly situated[5]) who live on unrestricted fee land to be exempt from taxation, creating a checkerboard of jurisdiction, alternating state and tribal juris-

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[3] *Okla. Tax Comm'n v. United States,* 319 U.S. 598, 609-10 (1943).

[4] Okmulgee, Oklahoma Sales Tax Rate, *available at* https ://www.sales-taxes.com/ok/okmulgee.

[5] The Seminole Nation, Cherokee Nation, Chickasaw Nation, and Choctaw Nation file Amici Curiae Briefs in this matter in support of Stroble's position to extend *McGirt* to income taxation.

diction, encumbering the State and local governments, and having a detrimental effect on landowners neighboring the tribal property.[6]

¶5 Despite today's decision, the *McGirt* decision continues to create significant uncertainty regarding regulatory and civil matters in eastern Oklahoma. If Congress did not disestablish the Muscogee (Creek) Nation's historical reservation, do tribal members living in eastern Oklahoma have to pay state sales taxes? Has the *McGirt* decision impacted the Oklahoma Corporation Commission's ability to regulate oil and gas? Does the ruling affect other agencies that provide essential services to citizens in eastern Oklahoma? Does the *McGirt* decision introduce an additional layer of governance to navigate in eastern Oklahoma? How does it impact property owners who have relied on city, county, and state laws and regulations regarding zoning for over 100 years? Questions remain as to whether *McGirt* impacts the maintenance of state highways, environmental regulations, and operations of oil and gas production owners in the region.

¶6 Extending *McGirt* to civil and regulatory matters would create greater uncertainty in commerce throughout eastern Oklahoma. The *McGirt* Court recognized five separate reservations encompassing the entire eastern half of Oklahoma, each with its own unique culture and laws. This divergence would ultimately affect mortgages, auto and appliance loans, and landlord-tenant relationships. Many everyday contractual and economic activities would fall under the jurisdiction of tribal courts. Extending

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[6] *See City of Sherril, N.Y. v. Oneida Indian Nation of N. Y.,* 544 U.S. 197, 218-20 (2005).

McGirt would also introduce an additional layer of governance, which would exclude non-tribal citizens—who make up 85% of the population in eastern Oklahoma—from voting in the government that oversees their affairs. The resulting uncertainty about these activities could impair commerce between tribal and non-tribal entities and individuals.

¶7 It is time to move forward. For nearly 200 years, tribal and non-tribal citizens have dedicated their time, talents, and financial resources to enhance their communities. Whether serving as neighbors on school boards or city councils, managing county governments, or running for state offices, both tribal and non-tribal members have played a role in shaping eastern Oklahoma into a richer and more diverse landscape, benefitting from the unique experiences each neighbor brings.

¶ 8 For these reasons, I would not extend *McGirt* beyond the confines of the Major Crimes Act for these reasons and those outlined in the majority opinion.

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 120,806

IN THE MATTER OF THE
INCOME TAX PROTEST OF ALICIA STROBLE,

ALICIA STROBLE,

Protestant/Appellant,

v.

OKLAHOMA TAX COMMISSION,

Respondent/Appellee.

FOR OFFICIAL PUBLICATION

Darby, J., concurring specially:

¶1 I concur with the *per curiam* opinion. I write separately to further explain why I believe the remaining Creek Reservation is not Indian Country for purposes of tax law.

¶2 The United States Supreme Court has long said:

> the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"

Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 511, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112 (1991) (quoting *United States v. John,* 437 U.S. 634, 648–649, 98 S.Ct. 2541, 2549, 57 L.Ed.2d 489 (1978); *see also United States v. McGowan,* 302 U.S. 535, 539, 58 S.Ct. 286, 288, 82 L.Ed. 410 (1938). While the United States Supreme Court held in *McGirt* that Congress created a Creek Reservation and never formally disestablished it, such that it meets the definition of "Indian Country" for purposes of federal *criminal* law, they did not declare it to be Indian Country generally. *See McGirt v. Oklahoma,* 591 U.S. 894, 902, 906, 913, 924, 140 S. Ct. 2452, 2462, 2464, 2468, 2474, 207 L. Ed. 2d 985 (2020).

¶3 In other words, under *McGirt* allotment did not disestablish the Creek Reservation as far as federal criminal law is concerned, but it did change the nature of the land such that it is no longer all set apart for the use of Indians under the superintendence of the federal government. *Cf United States v. Pelican,* 232 U.S. 442, 448–49, 34 S. Ct. 396, 399, 58 L. Ed. 676 (1914) (finding post-allotment land was Indian Country during trust period because it still retained a distinctive Indian character being devoted to Indian occupancy under limitations imposed by Federal legislation). Because, post-allotment, the remaining Creek Reservation is not set aside for use by Native Americans under federal superintendence, it is not Indian Country generally, and thus it is not exempt from tax jurisdiction for income tax. This is consistent with *Warren Trading Post's* analysis, which invalidated a state income tax in part because Congress had left the Indians on the Navajo Reservation largely free to run the reservation and its affairs without state control for

nearly a century. *Warren Trading Post Co. v. Ariz. Tax Comm'n,* 380 U.S. 685, 690, 85 S.Ct. 1242, 1245, 12 L.Ed.2d 165 (1965); *see also McClanahan v. State Tax Comm'n of Ariz.,* 411 U.S. 164, 170–71 n.6, 93 S.Ct. 1257, 1261 n.6, 36 L.Ed.2d 129 (1973). Arizona had been left with no duties or responsibilities respecting the reservation or the Indians residing thereon, whether in terms of providing roads, schools, or other needed services.[1] *Warren Trading Post,* 380 U.S., at 690–91, 85 S.Ct., at 1245–46. Contrarily, here, the Creek Reservation has not been left alone, free from state control—just the opposite. Oklahoma maintains the duty to provide roads, schools, and needed services for the entirety of the state and has done so, including where Ms. Stroble resided during the years for which she claims an exemption. The Creek Reservation found in McGirt for purposes of criminal law is not Indian Country for tax purposes.

[1] "And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians." *Warren Trading Post,* 380 U.S., at 690, 85 S.Ct., at 1245.

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OKLAHOMA TAX COMMISSION,

Respondent/Appellee.

FOR OFFICIAL PUBLICATION

COMBS, J., with whom EDMONDSON and GURICH, JJ., join, dissenting:

¶1 I respectfully dissent from the majority's affirmance of Respondent/Appellee Oklahoma Tax Commission's final order denying Protestant/Appellant Alicia Stroble income tax protest filed under the "Exempt Tribal Income Exclusion" found in section 710:50-15-2(b)(1) of the Commission's rules. In its recitation of facts, the majority tells us that "[t]he Commission found Stroble did not live in 'Indian country' for purposes of the state income tax exemption and [thus] denied her protest." Per Curiam Op. ¶ 4. Nevertheless, the majority's framing of the issue on appeal admits twice that Ms. Stroble lives on her tribe's reservation:

> The issue is whether Stroble, a member of the Muscogee (Creek) **Nation *who lives within the boundaries of the Creek Reservation recognized in* McGirt v. Oklahoma, *591 U.S. 894 (2020)*,** and whose income is derived from sources within the Creek Reservation, qualifies for a state income tax exemption under Oklahoma Administrative Code (O.A.C. § 710:50-15-2(b)(1).
>
> . . . .
>
> The issue presented is whether the State has jurisdiction to impose income taxes on a tribal member *who resides* and works for the tribe ***within the boundaries of the tribe's reservation as recognized in* McGirt**.

Per Curiam Op. ¶¶ 1, 9 (emphasis added). But then the majority finds that the "reservation" status recognized in *McGirt* only "constitute[s] 'Indian country' ***for purposes of the Major Crimes Act, 18 U.S.C. §§ 1151, 1153.***" *Id.* ¶ 9 (emphasis added). Despite that assertion, the majority never proceeds to explain how the Creek *Reservation* recognized in *McGirt* doesn't qualify as a "formal or informal reservation" under the Tax Commission's own definition of "Indian country" and under relevant U.S. Supreme Court precedent defining "Indian country." Rather, the majority just insists that *McGirt* said it was limited to answering the question before it "concern[ing] the statutory definition of 'Indian country' ***as it applies in federal criminal law.***" *Id.* ¶ 10 (emphasis added) (quoting *McGirt,* 591 U.S. at 935). The majority then points out that "the United States Supreme Court has not extended its ruling in *McGirt* to the State's civil or taxing jurisdiction" thus

far, questions *McGirt's* "unprecedented" "declaration–113 years after statehood—that nearly half of Oklahoma is a reservation," and advises the parties "it is not this Court's place to" extend *McGirt's* ruling beyond criminal jurisdiction—seemingly advising the parties they must get the U.S. Supreme Court involved. *Id.* ¶ 11. The majority ignores the import of the U.S. Constitution's Supremacy Clause and Indian Commerce Clause and of article I, section 1 of the Oklahoma Constitution,[1] all of which bind this Court to follow federal treaties and statutes that govern relations with Native American tribes and the case law interpreting them.

¶2 The majority's insistence that *McGirt* is limited to defining "Indian country" only for purposes of federal criminal law is simply a cherry-picked statement out of a broader discussion. Justice Gorsuch, writing for *McGirt's* majority, had much more to say about § 1151's impact on civil law and proceedings:

> *[T]he State worries that our decision will have significant consequences for civil and regulatory law. The only question before us, however, concerns the statutory definition of "Indian country" as it applies in federal*

[1] U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes."); Okla. Const. art. I, § 1 ("The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land").

criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law. Of course, many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country. But it is far from obvious why this collateral drafting choice should be allowed to skew our interpretation of the MCA, or deny its promised benefits of a federal criminal forum to tribal members.

It isn't even clear what the real upshot of this borrowing into civil law may be. Oklahoma reports that recognizing the existence of the Creek Reservation for purposes of the MCA might potentially trigger a variety of federal civil statutes and rules, including ones making the region eligible for assistance with homeland security, 6 U.S.C. §§ 601, 606, historical preservation, 54 U.S.C. § 302704, schools, 20 U.S.C. § 1443, highways, 23 U.S.C. § 120, roads, § 202, primary care clinics, 25 U.S.C. § 1616e-1, housing assistance, § 4131, nutritional programs, 7 U.S.C. §§ 2012, 2013, disability programs, 20 U.S.C. § 1411, and more. But what are we to make of this? Some may find developments like these unwelcome, but from what we are told others may celebrate them.

. . . .

In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict

> around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. See Okla. State., Tit. 74, § 1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as *Amici Curiae* 13–19. No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements, id., at 20, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one. And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.

McGirt, 591 U.S. at 935–36 (with the per curiam opinion's excerpt appearing in italics). With this fuller context, it's hard to understand why the majority argues and insists that *McGirt* limited its impact to federal criminal law. *McGirt* expressly foresaw a wider impact on civil issues and "conflict around jurisdictional boundaries" as developed on a case-by-case basis. *This case itself* is one of those

cases, specifically concerning income tax exemptions within Indian country.

¶3 The majority recognizes in a footnote that the Oklahoma Supreme Court has previously used § 1151's definition of "Indian country" in other civil court proceedings. *See* Per Curiam Op. ¶ 11 n.3 (citing *Clark v. Hough (In re Guardianship of K.D.B.),* 2025 OK 10, 564 P.3d 83 (guardianship proceedings involving a Native American child); *Wilburn v. State (In re S.J.W.),* 2023 OK 49, 535 P.3d 1235 (deprived proceedings involving a Native American child); *Milne v. Hudson,* 2022 OK 84, 519 P.3d 511 (protective order proceedings involving a Native American defendant)). Indeed, even aside from the cases in the majority's footnote, this Court has long recognized that § 1151 defines "Indian country" for purposes of criminal *and civil* jurisdiction. *Lewis v. Sac & Fox Tribe of Okla. Hous. Auth.,* 1994 OK 20, ¶ 7 n.18, 896 P.2d 503, 507 ("Although § 1151 defines Indian Country for application to the exercise of federal criminal jurisdiction, its terms extend to civil jurisdiction as well."); *State ex rel. May v. Seneca-Cayuga Tribe of Okla.,* 1985 OK 54, ¶ 8, 711 P.2d 77, 82 ("Underlying the trial court's refusal to assume state jurisdiction is the premise that the lands in question are 'Indian Country' as defined by 18 U.S.C. § 1151. The definition of 'Indian Country' is relevant to questions of both criminal and civil jurisdiction."); *Ahboah v. Hous. Auth. of Kiowa Tribe of Indians,* 1983 OK 20, ¶ 10, 660 P.2d 625, 627 ("While 18 U.S.C. § 1151 ostensibly applies only to issues of criminal jurisdiction, the United States Supreme Court has recognized its general applicability to questions of civil jurisdiction." (citations omitted)). More importantly, nine members of this Court in the year 1990

seemingly recognized the fact that § 1151 defines "Indian country" for purposes of civil proceedings in taxation cases. *Hous. Auth. of the Seminole Nation v. Harjo,* 1990 OK 35, ¶ 6 n.2, 790 P.2d 1098, 1100 n.2 (wherein the five-member majority comprised of Summers, Lavender, Doolin, Wilson, and Kauger, JJ., cited *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973), concerning taxation as one of several "cases discussing Federal Court jurisdiction based on 'Indian Country'"); *id.* ¶ 5, 790 P.2d at 1105 (Hargrave, C.J., dissenting) ("A vain search has been made for authority transplanting the definition of Indian Country found in 18 U.S.C. § 1151 into the civil law *of real property, as opposed to taxation. . . . It has been utilized, as far as can be told, in taxation and criminal jurisdictional settings,* and they generally have some relation to reservation status." (joined by Opala, V.C.J., and Hodges and Simms, JJ.)).

¶4 Beyond that, the majority takes the same position towards binding U.S. Supreme Court precedents that govern tax proceedings. As I see it, Ms. Stroble's victory in this income tax protest is predetermined by the U.S. Supreme Court's definition of "Indian country" in *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976); *Oklahoma Tax Commission v. Sac & Fox Nation,* 508 U.S. 114 (1993); and *McGirt,* 591 U.S. 894. *McClanahan* was a unanimous opinion in which the U.S. Supreme Court first found that, in light of "the relevant treaty and statutes," Arizona's income tax could not lawfully be imposed upon individual "reservation Indians with income derived wholly from reservation sources." *McClanahan,* 411 U.S. at 165 (noting that "the

problems posed by a state income tax are apparently of first impression in this Court"). Three years later in the *Moe* case, Montana argued that the General Allotment Act of 1887 (a/k/a the Dawes Act), ch. 119, § 6, 24 Stat. 388, 390 (codified at 25 U.S.C. § 349), gave it taxing jurisdiction over tribal members living within a reservation *on fee-patented lands. Moe,* 425 U.S. at 477–78. But the U.S. Supreme Court unanimously rejected such argument as "untenable for several reasons"—most notably observing that "Congress . . . has evinced a clear intent to eschew . . . [a] 'checkerboard' approach ***within an existing Indian reservation***" that would make the existence or non-existence of reservation status and taxing jurisdiction "depend[] upon the ownership of particular parcels of land," thereby forcing tax officials "to search tract books." *Id.* at 478–79 (emphasis added) (quoting *Seymour v. Superintendent of Wash. State Penitentiary,* 368 U.S. 351, 358 (1962)). Then twenty years later in *Sac & Fox Nation,* Oklahoma argued it "had complete tax jurisdiction over the Sac & Fox" because *McClanahan* and other tribal sovereign immunity cases "applied only to tribes ***on established reservations,***" whereas an "1891 Treaty [effectuating the provisions of the Dawes Act] had disestablished the Sac & Fox Reservation" in favor of allotments of trust land for individual tribal members. *Sac & Fox Nation,* 508 U.S. at 117, 120–21 (emphasis added). Again, the U.S. Supreme Court unanimously ruled against the State because "our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country,'" which ***"Congress has defined . . . broadly to include formal and informal reservations, dependent Indian communities,***

and Indian allotments, whether restricted or held in trust by the United States. See 18 U. S. C. § 1151," *id* at 123 (emphasis added) (citing Major Crimes Act, 18 U.S.C. § 1151 (1988)). Hence, in *Sac & Fox Nation* the Court aligned its definition of "Indian country" with Congress' broad definition of that term in the Major Crimes Act (more on this later, *see infra* ¶¶ 14–16). Nearly three decades later, the U.S. Supreme Court released its long-anticipated[2] opinion in *McGirt v. Oklahoma,* 591 U.S. 894 (2020), regarding whether the Major Crimes Act deprived Oklahoma of criminal jurisdiction to prosecute Jimcy McGirt for crimes occurring on land reserved for the Muscogee (Creek) Nation in an 1866 treaty and federal statute. *Id.* at 898-99 (referencing Treaty with the Creek Indians arts. III, IX, Muscogee (Creek)-U.S., June 14, 1866, 14 Stat. 785, 786–88). The Court addressed numerous arguments from Oklahoma that might demonstrate the disestablishment of the Muscogee (Creek) reservation—including evidence regarding the federal government's allotment of

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[2] Relatively speaking, the *McGirt* opinion was long anticipated because it was the culmination of two arguments before the U.S. Supreme Court spanning two of that Court's terms. The first argument was held November 27, 2018, in the case of *Carpenter v. Murphy,* No. 17-1107 (U.S. filed Feb. 6, 2018), as part of the Court's October 2018 Term (OT 2018). On the last day of that term, the Court restored the case to its calendar for reargument during the following term, OT 2019. It was speculated that the Court was evenly split on how to decide the case, as there were only eight justices. Reargument was held May 11, 2020, in the case of *McGirt v. Oklahoma,* No. 18-9526 (U.S. filed Apr. 17, 2019), in front of nine justices. *McGirt* was before the Court on certiorari from the Oklahoma Court of Criminal Appeals. Justice Gorsuch, who had not participated in *Murphy,* authored the majority opinion in *McGirt.*

lands under the Dawes Act,[3] Congress' abolishment of tribal courts and its transfer of all pending cases to the federal courts under the Curtis Act of 1898,[4] Congress' indication that the tribal government might be abolished within five years under the 1901 Creek Allotment Agreement,[5] the incorporation of Indian Territory into the State of Oklahoma in 1906, the historical handling of prosecutions since that time, and current demographics showing tribal members constitute a small fraction of those now residing on the land—and ultimately concluded that nothing had disestablished the reservation as it existed in 1866. *See id.* at 904–24, 937. Thus, for the first time since statehood, the U.S. Supreme Court had informed us that the formal reservation of the Muscogee (Creek) Nation covers all the land guaranteed under the 1866 Treaty, including "most of Tulsa and certain neighboring communities in Northeastern Oklahoma."[6] *Id.* at 932. That encompasses all of

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[3] General Allotment Act of 1887 (a/k/a the Dawes Act), § 6, 24 Stat. at 390.

[4] Curtis Act of 1898, ch. 517, § 28, 30 Stat. 495, 504–05.

[5] 1901 Creek Allotment Agreement, ch. 676, § 46, 31 Stat. 861, 872.

[6] Article III of the 1866 Treaty discusses the Muscogee (Creek) Nation's cession of "the west half of their entire domain," with "the eastern half of said Creek lands[] being retained by them . . . [and] forever set apart as a home for said Creek Nation." Treaty with the Creek Indians, *supra,* art. III, 14 Stat. at 786. It goes on to specify that "the west half of their lands" is comprised of an "estimated three millions [sic] two hundred and fifty thousand five hundred and sixty acres." *Id.* That means the eastern half retained by the Muscogee (Creek) Nation should be of comparable size. *See McGirt,* 591 U.S. at 938 (Roberts, C.J., dissenting) (stating that majority opinion "discover[s] a Creek reservation that spans three million acres and includes most of the city of Tulsa"). That's enough acreage to cover the entirety of

Okmulgee County, including the City of Okmulgee and Ms. Stroble's home. Under *Sac & Fox Nation* and *McClanahan,* the only question was whether Ms. Stroble lived within "Indian country" during Tax Years 2017, 2018, and 2019; *McGirt* definitively answered that question in the affirmative; and *Moe* assures us it shouldn't matter that she resided on fee-patented land within the reservation. Thus, the sum of the holdings from these U.S. Supreme Court precedents should spell out a victory for Ms. Stroble.

¶5 The brief legal analysis of the majority's per curiam opinion and the splintered nature of the special concurrences, along with my desire to address the arguments raised in all the writings, lead me now to address why it took so long for this Court to issue a decision that's only nine pages long. Ms. Stroble's appeal was retained by this Court on November 14, 2022. An oral argument was held on January 17, 2024. The majority opinion that eventually emerged was a per curiam opinion circulated in an attempt to

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the Muscogee (Creek) Nation's territory, which is "4,867 square miles [i.e., equivalent to 3,114,880 acres] in 11 Oklahoma counties." *E.g.,* News Release, Muscogee Nation, Muscogee (Creek) Nation Files Lawsuit Against Opioid Manufacturers, Pharmacies, Distributors (Apr. 3, 2018), https://www.muscogeenation.com/2018/04/03/muscogee-creek-nation-files-lawsuit-against-opioid-manufacturers-pharmacies-distributors/; News Release, Muscogee Nation, Muscogee Nation Proclaims Sovereignty Day on 1-Year Anniversary of Historic U.S. Supreme Court McGirt Decision (July 9, 2021), https://www.muscogeenation.com/2021/07/09/muscogee-nation-proclaims-sovereignty-day-on-1-year-anniversary-of-historic-u-s-supreme-court-mcgirt-decision/; *see also* ROA p. 174, Protestant's Ex. 4, at 1 (showing a map of the current reservation that includes all of Creek, Okfuskee, and Okmulgee Counties, and contiguous portions of Seminole, Hughes, McIntosh, Muskogee, Wagoner, Mayes, Rogers, and Tulsa Counties).

simplify the majority's holding, along with several special concurrences that hold the bulk of the legal analysis. I intend to address most of the arguments raised by the justices comprising the majority regardless of where in the various writings those arguments appear. This I do because the separate writings form a matrix of ideas that led a majority to the result they all agree upon, and my response to these separate writings is necessary to explain what leads me to the opposite conclusion.

A. Federal Law Preempts Oklahoma's Sovereign Authority to Tax Native Americans Like Ms. Stroble, Who Live on and Earn Income from Activities Occurring in Indian Country

¶6 The outcome in this particular matter is mandated by the U.S. Supreme Court's definition of "Indian country" in its precedents regarding state taxation of Native American tribes and tribal members. As previously mentioned, this Court is duty-bound under both the U.S. Constitution and Oklahoma Constitution to honor federal treaties and statutes governing relations with Native American tribes, as well as the case law interpreting them. It is Congress that has set the terms under which Native Americans live, the U.S. Supreme Court that has shaped the interpretation of those terms, and the U.S. Department of Interior's Bureau of Indian Affairs that has managed the day-to-day interactions with the Tribes. Indeed, Oklahoma was required to disclaim jurisdiction over Native Americans at statehood. *See* Oklahoma Enabling Act, ch. 3335, § 3, 34

Stat. 267, 270 (1906).[7] "In view of the[se] provisions of the Enabling Act and the acceptance thereof by the constitutional convention, the power to regulate and legislate with regard to the Indian citizens of Oklahoma was, by consent of the state, expressly reserved to Congress." *Neal v. Travelers Ins. Co.,* 1940 OK 314, ¶ 24, 106 P.2d 811, 817. Although that doesn't mean the State of Oklahoma can never exercise authority over Indian country—particularly over non-Indians in Indian country—"[t]he presumption and the reality . . . are that federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country." *Seneca-*

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[7] Section 3 of Oklahoma's Enabling Act required the state constitutional convention to include in the State's constitution the following provision:

> Third. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. That land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

Ch. 3335, § 3, 34 Stat. at 270. Although Oklahoma's Enabling Act was later amended in March of 1907, *see* Enabling Act Amendment, ch. 2911, 34 Stat. 1286 (1907), the amendment did not affect § 3 of the Enabling Act. The Oklahoma Constitution contains this provision in article I, section 3.

Cayuga Tribe of Okla. v. Oklahoma ex rel. Thompson, 874 F.2d 709, 713 (10th Cir. 1989).

¶7 Federal law has always recognized and protected a distinct status for Native Americans in their own tribal territory. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Village of Venetie,* 522 U.S. 520, 527 n.1 (1998). Within the context of tax jurisdiction, the U.S. Supreme Court has stated:

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, ***instead of a balancing inquiry, "a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation land and reservation Indians."***

Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (second alteration in original) (emphasis added) (quoting *County of Yakima v. Confederated Tribes & Bands of Yakima Nation,* 502 U.S. 251, 258 (1992); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973)). According to one of the leading treatises on federal Indian law, "***[i]t is now well-established*** that ***the categorical prohibition*** against state taxation of Indians applies ***in 'Indian country,' broadly defined,*** including 'formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.'" *Cohen's Handbook of Federal Indian Law* 694 (Neil Jessup

Newton et al. eds., 2005 ed.) (emphasis added) (quoting *Sac & Fox Nation,* 508 U.S. at 123). We see that principle borne out in *McClanahan* with respect to formal reservations, *see infra* ¶ 8; in *Moe* and *County of Yakima v. Confederated Tribes & Bands of Yakima Nation,* 502 U.S. 251 (1992), with respect to fee lands within reservation boundaries, *see infra* ¶ 10; and in *Oklahoma Tax Commission v. Citizen Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991), with respect to trust lands outside the reservation.[8] *Sac & Fox Nation* was the culmination of these cases.

¶8 In the seminal income tax case of *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973), the U.S. Supreme Court categorically prohibited the imposition of a state income tax on a Native American ***living and working on a formal reservation****:*

> This case requires us once again to reconcile the plenary power of the States over residents within their borders with the semiautonomous status of Indians living on tribal reservations. . . .

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[8] *See Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. at 511 ("Oklahoma argues that the tribal convenience store should be held subject to state tax laws because it does not operate on a formally designated 'reservation,' but on land held in trust for the Potawatomis. . . . In *United States v. John,* 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been "'validly set apart for the use of the Indian as such, under the superintendence of the Government.'" *Id.*, at 648-649, 98 S.Ct., at 2549 . . . .").

. . . .

> It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accountrements of tribal self-government. See, e.g., Organized Village of Kake v. Egan, [369 U.S. 60 (1962),] supra; Metlakatla Indian Community v. Egan, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed.2d 562 (1962); Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 612 (1943). Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations. See, e.g., Thomas v. Gay, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898); Utah & Northern R. Co. v. Fisher, 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542 (1885). Cf. Surplus Trading Co. v. Cook, 281 U.S. 647, 651, 50 S.Ct. 455, 456, 74 L.Ed. 1091 (1930). Nor, finally, is this a case where the State seeks to reach activity undertaken by reservation Indians on non-reservations lands. See, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114. Rather, this case involves the narrow question ***whether the State may tax a reservation Indian for income earned exclusively on the reservation.***

411 U.S. at 165, 168–69 (emphasis added) (citations omitted)). Nevertheless, Justices Kane and Jett

attempt to discredit, distinguish, and recharacterize *McClanahan.*[9] They argue that *McClanahan* "has

[9] Justices Kane and Jett also suggest factual distinctions between *McClanahan* and the case at hand. First, they argue that, "in *McClanahan,* there is no indication that the tribal member who lived and worked on the Navajo Reservation lived on private fee land," whereas Ms. Stroble does live on private fee land within the Creek Reservation. J. Kane's Concurring Op. ¶ 7 n.2. I would suggest that is a difference without distinction, as both Ms. McClanahan and Ms. Stroble clearly live on reservation land. Second, Justices Kane and Jett point out that the Navajo plaintiff "was presumably not the beneficiary of state-provided goods and services in the way that Stroble is." J. Kane's Concurring Op. ¶ 7 n.2; *see also* J. Darby's Concurring Op. ¶ 3 ("Arizona had been left with no duties or responsibilities respecting the reservation or the Indians residing thereon, whether in terms of providing roads, schools, or other needed services," whereas "here, the Creek Reservation has not been left alone"). Again, this seems to be a difference without distinction insofar as both women clearly received state services, as reflected in the U.S. Supreme Court's rejection of such an argument in both *McClanahan* and *Moe. See McClanahan,* 411 U.S. at 173 n.12 ("The court below pointed out that Arizona was expending tax monies for education and welfare within the confines of the Navajo Reservation. 14 Ariz. App.[452,] 456–457, 484 P.2d[221,] 225–226. . . . [Nevertheless], '[c]onferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization.' The Kansas Indians, [72 U.S. (]5 Wall.[) 737,] 757 [(1867)]."); *Moe,* 425 U.S. at 476 ("The State pointed below to a variety of factors: reservation Indians benefitted from expenditures of state revenues for education, welfare, and other services, such as a sewer system . . . . Noting this Court's rejection of a substantially identical argument in McClanahan, see 411 U.S., at 173, and n.12, 93 S.Ct., at 1262, 36 L.Ed.2d, at 136, and the fact that the Tribe, like the Navajos, had not abandoned its tribal organization, the District Court could not accept the State's proposition that the tribal members 'are now so completely integrated with the non-Indians . . . that there is no longer any reason to accord them different treatment than other citizens.'

been repeatedly miscredited for reversing the [typical] preemption analysis when it comes to state taxation of tribal members." J. Kane's Concurring Op. ¶ 7. By their estimation, that's due to what they describe as dicta in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973)—issued the same day as *McClanahan—saying* that States are preempted from imposing income taxes on tribal members living and working on the tribe's reservation absent express authorization from Congress. *See id.* Instead, they believe "*McClanahan* actually relegated the tradition of Indian sovereignty to the 'backdrop' and brought state sovereignty and federal preemption to the foreground," thereby requiring courts like us to apply the typical preemption analysis by "[looking] instead to the applicable treaties and statutes which define ***the limits of state power.***" J. Kane's Concurring Op. ¶8 (quoting *McClanahan,* 411 U.S. at 172–73). They then point out that "[t]he *McClanahan* Court examined treaties and federal statutes to discern whether the State's sovereign authority to tax tribal members living and working on the reservation had been preempted, not whether [the Native American's] immunity from state taxation had been preempted[,] . . . . [i.e.,] not if Congress had expressly authorized Arizona to tax Indians." *Id.* They then assert the *McClanahan* "Court ultimately determined that Arizona's taxing authority had been preempted by the Treaty of 1868, the Arizona Enabling Act, and the Buck Act." *Id.* (citing *McClanahan,* 411 U.S. at 179–80). Then, in a true plot twist, they conclude "Oklahoma has taxing jurisdiction within the bound-

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392 F.Supp.[1297,] 1315 [(D. Mont. 1975)]. In view of the District Court's findings, we agree that there is no basis for distinguishing McClanahan on this ground.").

aries of a reservation unless that jurisdiction has been preempted by a treaty or federal statute" ***without any analysis of the relevant treaties or federal statutes*** that they claim we should look to when utilizing "ordinary principles of federal preemption." *Id.* ¶ 9. Instead of applying those ordinary principles for which they argue, they rely solely upon *Oklahoma v. Castro-Huerta,* 597 U.S. 629 (2022), to assert that "Oklahoma does not need a permission slip from Congress to exercise taxing jurisdiction within its territory." *Id.* This is a true departure from U.S. Supreme Court precedents governing preemption in taxation cases.

¶9 These assertions from Justices Kane and Jett fail when you read what *McClanahan* actually said. They act as if all the relevant treaties and statutes in *McClanahan* explicitly forbade taxation of Navojos living on the reservation, but the opinion doesn't bear that out. First, the *McClanahan* Court found "[t]he treaty ***nowhere explicitly states*** that the Navajos were to be free from state law or exempt from state taxes," but that a particular "canon of construction [resolving doubtful expressions in favor of Native Americans, *see Carpenter v. Shaw,* 280 U.S. 363, 367 (1930),] taken together with the tradition of Indian independence" necessarily lead to the conclusion that the creation of a reservation "was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision." *McClanahan,* 411 U.S. at 174–75 (emphasis added). Second, the Court found Arizona's Enabling Act contained a grant of power allowing the State to impose ad valorem taxes on "any lands and other property outside of an Indian reservation owned or held by any Indian"; but while the converse exemption for property inside an Indian reservation may

not be as "clearly expressed" as tax law usually requires, there was "no reason to give this language an especially crabbed or restrictive meaning" when the Court "ha[d] in the past construed language far more ambiguous than this as providing a tax exemption for Indians." *Id.* at 176. Third, the Court found that, although § 106(a) of the Buck Act, 4 U.S.C. §§ 104 *et seq.,* "grant[ed] to the States general authority to impose an income tax on residents of federal areas," the Court had previously interpreted rather ambiguous language of an exception contained in § 109 using "the legislative history" that "ma[d]e[] plain that this proviso was meant to except reservation Indians from coverage of the Buck Act." *Id.* at 176–77 (citing *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 691 n.18 (1965)). Fourth, the Court found Arizona had never taken steps to exercise civil and criminal jurisdiction over reservation Indians pursuant to Public Law 280, 25 U.S.C. § 1322(a). *Id.* at 178. In conclusion, the Court found that "the appellee [State] nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected." *Id.* This last sentence appears to support *Mescalero*'s characterization of *McClanahan* requiring States to demonstrate authorization to tax—which is probably why Justices Kane and Jett admit "the United States Supreme Court has relied on this extrapolation of *McClanahan* in almost every Indian tax case since," J. Kane's Concurring Op. ¶ 7. Their reliance upon *Castro-Huerta* is of no avail because *Castro-Huerta* is inapposite insofar as it involved criminal jurisdiction rather than "the special area of state taxation" and insofar as it involved state jurisdiction over a non-Indian defendant. Thus, I think we're safe to proceed on the assumption that "in the special area of state

taxation, . . . McClanahan v. State Tax Commission of Arizona, *supra,* . . . hold[s] that such taxation [of Indian income from activities carried on within the boundaries of the reservation] is not permissible *absent congressional consent.*" *Mescalero,* 411 U.S. at 148. If the Oklahoma Tax Commission cannot show an authorization or special dispensation from Congress permitting it to impose the income tax arising from income earned within the boundaries of a reservation, it cannot do so.

¶10 In the cases of *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463 (1976), and *County of Yakima v. Confederated Tribes & Bands of Yakima Nation,* 502 U.S. 251 (1992), the same principles were applied with respect to Native Americans living ***on fee lands within reservation boundaries***. The *Moe* Court prohibited Montana from taxing personal property (like motor vehicles) owned by tribal members residing on the reservation, including those residing on fee-patented lands within the reservation, in order to avoid checker-board taxing jurisdiction within the reservation. *Moe,* 425 U.S. at 477–79. In a nearly unanimous opinion (8-1) written by Justice Antonin Scalia, the *County of Yakima* Court refused to allow the county to collect excise taxes on land sales of fee-patented parcels. Despite allowing the county to collect ad valorem taxes on fee-patented land under specific language in a proviso of the Burke Act of 1906, 34 Stat. 182, 183, that provided "all restrictions as to . . . taxation of said land shall be removed," the Court found the Burke Act did not remove restrictions on imposing an excise tax on the sale of such land because "[t]he excise tax remains a tax upon the Indian's activity of selling the land, and thus is void, whatever means may be devised for its collection."

County of Yakima, 502 U.S. at 268–70. As Justices Kane and Jett point out, *County of Yakima* is actually the source of the term "categorical approach" that is used to describe *McClanahan's* preemption rule in taxation cases. J. Kane's Concurring Op. ¶ 13 (quoting *County of Yakima,* 502 U.S. at 258). But then they criticize *County of Yakima* by relying again upon *Castro-Huerta. Id.* They also attempt to suggest factual distinctions concerning demographics between *Moe* and the case at hand—i.e., differences concerning the acreage of the reservation, the percentage of such acreage that was private fee land, the total population living on the reservation, and the percentage of such population that are Native American. *See* J. Kane's Concurring Op. ¶ 7 n.2. Finally, several of the justices discuss their belief that, in light of these demographics, Ms. Stroble's desired outcome would create a checkerboard effect like that condemned in *Moe. See id.* ¶ 7 n.2; *id* ¶¶ 27, 32 (quoting *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197, 219–20 (2005); citing *Moe,* 425 U.S. at 479); J. Winchester's Concurring Op. ¶ 4. But these objections fail in light of the relevant case law.

¶11 Justices Kane and Jett's reliance upon *Castro-Huerta* to discredit *County of Yakima, see id.,* is misplaced for the reasons already discussed above, *see supra* ¶ 9. Moreover, their attempt to suggest factual distinctions between *Moe* and the case at hand was already rejected by the U.S. Supreme Court in *McGirt* specifically with regard to the Muscogee (Creek) Nation and should therefore not serve as a basis for distinction. *McGirt,* 591 U.S. at 915–17, 922–24. Finally, the checkerboard effect only exists where the Tax Commission is forced to look up land records for Native Americans who apply for the income tax exemption if we deny Ms. Stroble's claim

due to the fact that she lives on fee-patented land. If we grant her claim, the Tax Commission would never be forced to look up land records for any Native Americans because all Native Americans living on the reservation who claim an income tax exemption would qualify regardless of whether their land is fee-patented or not. And if we grant her claim, the Tax Commission would never be looking up land records for non-Indians, as they would not be seeking the exemption due to their status as non-tribal members. Consequently, it appears invocation of the checkerboard effect actually weighs in favor of granting Ms. Stroble's protest. Thus, all attempts by members of the majority to disparage or distinguish *Moe* and *County of Yakima* must fail.

¶12 Then in the case of *Oklahoma Tax Commission v. Sac & Fox Nation,* 508 U.S. 114 (1993), the U.S. Supreme Court categorically prohibited the imposition of Oklahoma's state income tax on Native Americans ***living on "Indian country" as broadly defined in the Major Crimes Act, 18 U.S.C. § 1151***. Faced with an appeal where the lower courts had failed to determine the residency of the tribal members who sought exemption from Oklahoma's income tax, a unanimous U.S. Supreme Court reminded everyone that, "[t]o determine whether a tribal member is exempt from state income taxes under *McClanahan,* a court first must determine the residence of that tribal member." *Sac & Fox Nation,* 508 U.S. at 124. For that inquiry, a court must "ask only whether the land is Indian country." *Id.* at 125 (citing *Citizen Band Potawatomi, Indian Tribe of Okla.,* 498 U.S. at 511). Earlier in the opinion, the Court had clearly indicated that "Indian country" was much broader than just reservation land: "Congress has defined Indian country broadly to include formal and

informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. See 18 U.S.C. § 1151." *Id.* at 123. Thus, [o]n remand" the lower courts would be tasked with "determin[ing] whether the relevant tribal members live in Indian country—whether the land is within reservation boundaries, on allotted lands, or in dependent communities." *Id.* at 126. From this, we see that *Sac & Fox Nation* adopted the broad definition of "Indian country" found in § 1151, which is the definition we must employ in determining whether Ms. Stroble lives on "Indian country" and thus qualifies for the tax exemption under the principles of federal law and the express language of the Tax Commission's rule.

B. The Tax Commission's Rule Adopted Both Sac & Fox Nation's *and the Major Crimes Act's Definition of "Indian Country"*

¶13 Some members of the majority incorrectly assume the Tax Commission has adopted its own definition of "Indian country" that is different from the prevailing federal definition of that term in 18 U.S.C. § 1151. *See* J. Kane's Concurring Op. ¶¶ 41–42 ("But the Commission did not adopt the Major Crimes Act's definition of 'Indian country.' . . . Stroble points to the citation to 18 U.S.C. § 1151 at the end of the Commission's definition and argues the Commission incorporated 18 U.S.C. § 1151's definition into the tax rule's definition. I disagree." (joined by Jett, J.)). *But see* C.J. Rowe's Concurring Op. ¶ 1 ("However, I would find the Oklahoma Tax Commission adopted the Major Crimes Act's definition of 'Indian country' in the regulation."); V.C.J. Kuehn's Concurring Op. ¶ 6 ("Recognizing this general federal law, the Oklahoma Tax Commission promulgated a

rule which explains that exemption, defining Indian Country in a way consistent with federal case law and in language similar to Section 1151 . . . .”). As my discussion above of several U.S. Supreme Court precedents illustrates, *see supra* ¶¶ 8–12, the term “Indian country” has a long, complex history in federal law that cannot be ignored.

¶14 Justices Kane and Jett acknowledge *Sac & Fox Nation's* broad definition of “Indian country,” but they erroneously attempt to differentiate its definition from the Major Crimes Act's definition. *See* J. Kane's Concurring Op. ¶¶ 43–44 (quoting *Sac & Fox Nation,* 508 U.S. at 123). The language of *Sac & Fox Nation* doesn't permit such differentiation. Based on my reading of both definitions, it is apparent the two definitions are different ways of saying the same thing. For each category of land in the Major Crimes Act, there is a corresponding corollary in the *Sac & Fox Nation* definition. Just look at the full text of both definition side by side in pieces:

Major Crimes Act, 18 U.S.C. § 1151 (2018)	***Okla. Tax Comm'n v. Sac & Fox Nation,* 508 U.S. 114, 123 (1993)**
“Except as otherwise provided in sections 1154 and 1156 of this title, the term ‘Indian country’, as used in this chapter means . . .	“Congress has defined Indian country broadly to include . . . ”

". . . (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, . . . "	". . . formal and informal reservations, . . ."
". . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and . . ."	". . . dependent Indian communities, and . . ."
". . . (c) all Indian allotments, the Indian Titles to which have not been extinguished, including rights-of-way running through the same."	". . . Indian allotments, whether restricted or held in trust by the United States. See 18 U.S.C. § 1151."

Although the text is obviously not identical, *see* J. Kane's Concurring Op. ¶ 44, that does not necessarily mean the U.S. Supreme Court was trying to create a definition for "Indian country" that was different from Congress' definition in the Major Crimes Act. Rather, it is an indication of the Court's desire to describe each element of Congress' definition in the Court's own words, albeit somewhat abbreviated—an intent which I believe is confirmed

by the Court's citation to the Major Crimes Act itself. Justices Kane and Jett make much of the fact that "the words 'trust land' and 'informal reservation'" do not appear in the Major Crimes Act's supposedly broad definition. *Id.* But the trust allotments mentioned in *Sac & Fox Nation* are a subcategory of the Major Crime Act's reference to ***"all*** Indian allotments, the Indian titles to which have not been extinguished," which U.S. Supreme Court precedents have referenced since at least 1914. *See United States v. Pelican,* 232 U.S. 442, 446–47 (1914) (discussing the fact that, [a]lthough the lands were ***allotted*** in severalty, they were to be ***held in trust*** by the United States for twenty-five years for the sole use and benefit of the allottee, or his heirs, and during this period were to be inalienable" (emphasis added)). The "informal reservations" mentioned in *Sac & Fox Nation* remain more of a mystery, as that term has never been further explained or fleshed out in subsequent U.S. Supreme Court jurisprudence; but to me it is nothing more than a subcategory of reservation lands that have been recognized by something less official (i.e., less formal) than a treaty or statute approved by Congress. *See, e.g., Confederated Band of Ute Indians v. United States,* 330 U.S. 169, 181 (1947) (Murphy, J., dissenting) (discussing an 1880 agreement between the United States and the Ute chiefs and headmen containing an "informal acknowledgment by Congress" of an expanded reservation that included the formal reservation described in an 1868 treaty plus additional land set aside in an 1875 executive order). The inclusion of those terms in *Sac & Fox Nation's* definition of "Indian country" should not mislead us into thinking that its definition is different from that of the Major Crimes Act. Justices Kane and Jett also

put a lot of stock in *Sac & Fox Nation's* utilization of the signal "See" in its citation to the Major Crimes Act. *See* J. Kane's Concurring Op. ¶¶ 43–44. Relying upon a 2020 edition of *The Bluebook,* they argue that such signal indicates the "[c]ited authority ***clearly*** supports the proposition," meaning "the proposition is ***not directly stated*** by the cited authority but obviously follows from it" because "***there is an inferential step*** between the authority cited and the proposition it supports." *Id.* ¶ 43 (emphasis added) (quoting *The Bluebook: A Uniform System of Citation* Rule 1.2(a), at 54 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020)). From this, they extrapolate that the Major Crimes Act's definition only supports the proposition that Congress' definition of "Indian country" is broad, but not the proposition that the Major Crimes Act defines "Indian country" for purposes of taxing jurisdiction. *See id.* Such parsing really gets us into the weeds away from a reasonable reading of the text. As I see it, we shouldn't be basing our interpretation of *Sac & Fox's* definition on the presence or absence of a particular signal, especially the signal "See." But were I to indulge this discussion, I would first point out that Justices Kane and Jett have cited the wrong edition of *The Bluebook.* No doubt, the author of *Sac & Fox Nation* would have been utilizing a much earlier edition that contains a significantly different definition of the "See" signal:

> *See* Cited authority ***directly*** supports the proposition. *"See"* is used instead of "[no signal]" when the proposition is ***not stated*** by the cited authority but follows from it.

The Bluebook: A Uniform System of Citation Rule 2.2(a), at 8 (Colum. L. Rev. et al. eds., 14th ed. 1986) (emphasis added). Looking at this contemporaneous

version of *The Bluebook,* "See" would be an appropriate signal because § 1151 of the Major Crimes Act does "not state[]" the exact same words we read in *Sac & Fox Nation* and because *Sac & Fox Nation*'s definition is "directly support[ed]" by and "follows from" the Major Crimes Act's definition, without any inferential step necessary. In other words, the two definitions are different ways of saying the same thing. My conclusion here appears to be borne out in *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450 (1995), a U.S. Supreme Court opinion that issued two years after *Sac & Fox Nation.* Writing for a unanimous Court with respect to all but Part III of her opinion, Justice Ginsburg dropped a footnote after her first mention of "Indian country" to define that term as follows: "'Indian country,' ***as Congress comprehends that term, see 18 U.S.C. § 1151,*** includes ***'formal and informal reservations, dependent Indian communities, and Indian allotments, where restricted or held in trust by the United States.'*** **Sac and Fox,** ***508 U.S., at 123, 113 S.Ct., at 1991.****" Id.* at 453 n.2 (emphasis added). Herein, Justice Ginsburg on behalf of the Court seems to conflate Congress' comprehension of "Indian country" with the quoted definition from *Sac & Fox Nation,* complete with a citation to the Major Crimes Act. This clearly aligns the two definitions with one another. Thus, Justices Kane and Jett's assertion that *Sac & Fox Nation's* definition of "Indian country" is different from the Major Crimes Act's definition is incorrect.

¶15 This in turn impacts several other assertions they've made, such as their acknowledgment, on the one hand, that the language of the Tax Commission's rule "was borrowed from *Sac & Fox Nation*" and their claims, on the other hand, that "[t]he Oklahoma Tax

Commission did not adopt 18 U.S.C. § 1151 of the Major Crimes Act's definition of 'Indian country'" and that "no federal or state statute, administrative rule, or United States Supreme Court decision has ever declared that 'Indian country' is a legal term of art solely defined by 18 U.S.C. § 1151 of the Major Crimes Act." J. Kane's Concurring Op. pt. IV's heading & ¶¶ 39, 41, 43. Those statements cannot all be true if *Sac & Fox Nation's* definition and the Major Crimes Act's definition are one and the same, *see supra* ¶ 14.

¶16 The Tax Commission adopted the current version of its rule in 2004. The current version replaced an emergency rule that concerned exempting military income earned by Native Americans who resided within Indian country from Oklahoma's income tax. *See* Application of the Oklahoma Individual Income Tax to Native Americans Serving in the Armed Forces (emergency adoption), 20 Okla. Reg. 2811 (Aug. 15, 2003) (codified at Okla. Admin. Code § 710:50-15-2 (2003)). In its Notice of Rulemaking Intent, the Tax Commission stated:

> New Section **710:50-15-2, *Application of the Oklahoma Individual Income Tax to Native Americans,*** was adopted in part through emergency rulemaking procedures, effective June 26, 2003. The amendments being promulgated in this rulemaking action are an effort to provide guidance to the public regarding the broad policies applicable to the income taxation of Native Americans, as reflected in case law and in the decisions of Commission.

Application of the Oklahoma Individual Income Tax to Native Americans (notice of rulemaking intent), 21

Okla. Reg. 384, 385 (Feb. 2, 2004) (to be codified at Okla. Admin. Code § 710:50-15-2). Based on the language eventually adopted, it is clear that at least one of the cases being referenced in the Notice of Rulemaking Intent was *Sac & Fox Nation*[10] The final version of the rule adopted a definition of "Indian country" that recited the *Sac & Fox Nation's* definition almost verbatim: "'Indian Country' means and includes formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States. [**See**: 18 U.S.C. § 1151]." Okla. Admin. Code § 710:50-15-2(a)(1). The only difference in language between the regulation and Sac & Fox Nation is the phrase "the Indian titles to which have not been extinguished," which the regulation uses to describe "Indian allotments" but which does not appear in *Sac & Fox Nation's* definition. That phrase comes from the Major Crimes Act! Hence, in one sense, the Tax Commission's definition of "Indian country" resembles the Major Crimes Act's definition more closely than *Sac & Fox Nation* does. That is beside the point, however, in light of my conclusion that ***the definitions in the Major Crimes Act, in Sac & Fox Nation, and in the Tax Commission's rule are all describing the same thing using different words***. Suffice it to say, the Tax Commission intended to adopt the definition of "Indian country" found in both *Sac & Fox Nation* and the Major Crimes Act. In fact, it would seem the Tax

[10] Even the Tax Commissioner's order in this case admits that *Sac & Fox Nation's* definition of "Indian country" is "mirrored by the OTC administrative rule." ROA p.448, Findings, Conclusions & Order 10 n.6.

Commission has admitted numerous times over the years that its definition of "Indian country" is based on language from both *Sac & Fox Nation* and the Major Crimes Act. *See, e.g.*, ROA p.194, Protestant's Ex. 8, at 8 (consisting of a "Report of Potential Impact of McGirt v. Oklahoma" drafted by the Tax Commission's executive director at the time *McGirt* came out and, for purposes of this discussion, explicitly stating: "As the above cited cases make clear, the geographic area relevant in determining whether a state's taxing power is limited is a tribe's Indian country. ***In Oklahoma Tax Commission v. Sac & Fox Nation, the Court applied the definition of 'Indian country' in 18 U.S.C. § 1151 for state tax purposes*** . . . ." (emphasis added)); OTC Order No. 2006-05-04-25/Precedential ¶ 2, at 2 (Okla. Tax Comm'n May 4, 2006) ("As defined by federal law and decisions of the U.S. Supreme Court, 'Indian country' includes formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States, the Indian titles to which have not been extinguished. 18 U.S.C. § 1151; *Sac and Fox,* 508 U.S., at 123."); OTC Order No. 2006-05-0424/Precedential ¶ 2, at 2 (Okla. Tax Comm'n May 4, 2006) (same); OTC Order No. 2006-05-04-23/Precedential ¶ 2, at 2 (Okla. Tax Comm'n May 4, 2006) (same). Even had the Tax Commission intended to adopt only the definition in *Sac & Fox Nation,* it necessarily adopted the Major Crimes Act's definition by implication insofar as that case adopted the Major Crimes Act's definition. Consequently, Justices Kane and Jett's assertion that they "will not supplant the definition of 'Indian country' in the tax rule with the definition found in 18 U.S.C. § 1151" is a non sequitur. *See* J. Kane's

Concurring Op. ¶ 48. The Major Crimes Act's definition is already incorporated into the tax rule.

C. McGirt v. Oklahoma, *591 U.S. 894 (2020), Does Impact the Application of the Tax Commission's Income Tax Rule*

¶17 Having adopted a definition of "Indian country" that ultimately has § 1151 of the Major Crimes Act as its source, the Tax Commission has linked the fate of its income tax rule to case law interpreting § 1151, including *McGirt*. *McGirt*'s impact on this appeal is outcome-determinative. No matter how it may try to argue that its rule can avoid *McGirt*'s impact, the Tax Commission has been boxed in by federal law. The Tax Commission can't even amend the rule to avoid *McGirt* because they can't avoid *McClanahan, Moe, Yakima County,* or *Sac & Fox Nation.* The only way the Tax Commission could impose taxing jurisdiction over land that federal law deems to be "Indian country" is if Oklahoma were to become a Public Law 280 state. At present, however, *Sac & Fox Nation* assures us that "Oklahoma did not assume jurisdiction pursuant to Pub.L. 280 prior to the law's amendment in 1968," 508 U.S. at 125, and the Tax Commission has not shown us that the Muscogee (Creek) Nation has consented to an assumption of jurisdiction since the amendment. Although Public Law 280 "cannot be read as expressly conferring tax immunity upon Indians, . . . we cannot believe that Congress would have required the consent of the Indians affected and the amendment of [Oklahoma's] state constitution[] which prohibit[s] the assumption of jurisdiction if the State[] w[as] free to accomplish the same goal unilaterally by simple legislative enactment"—or, in the Tax Commission's case, by regulatory promul-

gation of rules. *McClanahan,* 411 U.S. at 178. The Tax Commission is stuck with the definition of "Indian country" that it adopted because that definition has been thrust upon it by federal law.

¶18 In this regard, it's no different from the outcome in our recent opinion in *Clark v. Hough* (*In re Guardianship of K.D.B.*), 2025 OK 10, 564 P.3d 83, that interpreted the Indian Child Welfare Act (ICWA) in light of *McGirt.* In *Clark,* we found that "ICWA's definition of reservation explicitly imports the definition of 'Indian country'—as defined by § 1151 of the Major Crimes Act—thereby incorporating by reference the criminal definition as held in *McGirt.* . . . This is not an independent finding. Rather, ICWA's incorporation of § 1151 of the Major Crimes Act in its definition of reservation mandates the outcome of this particular matter." *Id.* ¶¶ 16–17, 564 P.3d at 91. Here, the Tax Commission incorporates by reference the Major Crimes Act's definition of "Indian country." The tax rule's incorporating language may look different than ICWA's incorporating language, *compare* Okla. Admin. Code § 710:50-15-2(a)(1) (simply citing the Major Crimes Act and using one phrase therefrom in addition to the quoted language from *Sac & Fox Nation*), *with* 25 U.S.C. § 1903(10) (defining "reservation" to "mean[] Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section" that meet certain conditions), but that doesn't change anything. Through its incorporation of § 1151 of the Major Crimes Act, the Tax Commission has incorporated *McGirt's* definition of the reservation as "Indian country" and *McGirt*'s inclusion of fee-patented lands in "Indian country." *See Bayouth v. Dewberry,* 2024 OK 42, ¶ 16 n.7, 550 P.3d 920, 927 n.7 (observing "if a word is obviously transplanted from another legal

source, whether the common law or other legislation, it brings the old soil with it" (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 537 (1947))); *Sudbury v. Deterding,* 2001 OK 10 ¶ 8, 19 P.3d 856, 858 (citing *Harness v. Myers,* 1930 OK 61, ¶¶ 15–16, 288 P. 285, 288).

¶19 *McGirt* tells us that the Muscogee (Creek) Nation's formal reservation still exists to the full extent of its boundaries under the 1866 Treaty, which means "Indian country" as defined in the Major Crimes Act, in *Sac & Fox Nation,* and in section 710:50-15-2 of the Tax Commission's rules includes all land within the Muscogee (Creek) Nation's more-than-3-million-acre reservation, *see supra* note 6. "[W]hatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation." *McGirt,* 591 U.S. at 913; *see also id.* at 937 ("The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. . . . But Congress has never withdrawn the promised reservation."). *McGirt* also teaches us that the allotment of lands and the issuance of fee patents does not change the land's status as "Indian country":

> Without doubt, in 1832 the Creek "cede[d]" their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. 1832 Treaty, Art. I, 7 Stat. 366. And in 1866, they "cede[d] and convey[ed]" a portion of that reservation to the United States. Treaty With the Creek, Art. III, 14 Stat. 786. But because there exists no equivalent law terminating what

remained, ***the Creek Reservation survived allotment***.

In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. ***Remember, Congress has defined "Indian country" to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent,*** and, including any rights-of-way running through the reservation." 18 U.S.C. § 1151(a). ***So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians***. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others. See *Mattz[v. Arnett],* 412 U.S.[481,] 497, 93 S.Ct. 2245 [(1973)] ("[A]llotment under the . . . Act is completely consistent with continued reservation status"); *Seymour v. Superintendent of Wash. State Penitentiary,* 368 U.S. 351, 356–58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) (holding that allotment act "did no more than open the way for non-Indian settlers to own land on the reservation"); *[Nebraska v.] Parker,* 577 U.S. [481, 489], 136 S.Ct.[1072,] 1079–1080 [(2016)] ("[T]he 1882 Act falls into another category of surplus land Acts: those that

merely opened reservation land to settlement. . . . Such schemes allow non-Indian settlers to own land on the reservation" (internal quotation marks omitted)).

It isn't so hard to see why. The federal government issued its own land patents to many homesteaders throughout the West. These patents transferred legal title and are the basis for much of the private land ownership in a number of States today. ***But no one thinks any of this diminished the United States's claim to sovereignty over any land. . . . And there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally. Indeed, such an arrangement seems to be contemplated by § 1151(a)'s plain terms***. Cf. *Seymour,* 368 U.S., at 357–358, 82 S.Ct. 424.

Oklahoma reminds us that allotment was often the first step in a plan ultimately aimed at disestablishment. As this Court explained in *Mattz,* Congress's expressed policy at the time "was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing." 412 U.S. at 496, 93 S.Ct. 2245. Then. "[w]hen all the lands had been allotted and the trust expired, the reservation could be abolished." *Ibid.* This plan was set in motion nationally in the General Allotment Act of 1887, and for the Creek specifically in 1901. No doubt, this

is why Congress at the turn of the 20th century "believed to a man" that "the reservation system would cease" "within a generation at most." *Solem[v. Bartlett],* 465 U.S.[463,] 468, 104 S.Ct. 1161 [(1984)]. Still, just as wishes are not laws, future plans aren't either. Congress may have passed allotment laws to create the conditions for disestablishment. ***But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.***

Ignoring this distinction would run roughshod over many other statutes as well. In some cases, Congress chose not to wait for allotment to run its course before disestablishing a reservation. When it deemed that approach appropriate, Congress included additional language expressly ending reservation status. So, for example, in 1904, Congress allotted reservations belonging to the Ponca and Otoe Tribes, reservations also lying within modern-day Oklahoma, and then provided "further, That the reservation lines of the said . . . reservations . . . are hereby abolished." Act of Apr. 21, 1904, § 8, 33 Stat. 217–218 (emphasis deleted); see also *DeCoteau v. District Country Court for Tenth Judicial Dist.,* 420 U.S. 425, 439–440, n.22, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) (collecting other examples). Tellingly, however, nothing like that can be found in the nearly contemporary 1901 Creek Allotment Agreement or the 1908 Act. That doesn't make these laws special. Rather, in using the language that they did, these allotment

> laws tracked others of the period, parceling out individual tracts, while saving the ultimate fate of the land's reservation status for another day.

McGirt, 591 U.S. at 906–08 (emphasis added) (footnotes omitted). If allotment won't serve to deprive the land of its status as "Indian country" under § 1151 of the Major Crimes Act, it also won't serve to deprive the land of such status under *Sac & Fox Nation* or under the Tax Commission's income tax rule. Consequently, Ms. Stroble lives within Indian country under the jurisdiction of her Tribe and earns income from employment by her Tribe at an office within Indian country under the jurisdiction of her Tribe. She is therefore entitled to exemption from Oklahoma's income tax pursuant to federal law and the terms of section 710:50-15-2(b)(1) of the Tax Commission's rules.

D. City of Sherrill v. Oneida Indian Nation of New York, *544 U.S. 197 (2005), Is Distinguishable and Should Not Serve as a Basis for Applying the Equitable Doctrines of Laches, Acquiescence, or Impossibility Against Ms. Stroble*

¶20 Several members of the majority include a lengthy discussion of the distinguishable and inapposite case of *City of Sherrill v. Oneida Indian Nation of New York,* 544 U.S. 197 (2005), in their concurring opinions. J. Kane's Concurring Op. ¶¶ 22–34; J. Kuehn's Concurring Op. ¶¶ 7–10; J. Winchester's Concurring Op. ¶ 4 & n.6. Their reliance upon *City of Sherrill* isn't altogether surprising in light of its outcome against the Native American tribe and the Tax Commission's citation to it. Yet in another sense, it is surprising because *City of Sherrill* was of no

concern to any of the justices in *McGirt's* analysis of whether the Muscogee (Creek) reservation had been disestablished. When *McGirt* was decided in 2020, only three justices who participated in deciding *City of Sherrill* in 2005 remained on the Court—i.e., Justices Ruth Bader Ginsburg, Stephen Breyer, and Clarence Thomas. Justice Ginsburg wrote *City of Sherrill,* and Justices Breyer and Thomas joined her majority (8-1) opinion. In *McGirt,* Justices Ginsburg and Breyer joined Justice Gorsuch's majority (5-4) opinion and did not write separately, but Justice Thomas dissented and wrote separately. Yet none of the opinions in *McGirt—not* even Justice Thomas's dissent nor Chief Justice John Roberts's dissent—cited or discussed *City of Sherrill.* That should give the majority in the case at hand some pause in relying upon *City of Sherrill,* as it seems to indicate that *City of Sherrill* had nothing to offer in *McGirt's* analysis of whether the Muscogee (Creek) reservation still exists and still qualifies as "Indian country."

¶21 Taking a more in-depth look at *City of Sherrill's* facts, it becomes even more apparent that the majority's reliance upon it is misplaced. As acknowledged by Justices Kane and Jett, *see* J. Kane's Concurring Op. ¶ 23, the land at issue in *City of Sherrill* was last owned by the Oneida Indian Nation of New York (OIN) itself in 1805, having been sold that year to a tribal member "who then sold the land to a non-Indian in 1807." *Id.* (citing *City of Sherrill,* 544 U.S. at 211). Originally, the OIN had a 300,000-acre reservation guaranteed to them by the 1788 Treaty of Fort Schuyler. *Id.* (citing *City of Sherrill,* 544 U.S. at 203). Throughout the 1800s, both the federal government and the State of New York implemented policies to pressure or to remove tribes westward and to facilitate the purchase of land

for white settlement. *Id.* (citing *City of Sherrill,* 544 U.S. at 205–07). By 1838, the OIN had sold all but 5,000 acres of its original reservation. *City of Sherrill,* 544 U.S. at 206. "By 1843, the New York Oneidas retained less than 1,000 acres in the State. That acreage dwindled to 350 in 1890 . . . ." *Id.* at 207 (citation omitted). By 1920, the OIN had sold all but 32 acres. J. Kane's Concurring Op. ¶ 23 (citing *City of Sherrill,* 544 U.S. at 207). What the members of the majority don't detail is the OIN' s long litigation history regarding its New York lands, which I believe is crucial to understanding *City of Sherrill's* ultimate holding. Starting in 1951, the OIN initiated proceedings before the Indian Claims Commission seeking redress against the federal government "for lands New York had acquired through 25 treaties of cession concluded between 1795 and 1846." *City of Sherrill,* 544 U.S. at 207. Twenty years later, the Claims Commission ruled in favor of the OIN, finding the federal government had a fiduciary duty to ensure New York had paid sufficient consideration for the lands. *Id.* at 207–08 (citing *Oneida Nation of NY v. United States,* 26 Ind. Cl. Comm'n 138, 145 (1971)). The Court of Claims subsequently limited the United States' duty to transactions about which federal officials had knowledge and remanded the case back to the Commission to determine whether knowledge of the land transactions at issue existed. *Id.* at 208 (citing *United States v. Oneida Nation of N.Y,* 477 F.2d 939, 944–45 (Ct. Cl. 1973)). On remand, the Commission found actual knowledge of all the treaties. *Id.* (citing *Oneida Nation of N.Y. v. United States,* 43 Ind. Cl. Comm'n 373, 375, 406–07 (1978)). But before the Commission could hold further proceedings to determine ultimate liability and damages, the OIN asked to dismiss their case so

they could pursue a different course. *Id.* That different course involved filing a test case in federal court against two New York counties, Oneida and Madison Counties, for damages measured by the fair rental value for the years 1968 and 1969 associated with wrongful occupation of 872 acres of their ancestral lands. *Id.* The federal district court initially dismissed their complaint for failure to state a claim arising under federal law, but the U.S. Supreme Court reversed that dismissal. *Id.* at 208–09 (citing *Oneida Indian Nation of N.Y. v. County of Oneida (Oneida* 1), 414 U.S. 661, 675, 682 (1974)). Ultimately, the OIN recovered nearly $35,000 from the two counties in 2002. *Id.* at 209 (citing *Oneida Indian Nation of N.Y. v. County of Oneida,* 217 F. Supp. 2d 292, 310 (N.D.N.Y. 2002)). In the meantime, OIN had commenced litigation against the two counties for damages covering a period of time that spanned 200 years, which had been held in abeyance pending the outcome of the test case. *Id.* (citing *Oneida Indian Nation of N.Y. v. County of Oneida,* 199 F.R.D. 61, 66–68 (N.D.N.Y. 2000)). When litigation resumed in that case, the Oneidas sought (1) to amend their complaint to demand recovery of land they hadn't occupied since the conveyances concluded between 1795 and 1846, (2) to join approximately 20,000 private landowners as defendants, and (3) to seek their ejectment from the lands. *Id.* at 210. The federal district court refused to allow joinder of the private landowners. *Id.* Against that backdrop, the OIN pursued yet another avenue for recourse. In 1997 and 1998, the OIN purchased fee title to properties located in the City of Sherrill, which lies within Oneida County, and built a gasoline station, a convenience store, and a textile factory thereon. *Id.* at 211. When the City of Sherrill

assessed property taxes against the OIN, they refused to pay. *Id.* Thereafter, the City of Sherrill commenced eviction proceedings in state court, and the OIN sued the City of Sherrill in federal court seeking declaratory and injunctive relief based on their belief that the properties were exempt from taxation due to tribal sovereignty. *Id.* at 211–12. The federal district court ruled in the tribe's favor, and a divided panel of the Second Circuit affirmed. *Id.* at 212. The dissenting judge on the Second Circuit thought "the record raised a substantial question whether OIN had 'forfeited' its aboriginal rights to the land because it abandoned 'its tribal existence . . . for a discernable period of time.'" *Id.* (quoting *Oneida Nation of NY. v. City of Sherrill,* 337 F.3d 139, 171 (2d Cir. 2003) (Van Graafeiland, J., dissenting)). The U.S. Supreme Court granted a writ of certiorari specifically to address the issue raised by the dissent below in view of the tribe's litigation history. The OIN advanced a theory that "acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas' ancient sovereignty piecemeal over each parcel." *Id.* at 202. The Supreme Court rejected this theory and held that the "disruptive remedy" sought by the tribe was barred by equitable principles. *Id.* at 217. Specifically, the Court held that "the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the City of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally ***to initiate.***" *Id.* at 221 (emphasis added). The Court "decline[d] to project redress for the Tribe ***into the present and future,*** thereby disrupting the governance of central New York's counties and towns." *Id.* at 202 (emphasis

added). It's no wonder the U.S. Supreme Court invoked equitable defenses in *City of Sherrill;* they weren't just preventing the tribe's equitable relief in the case at hand, but its overreach in the future as demonstrated by the lengthy litigation history.

¶22 Since *City of Sherrill,* the Second Circuit has applied its equitable principles twice to bar similar ancient Indian land claims seeking possession, ejectment, or damages as a means to remedy the centuries-old transfer of reservation land that occurred in violation of the first Indian Trade and Intercourse Act, commonly known as the Non-intercourse Act, ch. 33, 1 Stat. 137 (1790). *See Cayuga Indian Nation of N.Y v. Pataki,* 413 F.3d 266, 275 (2d Cir. 2005); *Oneida Indian Nation of N.Y. v. County of Oneida,* 617 F.3d 114, 121 (2d Cir. 2010). But as with *City of Sherrill,* these two cases concerned attempts to rekindle tribal sovereignty or obtain relief based on a tribe's right to possess the land.

¶23 Contrast that with the case at hand. The Muscogee (Creek) Nation isn't a party to this case, which means they're not seeking anything. And all that Ms. Stroble is seeking is recovery of her ***paid*** taxes for ***the three years prior to filing suit only,*** *see* ROA pp.217–19, Division's Ex. 1, at 2–4 (showing payment), in compliance with the applicable statute of limitations, 68 O.S.Supp.2019, § 227(B)(1). She's not even seeking equitable relief to avoid future tax liability, which should draw into question why equitable defenses are even being discussed. *See Story v. Hefner,* 1975 OK 115, ¶ 26, 540 P.2d 562, 567 ("This case was tried to the court, sitting as a court of equity. He who seeks equity must do equity and come into court with clean hands. This applies with full

force and effect to a suit to obtain an injunction."); *accord Ramirez v. Collier,* 595 U.S. 411, 434 (2022) ("We agree that a party's inequitable conduct can make equitable relief inappropriate."). This case does not involve those types of disruptive remedies discussed in *City of Sherrill* and its progeny, but is instead about the interpretation and application of a state regulation that might result in a tax refund of $7,600.

¶24 Consequently, I strongly disagree with Justices Kane and Jett's assertion that "[t]he critical issue in *Sherrill* was not how the Tribe sought to reacquire reservation status." J. Kane's Concurring Op. ¶ 29. *City of Sherrill* turned on its unique facts, facts which set it apart from the case at hand.

¶25 I also disagree with Vice Chief Justice Kuehn's characterization of Ms. Stroble's request for relief as a request that we "should apply the *McGirt* criminal remedy – lack of jurisdiction requiring dismissal – to any Oklahoma civil cases." V.C.J. Kuehn's Concurring Op. ¶ 9. Interpreting an exemption in the Tax Commission's regulations in a way that requires them to refund taxes paid that were never owed is not the same as declaring that the Tax Commission never has jurisdiction over any income Ms. Stroble earns off the reservation or, for that matter, over a non-Indian's income earned on the reservation. The Tax Commission maintains its jurisdiction to collect taxes; I would just mandate a return of taxes that were overpaid because of the Tax Commission's error in interpreting the law regarding an income tax exemption. I don't understand Vice Chief Justice Kuehn's talk about picking and choosing and applying this or that "remedy," *see id.*

¶¶ 4, 9–10, especially after conceding the existence of a reservation—i.e., "Indian country"—see *id.* ¶ 1.

¶26 Lastly, even if I agreed that we could consider utilizing equitable doctrines like laches and acquiescence, I fail to see how those doctrines apply to Ms. Stroble. In their "evaluat[ion] [of Ms.] Stroble's claimed income tax exemption," Justices Kane and Jett first focus on conduct that is mainly attributable to her tribe: "From 1907 until the *McGirt* decision was issued in 2020, the Muscogee (Creek) Nation and its members were subject to Oklahoma's governance of the land in question." J. Kane's Concurring Op. ¶ 31. Ms. Stroble wasn't even alive for a majority of that time period. *See* ROA p.172, Protestant's Ex. 2, at 1 (stating Ms. Stroble's date of birth, which falls many years after the mid-mark of that 113-year period of time, i.e., 1963). The tribe's conduct shouldn't serve as a basis for preventing Ms. Stroble from protesting tax assessments for the years she can still protest under the statute of limitations. Then Justices Kane and Jett assert, "Not until 2020 did [Ms.] Stroble challenge the State's authority to tax the income of tribal members living and working in the subject area," as if that's a significant amount of time after she should have brought a challenge. J. Kane's Concurring Op. ¶ 31. Looking at the record, it appears she sought application of the tax exemption for Tax Year 2019 on April 15, 2020—the applicable IRS deadline for Tax Year 2019—in anticipation of the U.S. Supreme Court's forthcoming opinion in *McGirt* that issued nearly three months later on July 9, 2020; and she filed amended tax return paperwork for Tax Years 2017 and 2018 on December 17, 2020, only five months after *McGirt* issued. *See* ROA pp.221–22, Jt. Ex. 1, at 2–3 (showing the amended 2017 tax return signed by Ms. Stroble on December 9,

2020, and received by the Tax Commission on December 17, 2020); *id.* at pp.231–32, Jt. Ex. 4, at 2–3 (showing the amended 2018 tax return signed by Ms. Stroble on December 9, 2020, and received by the Tax Commission on December 17, 2020); *id.* at pp.237–38, Jt. Ex. 6, at 1–2 (showing Ms. Stroble's 2019 tax return dated April 15, 2020). I would hardly characterize that as sleeping on one's rights. Consequently, the equitable doctrines of laches, acquiescence, and impossibility are not applicable in light of the facts in this case.

¶27 Their application of the equitable doctrines of laches and acquiescence is troubling. I agree with Chief Justice Rowe's sentiment that using these equitable doctrines against Ms. Stroble is "an affront to the progress and advancement that Native Americans have accomplished despite facing centuries of political opposition." C.J. Rowe's Concurring Op. ¶ 10. His reference to Muscogee (Creek) hero Chitto Harjo is very appropriate here. *See id.* ¶ 11. *McGirt* found for the sake of both Jimcy McGirt and Alicia Stroble that the Creek Reservation still exists because—in Chitto Harjo's words—"the grass is growing, the waters run, the sun shines, the light is with us ***and the agreement is with us yet.***" John Bartlett Meserve, *The Plea of Crazy Snake (Chitto Harjo),* 11 Chrons. of Okla. 899, 902-03 (Sept. 1933) (emphasis added), *available at* https://gateway.okhistory.org/ark:/67531/metadc2123361/m1/20/ (quoting Chitto Harjo, Speech before the Special Senate Investigating Committee, Tulsa, Indian Ten. (Nov. 23, 1906)); *cf. McGirt,* 591 U.S. at 937 ("The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress

has never withdrawn the promised reservation."). Equitable defenses should not be weaponized to deprive Ms. Stroble of income that rightfully belongs to her.

E. McGirt *Should Not Be Deemed Non Retroactive Because of the Rule in* State ex rel. Matloff v. Wallace, *2021 OK CR 21, 497 P.3d 686*

¶28 At this juncture, I have only one more topic to address—a topic raised in Chief Justice Rowe's concurring opinion. While I agree with his finding that the Tax Commission "intended for the definition of 'Indian Country' to include the definition contemplated in the Major Crimes Act—which now includes the Muscogee (Creek) Nation," C.J. Rowe's Concurring Op. ¶ 8, I disagree with his ultimate conclusion that Ms. Stroble's appeal is "unmeritorious" because *McGirt* does not apply retroactively in light of the U.S. Supreme Court's denial of certiorari in cases like *State ex rel. Matloff v. Wallace,* 2021 OK CR 21, 497 P.3d 686, *cert. denied sub nom. Parish v. Oklahoma, cert. denied,* 142 S.Ct. 757 (2022), where the Oklahoma Court of Criminal Appeals had determined that *McGirt* would not apply retroactively in a criminal context, C.J. Rowe's Concurring Op. ¶ 9. Ultimate responsibility for raising this theory lies with the Tax Commissioners, whose order (now on appeal) mentions it. *See* ROA p.455, Findings, Conclusions & Order 17. I believe reliance upon this theory is ill-advised. Interestingly, the Tax Commission's appellate attorneys do not raise the argument in their brief.

¶29 Arguing for application of this theory in a tax proceeding ultimately demonstrates unfamiliarity with post-conviction or habeas relief in a criminal

case. Right out the gate, the Court of Criminal Appeals informs readers of its *State ex rel. Matloff* opinion that:

> In state post-conviction proceedings, this Court has previously applied its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus—to bar the application of new procedural rules to convictions that were final when the rule was announced. *See Ferrell v. State,* 1995 OK CR 54, ¶¶ 5–9, 902 P.2d 1113, 1114–15 (citing *Teague[v. Lane,* 489 U.S. 288 (1989)]) (finding new rule governing admissibility of recorded interview was not retroactive on collateral review) . . . .
>
> New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law. *See Carter v. State,* 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244 (citing *Griffith v. Kentucky,* 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (applying new instructional rule of *Anderson v. State,* 2006 OK 6, 130 P.3d 273 to case tried before the rule was announced, but pending on direct review). But new rules generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions. *Ferrell,* 1995 OK CR 54, ¶ 7, 902 P.2d at 1114–15 . . . .

. . . .

> Like the Supreme Court, we have long adhered to the principle that the narrow purposes of collateral review, and the reliance, finality, and public safety interest in factually accurate convictions and just punishments, weigh strongly against the application of new procedural rules to convictions already final when the rule is announced. Applying new procedural rules to final convictions, after a trial or guilty plea and appellate review according to then-existing procedures, invites burdensome litigation and potential reversals unrelated to accurate verdicts, undermining the deterrent effect of the Criminal law. *Ferrell,* 1995 OK CR 54, ¶¶ 6–7, 902 P.2d at 1114–15.

2021 OK CR 21, ¶¶ 7–8, 11, 497 P.3d at 688–89. Upon review of this explanation regarding post-conviction relief in state courts, which mirrors habeas relief in federal courts, it is clear *State ex rel. Matloff* only concerned refusal to apply new procedural rules retroactively in collateral attacks of underlying judgments in ***criminal*** cases. Ms. Stroble's case is not a criminal case, nor is she collaterally attacking anything. She is before this Court on ***direct appeal*** of an income tax protest. Her judgment is ***not final,*** as it is subject to our affirmance or reversal. Her case is still ***in the pipeline***. *See Globe Life & Accident Ins. Co. v. Okla. Tax Comm'n,* 1996 OK 39, ¶ 20 & nn.40–41, 913 P.2d 1322, 1329 & nn.40–41 (discussing application of the new rule of law "to this case, to cases now pending before judicial or administrative tribunals or in the appellate litigation

process, as well as to all controversies over like or identical purchases made *after* this opinion is promulgated"). The *Teague* non-retroactivity analysis for new rules in state post-conviction review has no bearing in this tax appeal.

¶30 *McGirt* isn't being applied to Ms. Stroble retroactively. Ms. Stroble filed her protest ***after*** the U.S. Supreme Court issued its *McGirt* opinion, not before. ROA p.1, Protest Letter 1 (showing April 12, 2021, as the date Ms. Stroble filed her protest against the Tax Commission's disallowance in February of 2021 of the Exempt Tribal Income exclusion). Moreover, in announcing that the Muscogee (Creek) reservation was never disestablished by Congress, *McGirt* was stating that the reservation has *always* existed. Thus, it existed in 2017, 2018, and 2019—and in every year since 1866, for that matter. Ms. Stroble is merely asking us to recognize that fact for the three tax years that Oklahoma's statute of limitations permits her to protest. That's really no different than what Mr. McGirt sought when he asked the U.S. Supreme Court to overturn his conviction that dated all the way back to 1997, *see McGirt,* 591 U.S. at 938 (Roberts, C.J., dissenting), ***which they did***. If they could undo a 23-year-old conviction, what's to prevent us from granting Ms. Stroble the relief she seeks on income taxes for which she could still file tax returns and amended returns?

¶31 Furthermore, Chief Justice Rowe's concurring opinion is forcing this Court to kick the can down the road to address the issue when it arises again—***and it will***. Perhaps Ms. Stroble herself has filed protests concerning Tax Years 2020, 2021, 2022, 2023, and potentially 2024, all of which have been held in abeyance pending the outcome of this appeal.

Those facts aren't in our record on appeal. But I am aware of at least one other pending protest involving the same issue for Tax Years 2020 and 2021, i.e., *Harold Measshintubby and Nellie Measshintubby, Plaintiffs, v. Oklahoma Tax Commission, Defendant,* Case No. CV-2023-0162 (Pittsburg Cty. Dist. Ct. filed July 14, 2023). That case has been stayed pending resolution of Ms. Stroble's appeal. *See* Order Granting Stay of This Matter 1, *Measshintubby v. Okla. Tax Comm'n,* No. CV-2023-0162 (Pittsburg Cty. Dist. Ct. Oct. 3, 2023). Why not address the issue now?

* * *

¶32 I am not attempting to apply *McGirt's* redefinition of "Indian country" wholesale to all civil and criminal cases. But the *McGirt* majority forewarned us about a wider impact on civil issues and "conflict around jurisdictional boundaries" ***as developed on a case-by-case basis***. Insofar as the Tax Commission has directly linked—and, pursuant to constitutional principles, must link—the fate of its income tax regulation to the broad definition of "Indian country" in both *Sac & Fox Nation* and 18 U.S.C. § 1151, *McGirt's* redefinition of "Indian country" within Oklahoma impacts the merits of Ms. Stroble's income tax protest. No equities should stand in the way of her non-disruptive remedy to recover $7,600 that were overpaid in Tax Years 2017, 2018, and 2019. That amount represents only the income she earned from employment by her tribe while living and working on land encompassed within the boundaries of her tribe's reservation. Her victory is mandated by *McClanahan, Moe, Yakima County, Sac & Fox Nation,* and *McGirt* and by the income tax

exemption in § 710:50-15-2(b) of the Tax Commission's rules.

¶33 For all the reasons discussed above, I respectfully dissent.

APPENDIX B

BEFORE THE OKLAHOMA TAX COMMISSION
STATE OF OKLAHOMA

CASE NO. T-21-014-S

IN THE MATTER OF THE INCOME TAX
PROTEST OF ALICIA STROBLE

ORDER NO. 2022 10 04 14

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission following an En Banc Hearing. Having fully reviewed and considered the matter, the Commission hereby VACATES the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on April 12, 2022. The Commission finds that the Taxpayer does not qualify for the Exempt Tribal Income Exclusion, and therefore denies the protest.

The attached Findings, Conclusions, and Order shall constitute the Final Order of the Commission. Further, the Order shall be identified as a Precedential Decision pursuant to OAC 710:1-3-72(c).

SO ORDERED OCT 04 2022

OKLAHOMA TAX COMMISSION

/s/ Leigh Ann McKanna
ASSISTANT SECRETARY

/s/ Shelly Paulk
SHELLY PAULK,
CHAIRMAN

/s/ Mark A. Wood
MARK A. WOOD,
VICE-CHAIRMAN

/s/ Charles T. Prater
CHARLES T. PRATER,
SECRETARY-MEMBER

BEFORE THE OKLAHOMA TAX COMMISSION
STATE OF OKLAHOMA

CASE NO. T-21-014-S

IN THE MATTER OF THE INCOME TAX
TAX PROTEST OF ALICIA STROBLE

FINDINGS, CONCLUSIONS AND ORDER

On the 17th day of August, 2022, the above-styled and numbered cause came on for consideration before the Oklahoma Tax Commission through an En Banc Hearing before the Oklahoma Tax Commissioners. Chairman Shelly Paulk, Vice-Chairman Mark Wood, and Secretary-Member Charles Prater were present and heard arguments from the parties: the Audit Services Division ("Division") of the Oklahoma Tax Commission, represented by and through Elizabeth Field, General Counsel, and Kiersten Hamill, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission ("OTC"), and the Protestant, Alicia Stroble, represented by her counsel, Michael D. Parks.

PROCEDURAL HISTORY

This case began as a protest of the Division's adjustment of Protestant's Oklahoma Resident Income Tax Returns for the 2017, 2018, and 2019 tax years, based on the Division's denial of Protestant's claims for the Exempt Tribal Income Exclusion. The adjustments resulted in tax due amounts of $2,150.00, $2,661.00, and $2,724.00 for the respective tax years, as indicated in Adjustment Letters L0238027072,

L1311768896, and L1465974336, dated February 22, 2021. Protestant timely protested the proposed adjustments by letter dated April 12, 2021, and received by the Division on April 15, 2021, within the 60-day statutory time to protest. Okla. Stat. tit. 68, § 221(C).

On May 13, 2021, the Office of Administrative Law Judges received the above-styled protest file for further proceedings consistent with the *Uniform Tax Procedure Code* [1] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges.* [2] The protest was assigned to Ernest H. Short, Administrative Law Judge, and docketed as Case No. T-21-014-S.

At the request of the parties, a Scheduling Order was issued on August 16, 2021. The parties filed a Joint Stipulation of Issue and Facts, listing Joint Exhibits 1-12 on November 30, 2021. On December 10, 2021, Protestant filed Protestant's Pre-Trial Brief with Protestant's Exhibits A-H attached thereto. On December 15, 2021, the Division filed Division's Prehearing Brief with Division's Exhibit 1 attached. Copies of Joint Exhibits 1-12 were filed on January 19, 2022.

An administrative hearing was held on January 21, 2022. As a preliminary matter, Joint Exhibits 1-12, Protestant's Exhibits 1-11, and Division's Exhibit 1 were admitted without objection. Protestant appeared and testified regarding the reasons for claiming the Exempt Tribal Income Exclusion on her Oklahoma Resident Income Tax Returns for the 2017,

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[1] Okla. Stat. tit. 68, § 201, *et seq.,* as amended.

[2] Rules 710:1-5-20 through 710:1-5-49 of the Oklahoma Administrative Code governing administrative proceedings related to tax protests.

2018, and 2019 tax years. Protestant called Ramolee Ozment, Auditor, OTC, who testified regarding the reasons the Division denied Protestant's claims for the Exempt Tribal Income Exclusion. The Division examined its auditor by way of cross-examination.

On January 21, 2022, the record was closed and the case was submitted for decision. The record was reopened on April 6, 2022 to admit the parties' Amended Joint Stipulation of Issue and Facts, after which the record was closed and the matter resubmitted for decision.

On April 12, 2022, the Administrative Law Judge issued his Findings, Conclusions and Recommendation ("FCRs"), finding that the Protestant demonstrated, by a preponderance of the evidence, she resided within the boundaries of the Muscogee (Creek) Nation Reservation during the 2017, 2018, and 2019 tax years, and therefore qualified for the Exempt Tribal Income Exclusion provided by Okla. Admin. Code § 710:50-15-2(b)(1). The Administrative Law Judge recommended the Commissioners grant Protestant's protest to the Division's denial of the Exempt Tribal Income Exclusion for tax years 2017, 2018, and 2019.

On April 27, 2022, the Division submitted its Application for En Banc Hearing before the Commissioners, citing errors by the Administrative Law Judge in the FCRs. On May10, 2022, the Protestant submitted a Reply to Division's Application for En Banc Hearing, objecting to the hearing. On May 31, 2022, the Commissioners granted the En Banc Hearing, setting it for July 27, 2022. It was later rescheduled for August 17, 2022, upon Protestant's unopposed Motion to Continue En Banc Hearing.

On August 17, 2022, the En Banc Hearing was held, and each party was given thirty minutes to present, followed by questions from the Commissioners. At the end of the hearing, the matter was considered submitted for decision.

FINDINGS OF FACT

1. Protestant is an enrolled citizen (member) of the Muscogee (Creek) Nation, a federally recognized Indian tribe. (Protestant Ex. 2; Joint Ex. 8.)

2. During tax years 2017, 2018, and 2019, Protestant resided on a tract of land located in Okmulgee County, Oklahoma, more particularly described as follows:

> Lot Fifty-seven (57) of Block One (1) in QUAIL MEADOWS, AMENDED, an Addition to the City of Okmulgee, Okmulgee County, State of Oklahoma, according to the Recorded Plat thereof.
>
> The street address of the Protestant's residence described in the preceding paragraph is 2310 Piney Point Avenue, Okmulgee, Oklahoma, 74447.
>
> (Protestant Ex. 6; Joint Ex. 9.)

3. The warranty deed provided by Protestant demonstrates the property was acquired in 2008, from the LaSalle Bank National Association, as Trustee for the C-BASS Trust 2006-CB9 C-BASS Mortgage Loan Asset-Backed Certificates, Series 2006-CB9. (Protestant Ex. 6; Joint Ex. 9.)

4. Protestant was employed by the Muscogee (Creek) Nation during the 2017, 2018, and 2019 tax years. (Protestant Ex. 10; Joint Ex. 10-12.)

5. On December 17, 2020, Protestant filed a delinquent, original 2017 Oklahoma Individual Income Tax Return with the OTC, claiming $61,842.00 in Exempt Tribal Income on Schedule 511-A, line 10. (Joint Ex. 1.)

6. On December 17, 2020, Protestant filed a delinquent, original 2018 Oklahoma Individual Income Tax Return with the OTC, claiming $61,842.00 in Exempt Tribal Income on Schedule 511-A, line 10. (Joint Ex. 4.)

7. On April 15, 2020, Protestant filed a timely, original 2019 Oklahoma Individual Income Tax Return with the OTC, claiming $65,793.00 in Exempt Tribal Income on Schedule 511-A, line 10. (Joint Ex. 6.)

8. On February 22, 2021, the Division issued three letters to Protestant (Letter IDs L0238027072, L1311768896, and L0238027072) stating that Protestant's 2017, 2018, and 2019 Returns had been adjusted because the "Exempt Tribal Income exclusion has been disallowed or adjusted. In order to qualify, all three requirements must be met: be a tribal member, live and work on Indian land to which the member belongs." (Protestant Ex. 9; Joint Ex. 2, 5, & 7.)

9. The Division's disallowance of the Exempt Tribal Income Exclusion from Protestant's Returns resulted in adjustments to Protestant's reported taxable income on Line 13 of Protestant's 2017, 2018, and 2019 Forms 511 from $0.00 to $50,099.00, $60,992.00, and $59,546.00, respectively. (Protestant Ex. 9; Joint Ex. 2, 5, & 7.)

10. On April 15, 2021, the Division received Protestant's protest to the adjustment of the 2017,

2018, and 2019 Returns, as well as additional documentation. (Protestant Ex. 9; Joint Ex. 3.)

11. Protestant timely protested the Division's disallowance of the claims of Exempt Tribal Income reported on line 10 of Protestant's 2017, 2018, and 2019 Forms 511-A. (Am. Joint Stips., 2 ¶ V.4, 3 ¶ VI.9, 4 ¶ VII.4.)

CONCLUSIONS OF LAW

1. The Oklahoma Constitution vests the whole matter of taxation exclusively within the power of the Legislature as limited by the Constitution. *Adair* v. Clay, 1988 OK 77, 780 P.2d 650, 655, citing Okla. Const. art. X, § 12, *cert denied,* 493 U.S. 1076, 110 S.Ct. 1125, 107 L.Ed.2d 1032 (1990).

2. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. Okla. Stat. tit. 68, § 221.[3]

3. In administrative proceedings before the OTC, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the OTC is incorrect. Okla. Admin. Code § 710:1-5-47; *Enter. Mgmt. Consultants, Inc. v. State ex rel. Okla. Tax Comm'n,* 1988 OK 91, ¶ 5, n. 11, 768 P.2d 359, 362; *Geoffrey, Inc. v. Okla. Tax Comm'n,* 2006 OK CIV APP 27, ¶ 25, 132 P.3d 632, 640. The burden of proof standard is preponderance of the evidence. 2 Am. Jur. 2d *Administrative Law* § 344. Each element of the claim must be supported by reliable, probative

[3] To be clear, the OTC has not asserted any jurisdiction over the Muscogee (Creek) Nation. Nor has Protestant asserted she paid income tax to the Nation on the income she seeks to exclude from income on which the OTC based its assessment. The Nation is not a party to this action.

and substantial evidence of sufficient quality and quantity to show the existence of the facts supporting the claim are more probable than their nonexistence. *Id.* Failure to provide evidence that an adjustment to the action of the OTC is warranted will result in denial of the protest. Okla. Admin. Code § 710:1-5-47.

4. Rules promulgated pursuant to the provisions of the Administrative Procedures Act[4] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. Okla. Stat. tit. 75, § 306(C). "Rules and regulations enacted by administrative agencies pursuant to the powers delegated to them have the force and effect of law and are presumed to be reasonable and valid." *Toxic Waste Impact Grp., Inc. v. Leavitt, 1988* OK 20, ¶ 12, 755 P.2d 626, 630.

5. The Oklahoma Tax Commission is statutorily obligated to administer the tax laws of Oklahoma as enacted by the Legislature. Okla. Stat. tit. 68, § 203. "The levying of taxes is purely statutory, and tax statutes must be administered as written." *W. Auto Supply Co., v. Okla. Tax Comm'n*, 1958 OK 44, ¶ 15, 328 P.2d 414, 420 (citing 51 Am. Jur., 615, note 19).

6. The Oklahoma Income Tax Act[5] governs the imposition of state income tax in Oklahoma. Oklahoma income tax is imposed on every resident or nonresident individual as required by law. Okla. Stat. tit. 68, § 2355(A). A taxpayer's income tax liability is determined under the law in effect when the income is received. *Wootten v. Okla. Tax Comm'n,* 1935 OK 54, ¶ 10, 40 P.2d 672, 674.

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[4] Okla. Stat. tit. 75, § 250 *et seq.,* as amended.

[5] Okla. Stat. tit. 68, § 2351 *et seq.,* as amended.

7. In cases in which a taxpayer files a return and the OTC determines the tax disclosed on the return is less than the tax determined by its examination, the OTC is required to issue a proposed assessment based on its determination. Okla. Stat. tit. 68, § 221(A). The OTC may assess, correct, or adjust the return or report as a result of audit or investigation. Okla. Stat. tit. 68, § 221(B).

8. "The income of an enrolled member of a federally recognized Indian tribe shall be exempt from Oklahoma individual income tax when. . . [t]he member is living within 'Indian Country' under the jurisdiction of the tribe to which the member belongs; and, the income is earned from sources within 'Indian Country' under the jurisdiction of the tribe to which the member belongs." Okla. Admin. Code § 710:50-15-2(b)(1).

9. "The income of an enrolled member of a federally recognized Indian tribe shall not be exempt from Oklahoma individual income tax when. . . [t]he member resides in Oklahoma, but not within 'Indian Country', regardless of the source of the income." Okla. Admin. Code § 710:50-15-2(c)(2).

10. "'Indian Country' means and includes formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States. [See:18 U.S.C. § 1151]" Okla. Admin. Code § 710:50-15-2(a)(1).

11. "'Informal reservations' means and includes lands held in trust for a tribe by the United States and those portions of a tribe's original reservation which were neither allotted to individual Indians, nor ceded to the United States as surplus land, but were

retained by the tribe for use as tribal lands." Okla. Admin. Code § 710:50-15-2(a)(2).

12. "This [U.S. Supreme] Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others." *Okla. Tax Comm'n v. United States,* 319 U.S. 598, 606, 63 S. Ct. 1284, 1288, 87 L. Ed. 1612 (1943). "An exemption cannot exist by implication and a doubt is fatal to the claim of exemption." *Am. Airlines, Inc. v. Okla. Tax Comm'n*, 2014 OK 95, ¶ 30, 341 P.2d 56, 64, citing *Shields, supra,* 100 P. at 571.

ISSUE

The issue is whether Protestant qualifies for the Exempt Tribal Income Exclusion claimed on Protestant's 2017, 2018, and 2019 Oklahoma Individual Income Tax Returns. The Exempt Tribal Income Exclusion rule sets forth the requirements that must be met, including the applicable definition of Indian Country, in order to claim the Exclusion: an enrolled member of a federally recognized Indian tribe living within Indian Country under the jurisdiction of the tribe to which the member belongs; and the member's income is earned from sources within Indian Country under the jurisdiction of the tribe to which the member belongs. Okla. Admin. Code § 710:50-15-2(b)(1).

The parties stipulated Protestant is an enrolled Citizen (member) of the Muscogee (Creek) Nation, a federally recognized Indian tribe, and was employed by the Muscogee (Creek) Nation during tax years 2017, 2018, and 2019. (FCRs 4, ¶ 8 & 9; Am. Joint Stips. 1 ¶ I & III.) Further, the parties stipulated all of the income Protestant claimed as exempt on the

2017, 2018, and 2019 Returns pursuant to the Exempt Tribal Income Exclusion was earned from sources within Indian Country under the jurisdiction of the tribe to which the member belongs. (FCRs 5, ¶ 10; Am. Joint Stips. 2 ¶ IV.)

Therefore, the determinative issue is whether Protestant was living within Indian Country under the jurisdiction of the Muscogee (Creek) Nation during the 2017, 2018, and 2019 tax years for purposes of the Exempt Tribal Income Exclusion. (FCRs 5.)

DISCUSSION AND ANALYSIS

The Oklahoma Tax Commission is statutorily obligated to administer the tax laws of Oklahoma as enacted by the Legislature. Okla. Stat. tit. 68, § 203. "The levying of taxes is purely statutory, and tax statutes must be administered as written." *W. Auto Supply Co., v. Okla. Tax Comm'n*, 1958 OK 44, ¶ 15, 328 P.2d 414, 420 (citing 51 Am. Jur., 615, note 19). Oklahoma income tax is imposed on every resident or non-resident individual as required by law. Okla. Stat. tit. 68, § 2355(A). To implement the statutory requirements, the OTC has promulgated rules within the Oklahoma Administrative Code to facilitate the administration of statute as provided by the Legislature. Okla. Stat. tit. 75, § 250.2. "Rules and regulations enacted by administrative agencies pursuant to the powers delegated to them have the force and effect of law and are presumed to be reasonable and valid." *Toxic Waste Impact Grp., Inc. v. Leavitt,* 1988 OK 20,¶ 12, 755 P.2d 626, 630.

Pertinent to this matter, the application of Oklahoma individual income tax to Native Americans, referred to as the Exempt Tribal Income Exclusion, is

set forth in the OTC's administrative rules. Okla. Admin. Code § 710:50-15-2 provides:

> (b) **Instances in which income is exempt.** The income of an enrolled member of a federally recognized Indian tribe shall be exempt from Oklahoma individual income tax when:
>
> > (1) The member is living within "Indian Country" under the jurisdiction of the tribe to which the member belongs; and, the income is earned from sources within "Indian Country" under the jurisdiction of the tribe to which the member belongs;

Okla. Admin. Code § 710:50-15-2(b)(1) (bold in original). The rule was promulgated pursuant to the provisions of the Oklahoma Administrative Procedures Act in 2004, and therefore, is presumed valid until declared otherwise by a district court of this state or the Supreme Court. Okla. Stat. tit. 75, § 306(C). To date, such a declaration has not occurred, and the OTC has consistently applied the Exempt Tribal Income Exclusion set forth in Okla. Admin. Code § 710:50-15-2 since its promulgation.

In the present action, Protestant claimed the Exempt Tribal Income Exclusion for tax years 2017, 2018, and 2019. Both parties agree that the Protestant met two of the three requirements. Specifically, Protestant is an enrolled member of the Muscogee (Creek) Nation, which is a federally recognized Indian tribe, and Protestant's income was earned from sources within Indian Country under the jurisdiction of the Muscogee (Creek) Nation. (Am. Joint Stips. 1 ¶ I, & 2 ¶ IV; Joint Ex. 8, 10, 11, & 12.)

However, Protestant's claim was disallowed by the Division because Protestant did not live within

Indian Country during the relevant tax years. (Joint Ex. 2, 5, & 7.) The Exempt Tribal Income Exclusion rule defines Indian Country as "formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States." Okla. Admin. Code § 710:50-15-2(a)(1).[6] Protestant has not claimed to reside within a dependent Indian community or an Indian allotment. Therefore, to qualify for the Exclusion, Protestant must prove residence within a formal or informal reservation pursuant to Okla. Admin. Code § 710:50-15-2.

A formal reservation is federally owned land "reserved from sale" under federal law. *United States v. Celestine,* 215 U.S. 278, 285, 30 S. Ct. 93, 95, 54 L. Ed. 195 (1909). It is land validly set apart for use by the Indians, under the federal superintendence of the government. *United States v. McGowan,* 302 U.S. 535, 539, 58 S. Ct. 286, 288, 82 L. Ed. 410 (1938). An informal reservation is defined by the Exempt Tribal Income Exclusion rule as "lands held in trust for a tribe by the United States and those portions of a tribe's original reservation which were neither allot-

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[6] The inclusion of formal and informal reservations in the administrative rule comes directly from a U.S. Supreme Court case wherein the Court included informal reservations in the definition of Indian Country, which is mirrored by the OTC administrative rule.

> Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.

Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123, 113 S. Ct. 1985, 1991, 124 L. Ed. 2d 30 (1993).

ted to individual Indians, nor ceded to the United States as surplus land, but were retained by the tribe for use as tribal lands." Okla. Admin. Code § 710:50-15-2(a)(2).

The warranty deed provided by Protestant demonstrates the land is not a formal reservation owned by the federal government. Protestant acquired fee title to the property in 2008, from a non-tribal grantor, the LaSalle Bank National Association, as Trustee for the C-BASS Trust 2006-CB9 C-BASS Mortgage Loan Asset-Backed Certificates, Series 2006-CB9. (Joint Ex. 9.) Further, the deed does not indicate the land is held by the Muscogee (Creek) Nation or the federal government in trust for the Muscogee (Creek) Nation, nor is it subject to any restrictions, and therefore does not qualify as an informal reservation pursuant to Okla. Admin. Code § 710:50-15-2(a)(2).

Protestant contends the Exclusion applies because Protestant's residence, during the relevant tax periods, was within the boundaries of the Muscogee (Creek) Nation Reservation that was never disestablished by Congress and qualifies as Indian Country under 18 U.S.C. § 1151(a). (FCRs 11.) To support this argument, Protestant cited the OTC's *Report of Potential Impact of McGirt v. Oklahoma* to assert that the Commission has taken the position that the 2020 U.S. Supreme Court decision in *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020), determined that most of eastern Oklahoma is now Indian Country, specifically a reservation, and no longer subject to state taxation. (Hr'g Tr.10-13, 77-81; Protestant Ex. 8.) Protestant's assertion is incorrect.

The *Report of Potential Impact of McGirt v. Oklahoma,* cited by Protestant, was prepared in response to an Executive Order as to any potential

impact of the *McGirt* ruling. (See Okla. Exec. Order 2020-24.) The Report was prepared and issued by the Office of the Executive Director of the Oklahoma Tax Commission on September 30, 2020, and bears the signature of Jay Doyle, the Executive Director at the time. (Protestant Ex. 8.) The Commissioners were not aware the Report was being prepared, and the Commissioners did not review, issue or approve the Report prior to its publication and distribution. A formal position taken by the Commission would be set forth in a Commission order, signed by the Commissioners, and to date no such order has been issued. (En Banc Hr'g Tr. 42.)

After the administrative hearing, the Administrative Law Judge issued FCRs, recommending the protest be granted because "Protestant demonstrated, by a preponderance of the evidence, she lived *within* the boundaries of the Muscogee (Creek) Nation reservation during the 2017, 2018, and 2019 tax years, *notwithstanding the issuance of any patent.* See 18 U.S.C. 1151(a)." ((FCRs 22)(emphasis added in original).)

A review of the record makes it abundantly clear that the analysis and recommendation in the FCRs hinges entirely upon an unauthorized expansion of the recent decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), to state taxation matters.

However, the *McGirt* decision was limited to whether the defendant's crimes were committed within Indian Country, as defined by 18 U.S.C. § 1151, in order to determine whether the state's criminal jurisdiction was preempted by federal law,

specifically, the Major Crimes Act ("MCA")[7]. *Id.* at 2459. The Court focused on whether the land where the crimes were committed qualified as a reservation under 18 U.S.C. § 1151(a) for this purpose. *Id.* The Court ultimately held that, "For MCA purposes, land reserved for the Creek Nation since the 19th century remains 'Indian country.'" *Id.* at 2456. As a result, the Court determined the federal government had exclusive jurisdiction to prosecute the defendant since the crimes were committed within Indian Country. *Id.* at 2478.

In the FCRs, the Administrative Law Judge completely disregarded the Court's express limitation of *McGirt* to the Major Crimes Act, and instead concluded that "the importance of the *McGirt* decision to the instant matter is the Court's analysis of whether Congress disestablished or diminished the Creek reservation." (FCRs 13.) The Administrative Law Judge's unilateral conclusion that the *McGirt* decision has application to the taxation protest before the OTC is without basis and completely discounts the Supreme Court's express limitation of *McGirt* to the MCA[8]. In fact, within the *McGirt* opinion, the

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[7] The Major Crimes Act provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). *McGirt*, 140 S.Ct. at 2456.

[8] To go a step further, the AU included another MCA case to aid in his analysis. *Murphy v.* Royal, 875 F.3d 896 (Nov. 9, 2017), *affd sub nom. Sharp v. Murphy,* 140 S.Ct. 2412, L.Ed.2d 1043 (July 9, 2020), was a Tenth Circuit criminal case that was affirmed by the Supreme Court for the reasons set forth in *McGirt.* However, like in *McGirt,* the Court made clear *Murphy was* also a Major Crimes Act case, therefore its application is

Court repeatedly stated the scope of the case was limited.

> ***For MCA purposes,*** land reserved for the Creek Nation since the 19th century remains "Indian country." *McGirt,* 140 S. Ct. at 2456 (emphasis added).
>
> Today we are asked whether the land these treaties promised remains an Indian reservation ***for purposes* of *federal criminal law***. *Id.* at 2459 (emphasis added).
>
> Mr. McGirt's appeal ***rests on the federal Major Crimes Act*** (MCA). *Id.* (emphasis added).

The Court even acknowledged Oklahoma's concern that the decision might be interpreted to have a wider impact, and reiterated the narrow scope of the case to federal criminal jurisdiction under the Major Crimes Act.

> Finally, the State worries that our decision will have significant consequences for civil and regulatory law. **The only question before us**, however, concerns the statutory definition of "Indian country" **as it applies in federal criminal law under the MCA,** and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law.

McGirt, 140 S.Ct. at 2480 (emphasis added).

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limited. "The Major Crimes Act is the jurisdictional statute at the heart of this case. It applies to enumerated crimes committed by Indians in 'Indian country.' When the Major Crimes Act applies, jurisdiction is exclusively federal." *Murphy,* 875 F.3d at 915.

Since *McGirt,* the Supreme Court issued another decision that further clarifies *McGirt* is limited to the Major Crimes Act. In *Oklahoma v. Castro-Huerta,* 142 S. Ct. 2486, 2489 (2022), the Court made clear that while federal law may preempt state authority in certain circumstances, (e.g., the Major Crimes Act as determined by *McGirt),* the general rule remains that the State is entitled to exercise authority over the whole of its territory.

> To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. See U.S. Const., Amdt. 10. As this Court has phrased it, a State is generally "entitled to the sovereignty and jurisdiction over all the territory within her limits." *Lessee of Pollard v. Hagan,* 3 How. 212, 228, 11 L. Ed. 565 (1845).

Id. at 2493.

In *Castro-Huerta,* the defendant appealed his state court conviction after *McGirt v. Oklahoma* was decided, claiming the State did not have authority to prosecute him, a non-Indian, because the crimes were committed within Indian Country. *Id.* at 2489. The defendant attempted to use the General Crimes Act (18 U.S.C. § 1152) and Public Law 280 (18 U.S.C. § 1162) to support the claim that state jurisdiction to criminally prosecute is preempted by federal law. The Court reviewed both laws and concluded neither

preempts state jurisdiction, and ultimately held the State has concurrent jurisdiction with the federal government to prosecute crimes in Indian Country. *Castro-Huerta,* 142 S. Ct. 2486, 2504-05 (2022).

The *Castro-Huerta* decision is important because it makes clear that the *McGirt* decision preempting state jurisdiction has very limited application, even in the scope of criminal matters, to a single federal law- the Major Crimes Act. *Id.* And by its very language, the Major Crimes Act does not apply to taxation. 18 U.S.C. § 1153.[9] Under *Castro-Huerta,* Oklahoma clearly has concurrent jurisdiction, even under the *McGirt* boundaries, unless otherwise preempted. There is no preemption for taxation established under *McGirt,* or otherwise.

Therefore, application of the Exempt Tribal Income Exclusion is contingent upon Protestant satisfying three requirements set forth in Okla. Admin. Code § 710:50-15-2. Protestant cannot meet this burden

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[9] 18 U.S.C. § 1153

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

because the entire argument rests wholly on *McGirt* to prove residence within Indian Country. (Protestant Br. in Supp. Oral Arg. before Comm'n En Banc 11.) Absent the application of the *McGirt* decision to the present case, Protestant's claim is without foundation, and Protestant does not qualify for the Exclusion.

The Oklahoma Tax Commission is an agency of the Executive Branch, not the Legislative Branch, and not the Judicial Branch, and as such does not have the authority to unilaterally extend the *McGirt* holding to taxation absent a statutory change or a determination by a court of competent jurisdiction. Okla. Const. art. IV, § 1. To date, the U.S. Supreme Court has not expanded the scope of *McGirt* to state taxation, nor has Congress or the State Legislature made any changes to Oklahoma tax laws that would exempt the *McGirt* defined historical reservation boundaries from state taxation.

The *City of Sherrill* case cited by the Division in its Brief (Division's En Banc Hr'g Br. 19-23) supports the same conclusion, that without a legislative change or a court decision expanding *McGirt* to taxation cases, neither the tribes, nor the Oklahoma Tax Commission for that matter, have the unilateral authority to revive ancient sovereignty newly reclaimed by the Tribes since the *McGirt* decision was issued. *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202-03, 125 S. Ct. 1478, 1483, 161 L. Ed. 2d 386 (2005). That case involved a dispute between the Oneida Indian Nation and the City of Sherrill, New York, over property taxes on land purchased by the Tribe that was once within its reservation long ago. *Id*. The Court considered the longstanding, non-Indian character of the area and

the inhabitants, the history of state control over the area, and the Tribe's long delay in seeking relief and determined the Tribe could not unilaterally revive its ancient sovereignty. *Id.*

Finally, strictly for the sake of argument, *even if* the Supreme Court were to expand *McGirt* to state taxation matters, it would not give Protestant the requested relief for the 2017, 2018, and 2019 tax years. The *McGirt* decision is a new rule of criminal procedure (decided in July of 2020), and as such, is not retroactive. *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 6, 497 P.3d 686, 688, *cert. denied sub nom. Parish v. Oklahoma*, 142 S. Ct. 757, 211 L. Ed. 2d 474 (2022). In *Matloff,* the District Attorney appealed a district court judge's decision to vacate a second degree murder conviction following the decision in *McGirt. Id.* at 687. The Oklahoma Court of Criminal Appeals ("OCCA") overturned the decision to vacate, finding that the *McGirt* ruling is a new rule of criminal procedure that cannot be applied retroactively. *Id.* at 691-92. The OCCA noted that the Supreme Court did not declare *McGirt* to be retroactive, and even predicted that *McGirt's* potential to unsettle convictions would be limited by other legal doctrines. *Id.* at 693. The defendant appealed the OCCA's decision to the U.S. Supreme Court, but the Court refused to take up the question of retroactivity. *Parish v. Oklahoma*, 142 S. Ct. 757, 211 L. Ed. 2d 474 (2022).

As a result, even if each of the other reasons denying Protestant's protest were to be overturned, the protest would still be denied because Protestant's 2017, 2018, and 2019 tax year protests cannot be won with the retroactive application of the 2020 Court decision.

CONCLUSION

In order to claim the Exempt Tribal Income Exclusion, all three requirements set forth in Okla. Admin. Code § 710:50-15-2 must be met. The only disputed requirement is whether Protestant lived within Indian Country under the jurisdiction of the member's tribe. The Division denied Protestant's claim of the Exclusion, thereby putting the burden on the Protestant to show the OTC's action to be incorrect. Okla. Admin. Code § 710:1-5-47. Protestant's entire case rests on the retroactive application of the *McGirt* decision to state taxation. However, the Commission does not have the authority to extend *McGirt* beyond the limitation set forth by the U.S. Supreme Court in its holding. Without the benefit of *McGirt,* the Protestant has not put forth any evidence to overturn the Division's action.

ORDER

The Commission hereby VACATES the Findings of Fact, Conclusions of Law and Recommendation issued in this case by the Administrative Law Judge on April 12, 2022.

The Commission finds the Protestant does not qualify for the Exempt Tribal Income Exclusion because the requirements set forth in Okla. Admin. Code § 710:50-15-2 have not been met. Protestant did not provide evidence to establish residence within Indian Country for the 2017, 2018, and 2019 tax years. As a result, the protest is DENIED.

The Commission further finds that absent a decision by a court of competent jurisdiction holding that all lands within the *McGirt* defined boundaries of the Muscogee (Creek) Nation Reservation are exempt from taxation, the Commission does not have the

authority to allow tribal members to claim the Exempt Tribal Income Exclusion because they may live and work within the *McGirt* defined boundaries. For the foregoing reasons, Protestant's income for these periods is fully taxable by the State of Oklahoma.

SO ORDERED OCT 04 2022

OKLAHOMA TAX COMMISSION

/s/Leigh Ann McKanna
ASSISTANT SECRETARY

/s/ Shelly Paulk
SHELLY PAULK, CHAIRMAN

/s/ Mark A Wood
MARK A. WOOD,
VICE-CHAIRMAN

/s/ Charles T. Prater
CHARLES T. PRATER,
SECRETARY-MEMBER

SUMMARY OF CASE

EXHIBIT "B"

Alicia Stroble was an enrolled member of the Muscogee (Creek) Nation during the tax years 2017, 2018, and 2019. The Muscogee (Creek) Nation is a federally recognized Indian tribe. Alicia Stroble was employed by the Muscogee (Creek) Nation during the tax years 2017, 2018, and 2019. All of her income was earned from sources within Indian Country under the jurisdiction of the Muscogee (Creek) Nation. Ms. Stroble resided at 2301 Piney Point Avenue, Okmulgee, OK 74447 during the tax years 2017, 2018, and 2019. She lived within the Indian Country of the Muscogee (Creek) Nation during the tax years 2017, 2018, and 2019. Ms. Stroble should have been allowed the Exempt Tribal Income Exclusion for 2017-2019.

On December 17, 2020, Ms. Stroble filed her Amended 2017, 2018, and 2019 Oklahoma Individual Tax Returns claiming the income she earned from the Muscogee (Creek) Nation as Exempt Tribal Income. On February 22, 2021, the Oklahoma Tax Commission disallowed the exclusion. On April 12, 2021, Alicia Stroble timely filed her protests for 2017-2019. The hearing was held on January 21, 2022, before Ernest H. Short, Administrative Law Judge. Judge Short filed his Findings, Conclusions, and Recommendation on April 12, 2022, recommending that the protest to the denial of Ms. Stroble's claims of tribal income exemption for tax years 2017, 2018, and 2019 be granted. The Commission filed an Application for En Banc Hearing on April 27, 2022. The hearing was held on August 17, 2022. On October 4, 2022, the Commission filed its Order vacating the Recommendation of Judge Short, and denying the Exempt Tribal Income Exclusion and protest.

ISSUES TO BE RAISED ON APPEAL

EXHIBIT "C"

1. Did Alicia Stroble live within the Indian Country of the federally recognized Indian tribe that she was a member of during the tax years 2017, 2018, and 2019?
2. Should the Exempt Tribal Income Exclusion have been allowed for Alicia Stroble for the tax years 2017, 2018, and 2019?
3. Should the Oklahoma Tax Commission have affirmed the Findings, Conclusions, and Recommendation of the Administrative Law Judge?
4. Was the Final Order of the Oklahoma Tax Commission finding Ms. Stroble did not qualify for the Exempt Tribal Income Exclusion, and denying her protest, an abuse of discretion, contrary to law, or against the clear weight of the evidence?