IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Case No. 120,806

Alicia Stroble,
Appellant,

v.

Oklahoma Tax Commission,
Appellee.

Appeal from the Final Order of Disposition
of the Oklahoma Tax Commission
T-21-014-S

State Income Tax Protest

BRIEF-IN-CHIEF OF APPELLANT

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February 13, 2023

INDEX

SUMMARY OF THE RECORD

The parties filed a Joint Stipulation of Issue and Facts on November 30, 2021. It is Document No. 15 in the Record on Appeal. The Appellant, Alicia Stroble, was the Protestant in the proceeding below before the Oklahoma Tax Commission. Appellant is an enrolled citizen (member) of the Muscogee (Creek) Nation, a federally recognized Indian tribe. (ROA, Doc. 15, p. 21). During the tax years 2017, 2018, and 2019, Appellant resided on a tract of land within the geographical boundaries of Creek County, Oklahoma, more particularly described as follows:

> Lot 57 of Block 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 Appellant's residence is 2310 Piney Point Avenue, Okmulgee, Okmulgee, Oklahoma, 74447. (ROA, Doc. 15, p. 21).

The parties filed an Amended Joint Stipulation of Issue and Facts on April 6, 2022. It is Document No. 25 and is found at Page 274 of the Record on Appeal. The parties amended their earlier Stipulation to provide the county where the Appellant resided was Okmulgee County, and not Creek County. (ROA, Doc. 25, p. 274).

The Appellant was employed with the Muscogee (Creek) Nation for the tax years 2017, 2018, and 2019. (ROA, Doc. 15, pp. 21, 22). All of the income Appellant claimed as exempt under the Exempt Tribal Income Exclusion was earned from sources within "Indian country", under the jurisdiction of the tribe to which Appellant belongs. (ROA, Doc. 15, p. 22).

On December 17, 2020, Appellant filed her Oklahoma Individual Tax Returns for 2017, 2018, and 2019 claiming Exempt Tribal Income. (ROA, Doc. 15, pp. 22-24). On February 22, 2021, the Appellee issued letters to the Appellant stating the Returns had been adjusted

because the Exempt Tribal Income Exclusion had been disallowed, because all three requirements were not met: "Be a tribal member, live and work on Indian land to which the member belongs". (ROA, Doc. 15, pp. 22-24).

On April 12, 2021, the Appellee received the Appellant's timely protest to the adjustment to her Returns for 2017, 2018, and 2019. (ROA, Doc. 15, pp. 22-24). After reviewing additional documentation provided by the Appellant, the Appellee denied the Exempt Tribal Income Exclusion for all three years, and declined to reverse its adjustment to Appellant's Oklahoma taxable income. (ROA, Doc. 15, pp. 23-24).

Appellant requested an oral hearing on her protest for the years 2017, 2018, and 2019. (ROA, Doc. 23, pp. 227-229). The hearing was held before The Honorable Ernest Short, Administrative Law Judge employed by the Oklahoma Tax Commission, on January 21, 2022. The Transcript of the Hearing is Document No. 24, pp. 250-273 of the Record on Appeal. Alicia Stroble testified at the hearing. Her address for the taxable years 2017, 2018, and 2019 was 2310 Piney Point Avenue, Okmulgee, Oklahoma 74447. (ROA, Doc. 24, pp. 254-255). At all material times, Appellant lived in the Indian country within the boundaries of the Muscogee (Creek) Nation. (ROA, Doc. 24, p. 255). Ms. Stroble worked for the National Council as a Legislative Research Specialist. The National Council is the legislative branch of the Muscogee (Creek) Nation who enact and amend laws. The National Council is the congress for the Muscogee (Creek) Nation. The National Council has two district representatives from each district, including Okmulgee County where Appellant lived. (ROA, Doc. 24, p. 255).

The legislative branch of the Muscogee (Creek) Nation consists of the National Council. The executive branch is separate and consists of the Chief and the Second Chief. The

judicial branch consists of the District Court and the Supreme Court. The main offices for all three branches are located at the Tribal Complex in Okmulgee, Oklahoma, located on trust land for the benefit of the tribe that is owned by the United States of America. (ROA, Doc. 24, p. 256). The Muscogee (Creek) Nation has its own Constitution which was approved in 1979, that it operated under in 2022. Examples of actions performed by the tribe which indicated it had a reservation within its geographic boundaries are: When Ms. Stroble wrote legislation, she would include the language "within our jurisdiction"; the tribe exercised jurisdiction within its geographical boundaries by their police department, their court system, and imposition of sales taxes at their casinos and smoke shops. (ROA, Doc. 24, pp. 257-258). The Muscogee (Creek) Nation has its own statutory code. Part of that code is a tax code concerning the taxes on casinos and smoke shops. (ROA, Doc. 24, p. 258).

The employee of the Oklahoma Tax Commission who reviewed Appellant's Income Tax Returns and made the adjustments was Ramolee Ozment. (ROA, Doc. 24, p. 259). Her inquiry was to determine if Ms. Stroble met the residency requirement required for the Exempt Tribal Income Exclusion. (ROA, Doc. 24, p. 260). Ms. Ozment found that two of the three requirements were met. (ROA, Doc. 24, pp. 260-261). Ms. Ozment denied her protest because Ms. Stroble did not live on either restricted or trust land. (ROA, Doc. 24, p. 261). There is no other reason why Ms. Ozment denied her protest. (ROA, Doc. 24, p. 261). Her audit of Ms. Stroble resulted from the formation of a special project that was created by the Director of the Oklahoma Tax Commission to review the returns that claimed the exemption for individual Indian income. This special project was created after several returns and amended returns claiming the Indian exemption had been batch processed and refunds paid out. (ROA, Doc. 24, p. 261). Most of the returns that Ms. Ozment audited resulted in her disallowing the

Exempt Tribal Income Exclusion. Most of them were disallowed because she concluded the taxpayers did not meet the residency requirement since they did not live on trust land or restricted land. (ROA, Doc. 24, p. 262). As a part of her audit work, Ms. Ozment never investigated what is considered "Indian country". (ROA, Doc. 24, p. 262). Ms. Ozment never determined whether or not taxpayers who claimed the exclusion were living within the "Indian country" under the jurisdiction of the tribe to which the member belongs as mandated by Oklahoma Administrative Code, § 710:50-15-2(b). (ROA, Doc. 24, p. 262). She never determined whether or not Ms. Stroble lived within "Indian country" as a part of her audit work.

Ms. Ozment agreed with the statement made on Page 8 of the Impact of the McGirt v. Oklahoma Report prepared by the Oklahoma Tax Commission, that 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. She further agreed that the regulation she relied upon in her audit now applies in all lands within the reservation boundaries described in the Muscogee (Creek) Treaty of 1866, according to the Oklahoma Tax Commission report. (ROA, Doc. 24, p. 263). She also agreed that the report prepared by the Oklahoma Tax Commission concluded the State could not tax the income of individual Creek Nation citizens who resided within the reservation boundaries, to the extent the income was generated within those boundaries. (ROA, Doc. 24, p. 263). Finally, Ms. Ozment agreed that Ms. Stroble lived within the 11-county tribal jurisdiction of the Muscogee (Creek) Nation that included Okmulgee County. (ROA, Doc. 24, pp. 263-264).

The Administrative Law Judge filed his Findings, Conclusions, and Recommendation on April 12, 2022. (ROA, Doc. 26, p. 280). The Administrative Law Judge concluded that

the parties stipulated that Protestant is an enrolled member of the Muscogee (Creek) Nation; that the Muscogee (Creek) Nation is a federally recognized Indian tribe; and that the income Protestant claimed as Exempt Tribal Income for the tax years 2017, 2018, and 2019 was earned from the Muscogee (Creek) Nation for employment within "Indian country" under the jurisdiction of the Muscogee (Creek) Nation. Judge Short further concluded that Protestant demonstrated by a preponderance of the evidence that she lived within the boundaries of the Muscogee (Creek) Nation reservation during the 2017, 2018, and 2019 tax years, and as such, Protestant qualified for the Exempt Tribal Income Exclusion provided by OAC 710:50-15-2(b)(1). Based upon the specific facts and circumstances of this case, Judge Short recommended that Protestant's protest to the Division's denial of her claims of the Exempt Tribal Income Exclusion for tax years 2017, 2018, and 2019 be granted. (ROA, Doc. 26, p. 301).

The Oklahoma Tax Commission filed an Application for En Banc Hearing on April 28, 2022. (ROA, Doc. 28, p. 305). On October 5, 2022, the Oklahoma Tax Commission filed its Final Order Vacating the Findings of Fact, Conclusions of Law, and Recommendation made and entered by the Administrative Law Judge on April 12, 2022, and finding that Ms. Stroble does not qualify for the Exempt Tribal Income Exclusion, and denied her protest. (ROA, Doc. 36, p. 438). Appellant commenced her Appeal by filing her Petition in Error on October 31, 2022.

STANDARD OF REVIEW

The Standard of Review in this case is *de novo* because the Appellant seeks review of the legal ruling by the Oklahoma Tax Commission ("Commission" or "OTC") that she did not qualify for the Exempt Tribal Income Exclusion claimed on her 2017, 2018, and 2019

Oklahoma Individual Income Tax Returns. As this Court has explained, "when the OTC, an administrative agency, acts in its adjudicative capacity, its orders will be affirmed on appeal if 1) the record contains substantial evidence supporting the facts upon which the order is based and 2) the order is free of legal error." *Am. Airlines, Inc. v. State, ex rel. Oklahoma Tax Comm'n*, 2014 OK 95, ¶¶ 24-25, 341 P.3d 56, 62-63. Further, the "OTC's legal rulings are subject to ... plenary, independent and nondeferential reexamination," and the Court therefore reviews "*de novo*" the OTC's rulings on dispositive legal issues. *Id.*

De novo review applies here because there are no disputed factual issues, and the issue in this case involves solely legal questions. The Exempt Tribal Income Exclusion rule sets forth the requirements that must be met to claim the exclusion: "[t]he 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). The parties stipulated Appellant was an enrolled member of the Muscogee (Creek) Nation, a federally recognized Indian tribe, and was employed by the Muscogee (Creek) Nation during the tax years 2017, 2018, and 2019. Further, the parties stipulated all the income Appellant 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. Thus, the only remaining issue that was tried below was whether the Appellant lived within "Indian country" under the jurisdiction of the tribe to which she belonged during the tax years 2017, 2018, and 2019.

The OTC rested its decision on the legal conclusions that 1) fee lands are not reservations or Indian country, and 2) the entire Creek Nation reservation is Indian country for the purposes of the Major Crimes Act only and, accordingly, the OTC lacked authority to extend reservation status for other purposes such as taxation. (ROA, Doc. 36, pp. 449-455). The Commission ruled that she did not meet this requirement. This Court should therefore review *de novo* the Final Order of the Commission to determine if it is free of legal error.

LEGAL ARGUMENT AND AUTHORITIES

As set forth below, all lands within the Muscogee (Creek) Reservation are "Indian country" regardless of their fee status. 18 U.S.C. § 1151(a) (defining "Indian country" to include "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent"); *see, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020). And it is well established that federal law preempts States from taxing Indian income derived within the boundaries of Indian country. *See, e.g.*, *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973). This rule is reflected in Oklahoma's Exempt Tribal Income Exclusion rule, Okla. Admin. Code § 710:50-15-2, and was acknowledged by the Oklahoma Tax Commission its report on the potential impact of *McGirt*, where the OTC agreed that all lands within the Muscogee (Creek) Nation Reservation are "Indian country." The OTC's arguments under *State, ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), and *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) are meritless as they do nothing to undermine this presumption of preemption.

For these reasons, the Appellant asks this Court to reverse the Commission's Final Order and to remand this case back to the Commission with instructions to grant Appellant's

protest so she may claim the Exempt Tribal Income Exclusion for the 2017, 2018, and 2019 tax years.

I. All Lands Within the Creek Reservation are Reservation Lands and Indian Country.

The OTC concluded that the lands on which the Appellant lived were not reservation lands because they are held in fee. (ROA, Doc. 36, pp. 449, 450). This position has been soundly rejected by the United States Supreme Court in *McGirt*. 140 S. Ct. at 246465, 2475-76 (citing *United States v. Celestine*, 215 U.S. 278 (1909), *Solem v. Bartlett*, 465 U.S. 463 (1984), and *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 357-58 (1962).

To arrive at Oklahoma Adjusted Gross Income for individuals, the Tax Commission is required to deduct amounts included in the taxable income of any taxpayer that "the State is prohibited from taxing because of the provisions of the federal Constitution, the state Constitution, federal laws, or laws of Oklahoma." 68 O.S. § 2358(A)(2). The income of an enrolled citizen of a federally recognized Indian tribe shall be exempt from Oklahoma Individual Income tax when the citizen is living within "Indian country" under the jurisdiction of the tribe to which the citizen belongs, and the income is earned from sources within "Indian country" under the jurisdiction of the tribe to which the citizen belongs. Okla. Admin. Code 710:50-15-2(b)(1). The Oklahoma Administrative Code defines "Indian country" to "mean[] and include[] 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).

Under 18 U.S.C. § 1151, the definition of "Indian country" encompasses three categories of land:

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."

Within 18 U.S.C. § 1151(a), Congress provided that "Indian country" includes "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." *Murphy v. Royal,* 875 F.3d 896, 917 (2017), aff'd sub nom. *Sharp v. Murphy*, 140 S. Ct. 2412, 207 L.Ed.2d 1043 (2020). Subsection (a) by its express terms thus "includes within the definition of Indian country *all* lands within the congressionally prescribed boundaries of a reservation, *including private fee lands*." *Hydro Res., Inc v. U.S. E.P.A.*, 608 F.3d 1131, 1157 (10th Cir. 2010) (second emphasis added). *See also McGirt*, 140 S. Ct. at 2464 (stating same and that "[n]or under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians.").

Because the definition of "Indian country" at 18 U.S.C. § 1151(a) expressly includes "all land" within the boundaries of a reservation, including fee lands, it is irrelevant whether the property upon which the Appellant resides is trust land, restricted land, or fee land. The Commission should have only inquired as to whether the Appellant resided within the boundaries of the Muscogee (Creek) Nation Reservation.

Reservation status depends on the boundaries Congress draws, not on who owns the land inside the Reservation boundaries. "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *McGirt v. Oklahoma*, 140 S. Ct. at 2468 (citing *Celestine*, 215 U.S. at 285). "When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Celestine*, 215 at 285; *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 359 (1962).

"Although § 1151 by its terms defines Indian country for purposes of determining federal criminal jurisdiction, the classification generally applies to questions of both civil and criminal jurisdiction." *Indian Country, U.S.A., Inc. v. State of Okl. ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 n. 5 (1987)); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993) ("For purposes of both civil and criminal jurisdiction, the primary definition of Indian country is 18 U.S.C. § 1151."); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998) ("Although this definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction such as the one at issue here."). The Commission recognizes this fact as it expressly requires the application of the "Indian country" definition under 18 U.S.C. § 1151 to civil tax matters by incorporating that definition into the Exempt Tribal Income Exclusion. Okla. Admin. Code § 710:50-15-2(a)(1).

Finally, the Commission relies on the clause, "whether restricted or held in trust by the United States" contained in Okla. Admin. Code 710:50-15-2(a)(1) to support its conclusion

that Appellant does not qualify for the tribal income exclusion. As demonstrated above, that language is from Section 1151(c) and applies to *non-reservation* allotments—it does not apply at all to reservations under Section 1151(a), which provides that all lands within a reservation are Indian country "notwithstanding the issuance of any patent[.]" 18 U.S.C. § 1151(a). And *McGirt* squarely held that the Muscogee (Creek) Nation Reservation is a "reservation" under Section 1151(a), including all fee lands within it. *See McGirt*, 140 S. Ct. at 2460-62, 2464, 2468. The phrase, "restricted or held in trust by the United States," is used in *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114 (1985), to demonstrate congressional intent that "Indian country" be defined broadly. *Id.* at 123. "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." *Id.* "The intent of Congress ... was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments." *Id.* at 125. The connecting phrases, "whether and together with" are therefore intended to communicate inclusiveness of all lands within a tribe's reservation boundaries. *Id.* at 124-125.

II. Because the Appellant Resided in Indian Country During the Disputed Tax Years, Oklahoma May Not Tax Her Income.

It is well established that States are preempted from taxing Reservation Indians on income derived solely from Reservation sources. *See, e.g., McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114 (1993); *see also Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987).

The Supreme Court first addressed the "question whether the State may tax a reservation Indian for income earned exclusively on the reservation" in *McClanahan*, where it held that absent express authorization from Congress, Arizona was preempted from imposing personal income taxes on reservation Indians because applicable law left such matters "to the exclusive province of the Federal Government and the Indians." *Id.* at 165, 171-72.

The Supreme Court carried the *McClanahan* rule forward and applied it to Oklahoma in *Sac & Fox Nation*, where the Sac & Fox Nation sued the Commission in response to its assertion of tax authority on income derived from the Tribe.[1] The Supreme Court held that Oklahoma could not impose income taxes on tribal members who lived in "Indian country." The Supreme Court vacated the judgment of the Court of Appeals and remanded the case because the Court of Appeals erred to the extent that it did not determine the residence of tribal members working for the Tribe. In large part, the Tribe based its claims of immunity from state taxes on *McClanahan*. The OTC argued that the analysis in *McClanahan* applied only to tribes on established reservations and that Oklahoma had complete tax jurisdiction over the Sac & Fox because the 1891 Treaty had disestablished the Sac & Fox Reservation.

The Supreme Court in *Sac & Fox* explained that the "Court of Appeals looked only to the status of the land on which the income was earned, in this case, trust land," and "[i]n light of *Oklahoma Tax Comm'n v. Citizen Band of Pottawatomie Tribe of Okla.*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), the court concluded that for tribal immunity purposes there was no difference between trust land validly set apart for Indian use and reservation land."

[1] The Tribe also asserted a claim against the State's ability to tax motor vehicles properly tagged by the Tribe but not by the State.

Id. at 122-23. Therefore, "the income of tribal members who worked for the tribe on trust land was immune from state taxation." *Id.* at 123.

The Supreme Court in *Sac & Fox* further concluded that the *residence* of a tribal member is a significant component of the *McClanahan* presumption against state tax jurisdiction. To that end, the Supreme Court explained that its cases made clear "that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; and that it was enough that the member lived in 'Indian country.'" *Id.* at 123. And when describing "Indian country," the Supreme Court made direct reference to the definition of "Indian country" found at 18 U.S.C. § 1151, stating that "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.*

The Supreme Court holding in *Sac & Fox* supports Ms. Stroble's position:

> To determine whether a tribal member is exempt from state income tax under *McClanahan*, a court first must determine the residence of that tribal member.... The Commission, however, contends that the relevant boundary for taxing jurisdiction is the perimeter of a formal reservation, not merely land set aside for a tribe or its members
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> ....
>
> Nonetheless, in *Oklahoma Tax Comm'n v. Citizen Band of Pottawatomie Tribe of Okla.*, we rejected precisely the same argument and from precisely the same litigant.... We noted that we have never drawn the distinction Oklahoma urged. Instead *we asked only whether the land is Indian country.*
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> *Sac & Fox Nation*, 508 U.S. 114, at 124-125 (emphasis added).

The Tenth Circuit's holding in *Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) is also instructive. In *Indian Country U.S.A.*, the Muscogee (Creek) Nation brought an action for declaratory and injunctive

relief against Oklahoma for, *inter alia*, unlawfully requiring the tribe to collect and remit state sales tax on the tribe's bingo activities. *Id.* at 970. Oklahoma argued that the site was not "Indian country" because it was "not a reservation" and the fee title was not held in trust by the United States for the Muscogee Creek Nation. *Id.* at 973. The Tenth Circuit soundly rejected this argument, explaining that Congress clearly set apart lands for the Muscogee (Creek) Nation and never "explicitly acted to divest Creek tribal lands of their Indian country status." *Id.* at 974-75. Accordingly, the bingo site was "Indian country" as defined under 18 U.S.C. § 1151(a) and was immune from state law. *Id.* at 975-76. The "Indian country" status of the site played a pivotal role in the Tenth Circuit's ultimate holding that the State lacked jurisdiction to tax the Muscogee (Creek) Nation's bingo activities because those activities had a "substantial connection to the Creek Nation's lands," "traditional presumptions favor[ed] the exclusion of state law from Creek Nation lands," and because the activities were "wholly within tribal boundaries," *id.* at 986-87.

The question of State taxing authority with respect to the Muscogee (Creek) Nation's "Indian country" was therefore decided in *Indian Country, U.S.A.*, and the boundaries to which that holding applies was later clarified in *McGirt*. In both cases, the courts found that the lands in question met the definition of "Indian country" under 18 U.S.C. § 1151(a)—the same federal provision that is incorporated into the text of Section 710:50-15-2(a)(1) and the Supreme Court's decision in *Sac & Fox*.

III. The Oklahoma Tax Commission Has Endorsed All of Appellant's Arguments.

The Oklahoma Tax Commission published a report entitled "Report of Potential Impact of McGirt v. Oklahoma" on September 30, 2020. It is found in the Record on Appeal in this case as Protestant's Exhibit 8 admitted at the hearing held on January 21, 2022, said Exhibit

being identified as Document No. 23, pages 185-207. The Report states it is submitted to the Oklahoma Commission on Cooperative Sovereignty on behalf of the Oklahoma Tax Commission. The Report further states that it is based on the Oklahoma Tax Commission's interpretation of existing statutes and case law as of September 30, 2020. (ROA, Doc. 23, p. 186). The Commission's Report is very important to this case because of statements made therein about prior opinions of the United States Supreme Court which were in effect in 2017, 2018, and 2019. These cases defined "Indian country" as that term is used in 18 U.S.C. § 1151, which is incorporated by reference thereto in the regulation of the Oklahoma Tax Commission concerning "Application of the Oklahoma Individual Income Tax to Native Americans". Okla. Admin. Code § 710:50-15-2(a)(1). The following important statements were made by the Appellee in its Report:

1. "The state is prohibited from imposing tax upon the income of individual members of federally recognized Indian tribes as long as the individual tribal member lives and earns the income from sources within Indian country under the jurisdiction of the tribe to which the member belongs." (ROA, Doc. 23, p. 191).

2. "In *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164 (1973), the United States Supreme Court held that the State of Arizona had no power to tax the income of a Navajo citizen who resided on the Navajo Reservation and whose income was wholly derived from on-reservation sources." (ROA, Doc. 23, p. 193).

3. "Two decades later, in *Oklahoma Tax Comm'n v. Sac & Fox Nation,* 508 U.S. 114 (1993), the court affirmed that the *McClanahan* holding was not confined to state taxation of income earned by tribal citizens on their tribe's reservation but extended to such income earned in their tribe's *Indian country. Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. at 123. (ROA, Doc. 23, p. 193).

4. "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 Comm'n v. Sac & Fox Nation*, the court applied the definition of "Indian country" in 18 U.S.C. § 1151 for state tax purposes; §1151 provides, in relevant part:

1.) The term "Indian country"...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....". (ROA, Doc. 23, p. 194).

5. **"McGirt plainly held that the Creek reservation survived allotment and remains intact today. Therefore, the provisions of Oklahoma Administrative Code § 710-50-15-2 now apply in all lands within the Reservation boundaries described in the Muscogee (Creek) Treaty of 1866. Consequently 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." (ROA, Doc. 23, p. 194)**

The OTC nevertheless ruled in its Final Order that even if the Supreme Court were to expand *McGirt* to state taxation matters, it would not give Ms. Stroble the requested relief for the 2017, 2018, and 2019 tax years. This statement is contrary to the following inclusions in the Commission's Report:

1. "Income tax collections are a primary area of concern, as qualifying individual tribal members may (1) immediately halt income tax withholding from their wages, (2) begin claiming the income tax exclusion on 2020 Individual Income Tax Returns, or 2019 Individual Income Tax Returns for which a valid extension has been filed, and (3) file Amended Income Tax Returns claiming refunds for prior years within the statute of limitations. **Because *McGirt* held that the Creek Reservation was never disestablished, the decision applies retroactively, and allows taxpayers to claim tax refunds for prior years." (ROA, Doc. 23, p. 207)**

IV. Nothing in the OTC's Present Arguments Undermines the Clear Requirements of the Law Set Forth Above.

A. The OTC's Reliance on *Matloff* is in Error.

The Commission also relied on *State, ex rel. Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, to find that *McGirt*'s holding is not retroactive and, therefore, cannot be applied to Ms. Stroble's claims. (ROA, Doc. 36, pp. 455, 456). The OTC's reliance on *Matloff* is misplaced.

To begin, under Oklahoma law, taxpayers have a statutory right to seek refunds for up to three years. 68 O.S. § 227. ("[A]ny taxpayer who has so paid any such tax may, within three (3) years from the date of payment thereof file with the Tax Commission a verified claim for refund of such tax so erroneously paid."). *Matloff* has no relevance as to whether *McGirt* can be applied retroactively for that period. It only concerned *McGirt*'s applicability to *criminal* convictions that were final when *McGirt* was decided, and turned on whether *McGirt* announced a new substantive or procedural rule for criminal cases and the policy reasons for upholding final convictions. *Matloff*, 2021 OK CR 21, ¶¶ 26-28, 38. *See also id.* at ¶ 11 (stating that "the narrow purposes of collateral review, and the reliance, finality, and public safety interests 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."). None of these policy concerns relating to criminal law and procedure have the slightest applicability or relevance in this case. Instead, the normal rule of retroactivity applies. *See Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 97 (1993) (when the Supreme Court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and 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 our announcement of the rule.").

B. The OTC's Reliance on *Castro-Huerta* is in Error.

The OTC misapprehended the holding of *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) and relied on its misunderstanding to find that "*McGirt* is limited to the Major Crimes Act" and that the Supreme Court's decision in *McGirt* "preempting state jurisdiction has very limited application." (ROA, Doc. 36, pp. 452, 453). But *Castro-Huerta* held no such thing. In

Castro-Huerta, the Supreme Court held that Oklahoma had concurrent jurisdiction to prosecute crimes committed by a *non-Indian* against an Indian in Indian country because neither federal law nor principles of tribal self-government *preempted* the State's exercise of jurisdiction over such crimes. Indeed, *Castro-Huerta* expressly recognized that "under this Court's precedents, federal law may preempt ... state jurisdiction in certain circumstances." *Castro-Huerta*, 142 S. Ct. at 2493. That is precisely the case here: Supreme Court precedent makes clear that federal law preempts the State from taxing the income of Indians in Indian country. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114 (1993).

Moreover, the Supreme Court in *Castro-Huerta* made clear that "[f]ederal law defines 'Indian country' to include, among other things, 'all land within the limits of any Indian reservation under the jurisdiction of the United States Government.'" *Id.* at 2493. And it explicitly reaffirmed *McGirt*'s holding that Congress had never "properly disestablished the Creek Nation's reservation in eastern Oklahoma," *Castro-Huerta*, 142 S. Ct. at 2491, and that under *McGirt*, "the eastern part of Oklahoma ... is now recognized as Indian country," *id.* at 2492. The Supreme Court in *Castro-Huerta* thus found the crime occurred in Indian country without concern for whether the land at issue was fee land, or whether it was held in trust for a tribe, or any other consideration. *Castro-Huerta*, therefore, did not limit or overrule *McGirt*, and in fact, supports the Appellant's position in this case.

C. The OTC's Reliance on *City of Sherrill* is in Error.

The OTC also relied upon *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 202-03 (2005) for the proposition that "without a legislative change or a court decision expanding *McGirt* to taxation cases, neither the tribes, nor the Oklahoma Tax Commission ... have the

unilateral authority to revive ancient sovereignty newly reclaimed by the Tribes since the *McGirt* decision was issued." (ROA, Doc. 36, pp. 454, 455). As a threshold matter, Ms. Stroble does not base her tax protest solely, or primarily, on *McGirt*; she instead relies on Supreme Court precedent that makes clear the State is preempted from taxing Indian income in Indian country. Moreover, the facts in *Sherrill* that undergirded the Supreme Court's reasoning are simply not present here. *Sherrill*, therefore, has no application to the Court's decision in this case.

In *City of Sherrill*, the Oneida Indian Nation filed an action against a city and county, seeking to exempt lands it purchased on the open market from local taxation. The lands had originally been transferred from the Oneida Indian Nation to a tribal member in 1805, who later sold the lands to a non-Indian in 1807 in violation of the Nonintercourse Act. *Id.* at 211. The Oneida Indian Nation purchased the lands two hundred years later to operate various commercial enterprises and later "refused to pay ... property taxes," *id.* at 211, asserting that the purchase "unified fee and aboriginal title" and therefore permitted the Oneida Indian Nation to "assert sovereign dominion over the parcels." *Id.* at 213. Thus, the issue the Supreme Court addressed was whether the Oneida Indian Nation's purchase revived its sovereignty over its historic tribal land and precluded the city from imposing property taxes. Ultimately, the Supreme Court "reject[ed] the unification theory" and held that "'standards of federal Indian law and federal equity practice' preclude[d] the Tribe" from reasserting its sovereign control over its reacquired lands. *Id.* at 214.

The Supreme Court's decision hinged on the unilateral nature of the Oneida Indian Nation's attempt to create Indian country, the near non-existent presence of the Oneida in the city and county, and the Oneida Indian Nation's relinquished governmental control over the

land. *Id.* at 215, 218-20. These facts triggered the doctrines of laches, acquiescence, and impossibility and rendered inequitable the piecemeal shift in government that the tribe's unilaterally sought to initiate. *See id.* at 216-21.

None of the controlling facts in *Sherrill* exist here. This case is brought by an individual Muscogee (Creek) citizen; it is not an action brought by the Nation to unilaterally assert its sovereign interests over property the Nation purchased in fee. Additionally, a majority of Muscogee (Creek) citizens live within the Nation's reservation boundaries, and the Oklahoma Tax Commission failed to find otherwise.[2] And most critically, the Muscogee (Creek) Nation has never abandoned its sovereignty over its eleven-county Reservation: The Muscogee (Creek) Nation is organized pursuant to the Constitution it adopted in 1979,[3] and it exercises jurisdiction within the eleven-county districts of the Muscogee (Creek) Nation.[4] Under its Constitution, the Muscogee (Creek) Nation operates pursuant to its executive, legislative, and judicial branches of government.[5] The Muscogee (Creek) Nation's National Council has enacted a legislative code, which includes a tax code on smoke shops and casinos.[6] Indeed, Ms. Stroble testified that she was an employee of the National Council during the relevant tax years. The Muscogee (Creek) Nation's laws are interpreted by its robust trial and appellate court system,[7] and they are enforced by its 58-person Lighthorse Police Force.[8] The Muscogee (Creek) Nation has thus continually governed its Reservation lands. In fact, the Creek Nation's continuous presence and governance of its reservation for the past 200 years – in sharp contrast

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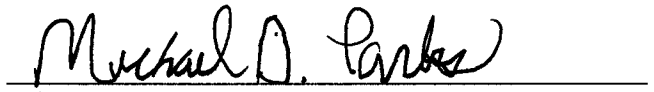
[2] https://www.muscogeenation.com/services/citizenship/citizenship-facts-and-stats/.
[3] http://www.creeksupremecourt.com/mcn-constitutiion/.
[4] https://mcngis.com/images/stories/maps/MCN_JURISDICTION_2012_8.5X11rd.pdf.
[5] *See supra,* n. 3.
[6] http://www.creeksupremecourt.com/wp-content/uploads/title36.pdf.
[7] https://www.muscogeenation.com/government/judicial/.
[8] https://www.muscogeenation.com/services/lighthorse-police/.

to the Oneidas in *Sherrill* – was a central reason the Court in *McGirt* found that the Creek Reservation was not disestablished and remained Indian country today. *See McGirt*, 140 S. Ct. at 2465-68, 2476. *Sherrill* simply does not apply.

CONCLUSION

The Oklahoma Supreme Court should reverse the Final Order of the Oklahoma Tax Commission, and remand this case to the Oklahoma Tax Commission with instructions to grant Appellant's protest, and allow her claim for the Tribal Exempt Income Exclusion for the 2017, 2018, and 2019 tax years.

Respectfully Submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellant's Brief-in-Chief was mailed this 13th day of February, 2023, to Kiersten Hamill, Oklahoma Tax Commission, ATTN: Legal, P.O. Box 269056, Oklahoma City, OK 73126 and Elizabeth Field, Oklahoma Tax Commission, ATTN: Legal, P.O. Box 269056, Oklahoma City, OK 73126, by depositing it in the U.S. Mail, postage prepaid.

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