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

APPELLANT'S REPLY BRIEF

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LEGAL ARGUMENT AND AUTHORITIES

For all the sound and fury of the OTC's briefing, this case is straightforward under both state and federal law. *McGirt* held that the Muscogee (Creek) Reservation remains a reservation under federal law and therefore satisfies the definition of Indian Country in 18 U.S.C. § 1151 ("§ 1151"). Accordingly, the Muscogee (Creek) Reservation is also a reservation under the definition of "Indian Country" in Oklahoma Administrative Code § 710:50-15-2 ("Section 710:50-15-2"), an OTC rule that applies to the same reservations as § 1151 and that precludes the State from taxing tribal members who work and live within their tribes' reservations. Because Section 710:50-15-2 bars the OTC from taxing the Appellant, this case should be resolved in her favor as a matter of state law without needing to reach the question whether the taxation here is preempted by federal law.

But if this Court reaches the federal issue, it is just as straightforward: For five decades, the Supreme Court has repeatedly held that states are categorically preempted from taxing income earned by Indians living and working in their tribes' "Indian Country" as defined by § 1151, including on fee land within reservation boundaries. The OTC's invocation of equitable considerations cannot alter this clear legal principle, and the OTC's equitable arguments fall far short of the mark in any event.

I. The OTC Is Attempting To Relitigate Issues Settled by *McGirt*.

A. *McGirt* Rejected the Argument that the Muscogee (Creek) Reservation Enjoys a Lesser Status Because the Nation Received a Fee Patent for It.

McGirt held that the Muscogee (Creek) Reservation is a "reservation" and thus is "Indian Country" under § 1151. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020). Throughout its brief, however, the OTC avoids referring to these lands as a "reservation," instead using terms such as "historical Creek territory." *E.g.*, OTC Response Brief ("Resp.")

5, 7. According to the OTC, the Muscogee (Creek) Nation does not have a "reservation" because it was granted fee-simple title instead of a title of occupancy on land held in trust by the United States. *See id.* at 6. But *McGirt* squarely rejected the argument that "fee title is somehow inherently incompatible with reservation status"—an argument the dissent made "no attempt to defend." 140 S. Ct. at 2474-75. As the Court explained, the Creeks chose a fee title for their reservation specifically because they believed it was *more* protective than a right of occupancy on trust land, so "the State's argument inescapably boil[ed] down to the untenable suggestion that, when the federal government agreed to offer more protection for tribal lands, it really provided less," *id.* at 2476. The Court chastised the State for basing such an argument on "scattered opinions of agency officials," *id.* at 2475. Undeterred, the OTC recycles the same argument here in contending that the Muscogee (Creek) Reservation is not a "formal reservation," including relying on the same 1894 Department of Interior report already rejected by the Court. *See* Resp. 6; *McGirt*, 140 S. Ct. at 2475. Moreover, *McGirt* reaffirmed the principle—recognized for more than a century—that fee lands *within* reservation boundaries are part of the reservation. *See* Appellant's Opening Brief ("Op. Br.") 10. An opinion of the United States Supreme Court commands far more respect than the OTC shows it here.

B. *McGirt* Settled that the Muscogee (Creek) Reservation Is a "Reservation" and "Indian Country" for Purposes of Criminal and Civil Law.

The OTC also attempts to confine *McGirt* to federal criminal law and to civil statutes that "expressly incorporate" § 1151. *See, e.g.*, Resp. 8, 11, 18. But Oklahoma knew that a recognition of reservation status would have wider implications when it litigated *McGirt*. It cited twenty-one civil statutes that would be triggered on the Muscogee (Creek) Reservation if its status were confirmed, *see* Brief for Respondent at 43-44, *McGirt* (No. 18-9526), 2020 WL 1478582 ("*McGirt* Okla. Br."), the vast majority of which do *not* incorporate § 1151's

definition of "Indian country" but instead use terms such as "reservation" and "nontaxable Indian lands" without defining those terms. *See, e.g.*, 23 U.S.C. § 120 (highways); 20 U.S.C. § 1411 (disability programs).[1] Indeed, the State argued that reservation status would limit its *taxing* power: "The State generally lacks the authority to tax Indians in Indian country, *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993) ("*Sac & Fox*"), so turning half the State into Indian country would decimate state and local budgets." *McGirt* Okla. Br. 44. This understanding was reflected in the OTC report published a few months after *McGirt*. *See* Op. Br. 14-16 (discussing Okla. Tax Comm'n, Report of Potential Impact of McGirt v. Oklahoma 8 (2020) (ROA, Doc. 23, p. 194)).[2]

The majority and dissent in *McGirt* agreed that the decision would render applicable a wide variety of civil statutes and rules on the Muscogee (Creek) Reservation. *See* Creek and Seminole Amicus Brief ("MCN Br.") 7 (citing *McGirt*, 140 S. Ct. at 2480, 2501). As the Chief Justice's dissent stated, "The Court ... acknowledges that 'many' federal laws, triggering a variety of rules, spring into effect when land is declared a reservation." 140 S. Ct. at 2501.

Moreover, this Court has recognized that *McGirt* extends to the civil realm. As Tribal amici have discussed, *see* MCN Br. 9, this Court held in *Milne v. Hudson*, 2022 OK 84, ¶ 11, 519 P.3d 511, 513-14, that under *McGirt*, the Muscogee (Creek) Reservation qualifies as a "reservation" for purposes of determining jurisdiction to issue a civil protective order. In doing so, it observed that "[i]t is well established that the federal statutory definition of Indian Country in 18 U.S.C. § 1151 applies in both civil and criminal contexts." *Id.*; *see also* Op. Br.

[1] The State displayed this same understanding after *McGirt*, asking for and receiving EPA approval to administer regulations in the area recognized as "Indian Country" by *McGirt*. MCN Br. 9-10.

[2] While the OTC desperately tries to distance itself from this report, *see* Resp. 10 n.1, it was expressly issued "[o]n behalf of the Oklahoma Tax Commission" (ROA, Doc. 23, p. 186).

10 (citing additional case law). This Court further explained that *McGirt*'s recognition of the Reservation as Indian country under § 1151 means that a host of laws accordingly apply. *Milne*, 2022 OK 84, ¶ 7, 519 P.3d at 513 ("*McGirt* expanded the popular understanding of the extent of Indian Country in Oklahoma. This necessarily expands the law we may consider and apply in cases raising Indian Country issues."). But the OTC simply ignores this part of *Milne*.[3]

In short: The majority and dissenting opinions in *McGirt*, the State's arguments in that case, and this Court's precedent make clear that the Reservation is a "reservation" and "Indian Country"—not just for § 1151, but for other statutes and regulations for which "reservation" status is relevant. The OTC cannot point to a single post-*McGirt* case holding otherwise.

II. The Muscogee (Creek) Reservation Is a "Formal" Reservation Under Section 710:50-15-2(a)(1).

The OTC faults the Appellant for asserting that Section 710:50-15-2 "incorporat[es]" § 1151. Resp. 8. Even though Section 710:50-15-2 expressly cites § 1151, it contends, the two provisions must have different meanings because the former refers to "formal and informal reservations" and the latter to "any Indian reservation." *See id.* at 8-9. But the text and history of Section 710:50-15-2 confirm that even if Section 710:50-15-2 does not literally "incorporate" § 1151, the phrase "formal and informal reservations" in Section 710:50-15-2's "Indian country" definition carries the same meaning as the term "any Indian reservation" in § 1151.[4]

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[3] In *Oklahoma v. U.S. Department of the Interior*, 577 F. Supp. 3d 1266, 1269, 1274 (W.D. Okla. 2021), the court likewise held that it is "legally unavoidable" under *McGirt* that the Reservation falls within a statute that applies to "Federal Indian reservation[s]" but does not further define the term or incorporate § 1151. There, Oklahoma cited the same BIA "Frequently Asked Questions" webpage cited by the OTC here to argue that the "reservation" recognized in *McGirt* is not really a "reservation" in the normal sense of the term. *See id.* at 1274; Resp. 5-6. The court rejected the notion that "an out-of-context statement from the BIA's website should inform the court's interpretation" of the meaning of "Federal Indian reservation." 577 F. Supp. 3d at 1274.

[4] "The same interpretive rules apply to ... rules and regulations as do in statutory construction." *Tr. Co. of Okla. v. State ex rel. Dep't of Hum. Servs.*, 1995 OK 12, 890 P.2d 1342, 1346.

A. The Text and History of Section 710:50-15-2 Confirm that the Phrase "Formal and Informal Reservations" Is Coterminous with the Phrase "Any Indian Reservation" in § 1151.

The origin of the phrase "formal and informal reservations" removes any doubt that its meaning is identical to "any Indian reservation" in § 1151. As the OTC acknowledges, the term "formal and informal reservations" "comes directly from" *Sac & Fox*'s description of "Indian Country" under § 1151. (ROA, Doc 36, p. 448 n.6). This description—which was adopted almost verbatim as Section 710:50-15-2(a)(1)[5]—emphasized that § 1151 "defined Indian Country broadly." *Id.* (quoting *Sac & Fox*, 508 U.S. at 123). Thus, the phrase "formal and informal reservations" in Section 710:50-15-2 comes directly from a description by the United States Supreme Court of the phrase "any Indian reservation" in § 1151. This Court has also described the scope of § 1151's definition of "Indian Country" by quoting the same *Sac & Fox* language adopted into Section 710:50-15-2. *See Lewis v. Sac and Fox Tribe of Okla. Hous. Auth.*, 1994 OK 20, n.18, 896 P.2d 503.

Sac & Fox uses "formal and informal reservations" instead of "any Indian reservation" simply to emphasize the breadth of the latter term in § 1151. As Tribal amici have explained, *see* Amicus Brief of Cherokee Nation, Chickasaw Nation, and Choctaw Nation ("Cherokee Br.") 13, *Sac & Fox* uses the term "formal reservations" to describe areas normally referred to simply as "reservations"—within which, as the OTC conceded in *Sac & Fox*, 508 U.S. at 120-21, state income taxes on tribal members are preempted, *see infra* pp. 13-16. The Court contrasted such places with "informal reservations," meaning land outside a reservation's perimeter that has nonetheless been "set aside for a tribe or its members," *Sac & Fox*, 508 U.S.

[5] The only difference is the clause "the Indian titles to which have not been extinguished," which modifies "Indian allotments." That phrase is copied directly from § 1151(c)—which defines the "Indian allotments" that qualify as "Indian country"—thereby further confirming that Section 710:50-15-2(a) is intended to mirror § 1151.

at 124. For example, an "informal reservation" would include "a tribal convenience store located outside the reservation on land held in trust for the Potawatomi." *Id.* at 125 (citing *Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 511 (1991) ("*Potawatomi*")).[6]

Given that the phrase "formal and informal reservations" in Section 710:50-15-2 "comes directly from" *Sac & Fox*'s description of § 1151 and that *Sac & Fox* used the phrase to describe the breadth of "any Indian reservation," the two phrases are undoubtedly equivalent. *See Okla. Auto. Dealers Ass'n v. State ex rel. Okla. Tax Comm'n*, 2017 OK 64, n.39, 401 P.3d 1152 ("If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (brackets and citation omitted)). Neither *Sac & Fox* nor *Lewis* gave any reason to believe that the term "formal and informal reservations" is *narrower* than the phrase "any Indian reservation" in § 1151. Thus, regardless whether the OTC used magic words to literally "incorporate" § 1151 into Section 710:50-15-2(a), the text and origins of the language in Section 710:50-15-2(a) make unambiguous that the term "formal and informal reservations" is intended to match the phrase "any Indian reservation" in § 1151.

B. There Is Nothing "Strange" About Including Fee Land in the Meaning of "Formal Reservation" But Not in the Meaning of "Informal Reservation."

The OTC argues that it would be "strange" for the undefined term "formal reservation" in Section 710:50-15-2 to include unrestricted fee land, since the definition of "informal reservation" does *not* include such land. Resp. 5. But there is nothing strange about this. As noted, the term "informal reservation" in Section 710:50-15-2 derives from cases discussing how lands *outside normal reservation boundaries* can be Indian Country. *See supra* pp. 5-6.

[6] Note that the Court used "reservation" in that sentence as a synonym for what it elsewhere in the opinion refers to as a "formal reservation."

Indeed, the land types considered in those cases—off-reservation trust land in *Potawatomi* and tribally-owned lands retained in an otherwise allotted and ceded area in *Sac & Fox*—match the requirements in Section 710:50-15-2(a)(2)'s definition of "informal reservation"—"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." By contrast, fee land *within* reservation boundaries unquestionably is part of the reservation. *See* Op. Br. 8-11; MCN Br. 10-11. Thus, "formal reservation" includes fee lands while "informal reservation" does not.

What *would* be strange would be for the OTC to adopt the phrase "formal reservation" from *Sac & Fox*'s description of § 1151 and yet to intend for it to mean something other than what it means in *Sac & Fox* and § 1151 (i.e., all land within reservation boundaries). Not only is that implausible, it would also mean that the term "formal and informal reservations" in Section 710:50-15-2 contains worthless surplusage. *See Hill v. Bd. of Educ.*, 1997 OK 107, ¶ 12, 944 P.2d 930, 933 ("This Court .... must interpret legislation so as to give effect to every word and sentence."). If, as the OTC now suggests, *see* Resp. 4-6, a "formal reservation" describes only non-allotted lands held in trust by the United States, then any "formal reservation" land would also be an "informal reservation" under Section 710:50-15-2(a)(2), as that term "includes lands held in trust for a tribe by the United States[.]"

C. The Exclusions in Section 710:50-15-2(c) Do Not Aid the OTC's Argument.

The OTC tries to use two exclusions in Section 710:50-15-2(c) to show that Section 710:50-15-2(a)(1)'s definition of "Indian Country" does not cover fee land within the Muscogee (Creek) Reservation. First, the OTC represents that Section 710:50-15-2(c)(5) "provides that 'unrestricted, non-trust property ... does not fall within the definition of 'Indian Country,' *even if* it is 'owned by an Indian Housing Authority [("IHA")].'" Resp. 6 (ellipsis

in original) (emphasis added). But the OTC has transformed the meaning of this provision by using an ellipsis and inserting the phrase "even if." The actual provision reads as follows:

> (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.

Section 710:50-15-2 (italics added). Under basic principles of English, "owned by an Indian Housing Authority" is a *limiting* modifier of the noun that precedes it—"unrestricted, non-trust property." *See Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) ("Adjectives modify nouns—they pick out a *subset* of a category that possesses a certain quality." (emphasis added)). This carveout therefore exempts unrestricted non-trust property from the definition of Indian Country *only if* owned by an Indian Housing Authority.[7]

Second, the OTC points to the provision that an Indian may not claim residence in Indian Country "primarily by virtue of" federal aid programs "[e]ven though administered by the Tribe within its own service area," Section 710:50-15-2(c)(4). *See* Resp. 6-7. But this provision does not *exclude* tribal service areas from Indian Country. It means that land does not qualify as Indian Country just *by virtue of being* a service area. And that makes sense. Tribal service areas are those areas within which the United States provides various services and benefits to tribal members. A tribe can have more than one service area; multiple tribes can share overlapping service areas; and a tribe can have both a reservation and a service area with different boundaries. *See Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 999 n.1

[7] IHA projects traditionally tended to be state agencies. *See Lewis*, 1994 OK 20, 896 P.2d at 506 ("Our Legislature enacted the Oklahoma Housing Authorities Act which authorizes the creation of local IHAs and makes them state agencies." (footnote and emphasis omitted)).

(10th Cir. 2001), *opinion modified on reh'g*, 257 F.3d 1158 (10th Cir. 2001) ("We are not persuaded ... that service areas are generally defined by reservation boundaries."). Here, the Appellant does not claim she lived in Indian Country by virtue of the land being a service area. She claims she lived in Indian Country by virtue of the land being within a reservation.[8]

D. The OTC Asks This Court To Improperly Disregard the *Meaning* of Section 710:50-15-2 so as to Avoid a New *Application* of It.

The OTC also argues that even if the plain meaning of "formal reservation" encompasses the Creek Reservation, it nonetheless cannot include the Reservation because the OTC did not believe the Reservation had that status when it promulgated Section 710:50-15-2. Resp. 6, 9-10. This argument defies basic principles of statutory and regulatory interpretation. "While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). As this Court has said,

> where a statute is expressed in general terms and in words of the present tense, it will be construed to apply not only to things and conditions existing at the time of its passage, but it will be also given a prospective interpretation by which it will apply to such things and conditions as come into existence thereafter.

Acme Oil & Gas Co. v. Cooper, 1934 OK 324, 33 P.2d 191, 193 (citation omitted); *see also* 2B Sutherland Statutory Construction § 49:2 (7th ed., updated Nov. 2022) (same); *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998) ("As we have said before, the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It

[8] In trying to identify differences between Section 710:50-15-2 and § 1151, the OTC also points out that Section 710:50-15-2(a) includes a lengthy definition of "dependent Indian communities" that does not appear in § 1151. Resp. 8. But the definition in Section 710:50-15-2(a) is taken verbatim from a Supreme Court case *defining the meaning of "dependent Indian communities" under § 1151. See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 526-27 (1998). Thus, the definition appearing in Section 710:50-5-2(a)(3) again confirms that the scope of "Indian Country" in Section 710:50-15-2 was intended to match that of § 1151.

demonstrates breadth." (quotation marks and citation omitted)). Thus, if the plain text of a law encompasses a situation not envisioned by that law's enactors, the text must still be applied. *See Lang v. Erlanger Tubular Corp.*, 2009 OK 17, ¶ 8, 206 P.3d 589, 591 ("It is the duty of courts to give effect to legislative acts, not to amend, repeal or circumvent them. A court is not justified in ignoring the plain words of a statute." (citation omitted)).

Indeed, it would be absurd for statutes or regulations to apply only to the situations envisioned by their enactors, even when changes in technology or legal status bring new situations, persons, and places within the plain text of the law. Consider, for example, a 1948 anti-smuggling statute that criminalizes "fraudulently or knowingly import[ing] or bring[ing] into the United States, any merchandise contrary to law[.]" 18 U.S.C. § 545. No court would limit "merchandise" to products that Congress knew existed at the time of enactment, nor treat the phrase "contrary to law" as referring only to laws that existed at the time of enactment, *see, e.g., United States v. Sterling Islands, Inc.*, 391 F. Supp. 3d 1027, 1053 (D.N.M. 2019).

Hence, many statutes and regulations not originally envisioned to apply in eastern Oklahoma have taken effect since *McGirt*. As noted, the State recognized that numerous statutes would be triggered by recognition of reservation status in *McGirt*, many of which have since been applied within the Creek Reservation boundaries. *See supra* pp. 2-3. The OTC accepted this when it wrote its report on the tax implications of *McGirt*. *See* (ROA, Doc. 23, p. 194). Not until this litigation did the State or the OTC suggest that statutes and regulations would apply in the Reservation only if their drafters had envisioned that being the case.

Moreover, when Section 710:50-15-2 issued, the OTC knew that the status of land as "Indian Country" could change over time as a result of court decisions or federal government action. *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967,

975 n.3, 976 (10th Cir. 1987) (leaving open "whether the exterior boundaries of the 1866 Creek reservation have been disestablished" but holding that a tribally owned tract within the Creek Reservation was "reservation" under § 1151(a)); *see also United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999) (upholding Interior Secretary's power to take land into trust for tribes in Oklahoma and cause such land to become Indian Country). Yet the OTC did not draft Section 710:50-15-2 in a way that confined its definition of "Indian Country" to those areas already recognized as such by the OTC in 2004.

Undeterred, the OTC argues that if § 1151 is "incorporate[d]" into Section 710:50-15-2, *McGirt* should not have any bearing on Section 710:50-15-2's application because the rule would "incorporate only the meaning of Section 1151 as it was understood 'at the time of' the incorporation[.]" Resp. 9 (citing *CompSource Mut. Ins. Co. v. Oklahoma ex rel. Okla. Tax Comm'n*, 2018 OK 54, ¶ 21, 435 P.3d 90, 99). But Appellant does not argue that the *meaning* of Indian Country has changed under § 1151 or Section 710:50-15-2 since 2004, only that the statute must be applied to the Creek Reservation now that it has been confirmed by the Supreme Court to fall within that meaning. Indeed, *CompSource* did not reject new *applications* of an unchanged statute, but rather simply held that if a statute "adopts or incorporates another statute or a portion thereof, then the adoption takes the statute existing at the time of the adoption and *does not include subsequent amendments or modifications*[.]" 2018 OK 54, ¶ 21, 435 P.3d at 99 (emphasis added). Here, there have been no amendments to § 1151 or Section 710:50-15-2, and the Appellant is self-evidently not arguing for any such amendment to govern here.

E. The OTC Is Not Owed Deference for Its New Construction of the Rule.

The OTC also argues that this Court must show "great deference to an agency's interpretation of its own rules." Resp. 7 (citation omitted). But no such deference is owed here. First, the rule is not ambiguous—it clearly applies to the Muscogee (Creek) Reservation.

See supra pp. 2-6. Second, even if it were, deference is owed to an agency only when the Commission is "acting in its area of expertise" or "applying a longstanding administrative construction[.]" *Okla. Gas & Elec. Co. v. State ex rel. Okla. Corp. Comm'n*, 2023 WL 2768145, 2023 OK 33, ¶ 8 (not yet released for permanent publication); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (deference not owed to agency interpretation of regulation unless "expertise-based"). Here, interpreting this regulation involves a purely legal question about the meaning of a provision drawn directly from a federal statute and federal case law, and hence does not fall within the OTC's "area of expertise." Nor is the OTC "applying a longstanding administrative construction." To the contrary, its newfound position contradicts its own report from September 2020. *See* (ROA, Doc. 23, p. 194) ("[T]he 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.").

* * *

The OTC's argument boils down to the idea that although the Muscogee (Creek) Reservation has "reservation" status under *McGirt*, it is neither a "formal reservation" nor an "informal reservation" but rather some previously unknown species of reservation, simply by virtue of having been created with the grant of a fee patent—even though the Creeks were granted such a patent specifically because that would be *more* protective than the more common means of creating a reservation, even though *McGirt* held that this form of title makes the Creek Reservation no less a reservation, even though the phrase "formal and informal reservations" originated as a description of the term "any Indian reservation," even though the OTC never previously indicated that it meant for the phrase "formal and informal reservations" to be any narrower than the phrase "any Indian reservation," even though interpreting Section 710:50-15-2 to require that "formal or informal reservations" be based on trust land would

yield surplusage and would render the citation to § 1151 worthless, even though an OTC report issued less than three years ago stated that Section 710:50-15-2 applies to all lands within the boundaries of the Muscogee (Creek) Reservation, and even though the OTC cannot point to a single case supporting its newfound idea that the term "formal reservation" actually means "only reservations held in trust." This Court should reject the argument and, in doing so, resolve this case on state law grounds alone.

III. Federal Law Preempts the State's Income Tax as Applied to the Appellant.

The OTC's brief rests on a fundamental misunderstanding of preemption in Indian law. Resp. 10-18. As the Supreme Court recently reiterated in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2494 (2022), "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." Under the latter, two clear rules govern in the special area of taxation: (1) a state may not tax tribal members in their own Indian country, but (2) a state may tax *nonmembers* in Indian country unless "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" shows that "the exercise of state authority would violate federal law," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). The OTC confuses these two rules—only the first applies to Appellant.

A. *Castro-Huerta* Did Not Alter the Categorical Rule that Federal Law Preempts State Taxation of Indian in Their Own Indian Country.

Fifty years ago, *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), "lay[] to rest *any* doubt" that "there has been no satisfactory authority for taxing ... Indian income from activities carried on within the boundaries of the reservation ... absent congressional consent." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (emphasis added). As the Supreme Court later explained, *McClanahan* "held that a State was

without jurisdiction to subject a tribal member living on the reservation, and whose income derived from reservation sources, to a state income tax absent an express authorization from Congress." *Sax & Fox*, 508 U.S. at 123. Time and again, the Court has affirmed this categorical rule. *See, e.g.*, *Bryan v. Itasca Cty.*, 426 U.S. 373, 376 & n.2 (1976) (quoting *Mescalero*); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 474 (1976) (same); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) ("Indian tribes and individuals generally are exempt from state taxation within their own territory."). In short, the Court has said, in a case involving the OTC:

> [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."

Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (brackets omitted) (quoting *Cty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (Scalia, J.) ("*Yakima*")).

This per se rule is grounded in principles of tribal self-government. *McClanahan* explained that under the "Indian sovereignty doctrine," "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." 411 U.S. at 171 (citation omitted); *Sac & Fox*, 508 U.S. at 123 ("*McClanahan* relied heavily on the doctrine of tribal sovereignty."). *McClanahan* reasoned that "the right of reservation Indians to make their own laws and be ruled by them" is "violated when the state collect[s] a tax ... it had no jurisdiction to impose." 411 U.S. at 181 (citation omitted). As Justice Scalia put it, "the power to tax involves the power to destroy[.]" *Yakima*, 502 U.S. at 258 (citation omitted). "The *McClanahan* principle,"

moreover, "gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes and to regulate and protect the Indians and their property against interference even by a state." *Bryan*, 426 U.S. at 376 n.2 (quotation marks and citations omitted).

The categorical rule is broadly accepted. This Court has stated clearly that "taxing ... Indian income from activities carried on within the boundaries of the reservation ... is not permissible." *Oklahoma ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶ 38, 237 P.3d 199, 212 (citation omitted), *overruled in part on other grounds, Montgomery v. Airbus Helicopters, Inc.*, 2018 OK 17, 414 P.3d 824. Likewise, the Conference of Western Attorneys General has unequivocally recognized that "the Supreme Court has adopted a *per se* rule. Imposition of state taxes on the property, income, or activities of a federally recognized tribe or its members on their reservation is invalid ... , absent clear federal law to the contrary." *American Indian Law Deskbook* § 11:3 (May 2023 Update) ("*Deskbook*"). The OTC does not cite a single case upholding state taxation of an Indian in her own Indian country in violation of this rule. Nor does the OTC cite a single federal statute permitting its tax on the Appellant.

Nevertheless, the OTC contends that this categorical preemption rule is incompatible with the Supreme Court's analysis in *Castro-Huerta* and that the Appellant's tax exemption requires fact-specific interest balancing under *Bracker*. Resp. 15. The OTC is wrong.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Supreme Court explained why, in the special area of taxation, case-by-case balancing is not required:

> In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule.... 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.

Id. at 215 n.17. Nowhere does *Castro-Huerta* purport to reverse—or even call into question—this rule and the vast body of precedent on which it stands. Indeed, *Castro-Huerta* cites *McClanahan* with approval in reaffirming the "principle of federal law that ... precludes state interference with tribal self-government." 142 S. Ct. at 2495 n.2 (citing *Bracker*, 448 U.S. at 142-43 and *McClanahan*, 411 U.S. at 171-72). In sum, *Castro-Huerta* expressly recognizes that state laws impinging on tribal sovereignty are preempted under Supreme Court precedent, and those precedents clearly establish that state income taxation of tribal members living and working on their own reservation is categorially preempted.[9]

B. *Bracker* Balancing Does Not Apply to a Tax on Indians in Indian Country.

The OTC's position that fact-specific *Bracker* balancing is necessary here rests on a fundamental confusion: *Bracker* balancing only applies when a state imposes a tax on *nonmembers* in Indian country. As the Supreme Court has explained:

> If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. *But* 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[.]

Chickasaw Nation, 515 U.S. at 459 (emphasis added) (citation omitted).[10] The Court has adhered to this distinction since *Bracker* itself. *See* 448 U.S. at 144-45.

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[9] As *Sac & Fox* held, for *McClanahan*'s purposes, all that matters is "whether the land is Indian country," 508 U.S. at 125, which the Court defined in reference to "18 U.S.C. § 1151," *id.* at 123. *See Deskbook* § 11:3 (*Sac & Fox* "held that *McClanahan*'s limitation on state taxing jurisdiction extends to income earned by tribal members residing within 'Indian country' as defined in 18 U.S.C.A. § 1151, not only on a reservation"); *see also supra* p. 5. Since *McGirt* held that the Creek Reservation is "Indian country" under § 1151, the per se rule applies to Appellant. The OTC's attempts to muddy these clear waters, Resp. 18, fail.

[10] The OTC erroneously suggests that *Chickasaw Nation* permits a State to tax Indians within Indian country because it may "tax *all* the income of its residents." *See* Resp. 10, 11 (quotation marks omitted). But *Chickasaw Nation* made these comments solely with regards to a tax imposed "on tribal members who live in the State *outside* Indian country," 515 U.S. at 462 (emphasis added).

In fact, *all* the cases the OTC cites for its *Bracker* analysis adhere to this distinction, *see* Resp. 11-14,[11] and many spell it out. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005) ("[T]he *Bracker* interest-balancing test applies only where a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." (quotation marks omitted)); *Duro v. Reina*, 495 U.S. 676, 686 (1990) ("States may not impose certain taxes on transactions of tribal members on the reservation because this would interfere with internal governance and self-determination. [Citing *McClanahan* and *Moe*.] But this rationale does not apply to taxation of nonmembers[.]"); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160 (1980) (while a "state retail sales tax could be applied to the purchase by non-Indians of goods .... [i]t was ... quite clear after *Moe* and *McClanahan* that the sales tax could not be applied to similar purchases by tribal members[.]").

Again, *Castro-Huerta* is not to the contrary. *Castro-Huerta*, like *Bracker*, involved a challenge to state jurisdiction over a nonmember in Indian country, and the Court repeatedly limited its decision to the "narrow jurisdictional issue" of "non-Indian on Indian crimes." 142 S. Ct. at 2500; *see* Cherokee Br. 20 (more examples). Moreover, when *Castro-Huerta* stated that States generally have jurisdiction over Indian country, each of its eight quoted cases involved jurisdiction over non-Indians or over Indians *outside* Indian country—none involved Indians *inside* Indian country.[12] Nothing in *Castro-Huerta* suggests that it upended decades

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[11] Another case the OTC cites, *Milne*, Resp. 10, nowhere mentions *Bracker* balancing in its majority opinion and involved a nonmember on a reservation, which would not trigger any per se rule against State jurisdiction. *See* 2022 OK 84, 519 P.3d 511; *id.* at 516 (Darby, C.J., concurring).

[12] *See Organized Vill. of Kake v. Egan*, 369 U.S. 60, 62 (1962) (off-reservation conduct); *New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 370 (1858) (non-Indian conduct); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930) (non-Indian personal property); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 498 (1946) (crime only involving non-Indians); *Yakima*, 502 U.S. at 257-58 (discussing non-Indian conduct); *Nevada v. Hicks*, 533 U.S. 353, 355 (2001) (non-Indian conduct related to off-reservation Indian conduct); *United States v. McBratney*, 104 U.S. 621, 621 (1881) (crime by non-Indian); *Draper v. United States*, 164 U.S. 240, 241 (1896) (same).

of precedent applying *Bracker* balancing to nonmembers in Indian country, on the one hand, and applying the per se rule to Indians in Indian country, on the other.

C. The OTC's Attempts To Distinguish the Categorical Rule Are Meritless.

1. *The Categorical Rule Applies to Indians on Reservation Fee Land.*

The OTC argues that the categorical rule does not apply because "Appellant resides on fee land," Resp. 17. But it has been long-settled that the categorical rule applies to *all* reservation lands, including fee lands. Op. Br. 8-11; MCN Br. 10-12; Cherokee Br. 14-15; *see Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-558 (1962) (explaining that § 1151 "squarely put to rest" the argument that "existence or non-existence of an Indian reservation ... depends upon the ownership of particular parcels of land").

The Supreme Court has thus applied the categorical bar against taxation to Indians on fee lands within an Indian reservation. In *Moe*, the State of Montana made the same argument the OTC makes here—that federal law could not preempt "Montana's jurisdiction as to those Indians living on 'fee patented' lands" within a reservation, 425 U.S. at 478. But the Court rejected this argument as "untenable," *id.*, and applied the *McClanahan* rule, *id.* at 480-81. Were Montana's tax jurisdiction extended to Indians on fee lands, the Court reasoned, the reservation would effectively be "substantially diminished in size," an outcome *Seymour* foreclosed. *Id.* at 478. As Justice Scalia later summarized for the Court, "the *in personam* [tax] jurisdiction over reservation Indians at issue in *Moe* would have been significantly disruptive of tribal self-government[.]" *Yakima*, 502 U.S. at 265. *Yakima* similarly held that federal law preempted an excise tax on tribal members' sales of fee land within the reservation because Congress had not expressed any intent to "allow the county to enforce its excise tax on sales of" "reservation land patented in fee," *id.* at 270. There is no ambiguity in these cases—the per se rule applies to tribal members on all reservation lands, regardless of their fee status.

The OTC misreads *Moe*, arguing that its holding is somehow limited by site-specific "'checkerboard' concerns" expressed by the Court. Resp. 17-18. The Court, however, was speaking not to its own concerns but to *Congress's* intent that reservation status should not turn on the fee ownership of lands. *Moe* quoted *Seymour*'s conclusion that excluding fee lands from reservation status would create "an impractical pattern of checkerboard jurisdiction," 425 U.S. at 478 (quoting *Seymour*, 368 U.S. at 358), and would be "contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction," *id.* The Court reiterated that it was "Congress ... [that] evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation[.]" *Id.* at 479. *Moe* in no way supports the OTC's view that this Court can fashion an unprecedented rule of law based on the fee status of reservation land.

The OTC's remaining efforts to limit the *McClanahan* rule to trust land, *see* Resp. 16-17, also fail. Contrary to the OTC's claim, *Sac & Fox* and *Potawatomi* affirm the applicability of the categorical rule to all lands within a reservation. For example, in *Sac & Fox*, the Court explained 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," 508 U.S. at 124, and clarified that "we ask *only* whether the land is Indian country," *id.* at 125 (emphasis added)—that is, "whether the land is *within* reservation boundaries," *id.* at 126 (emphasis added). Nowhere in its explanation of the per se rule did *Sac & Fox* carve out an exception for fee lands.[13] Nor does *Indian Country, U.S.A.*, help the OTC. There, "the legal incidence of

[13] While the OTC cites *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250 (N.D. Okla. 2009), this isolated district court opinion, which found that the Osage Reservation (unlike the Creek Reservation) had been disestablished, is fundamentally flawed on multiple levels. Like the OTC, it misreads *Sac & Fox*. It disregards *Moe* and *Yakima* in its discussion of the per se rule. Its treatment of *Colville* ignores that *Colville* expressly reaffirmed *McClanahan*'s prohibition against taxing tribal members in Indian country. *Id.* at 1262; *see supra* p. 17. In analyzing a state tax on Indians, it cites a separate area of Indian law regarding *tribal*

the tax" was on "nonmember purchaser[s]" in Indian country, rendering *Bracker* balancing applicable. 829 F.2d at 984.

2. *The McClanahan Rule Is Not Limited to Specific Treaties and Statutes.*

The OTC next seeks to distinguish *McClanahan* and *Moe* on the ground that they involved the interpretation of "treat[ies] and statutes." Resp. 17 (citation omitted). This maneuver is unavailing. It is well-settled that *McClanahan* has given rise to a categorical rule, which courts uniformly apply without examining specific treaties and statutes. *Supra* pp. 13-16. For instance, in *Yakima*, Justice Scalia did not compare the treaties and statutes in *McClanahan* and *Moe* to those relevant to the Yakima Nation. Instead, he applied the categorical rule, 502 U.S. at 258, and asked only whether Congress, through the General Allotment Act, had permitted the county's excise tax on Indians' sale of reservation fee land, *id.* at 268-70. Because Congress had not done so, the tax was preempted. That is the only analysis required.

3. *State Involvement on Reservations Does Not Affect the Per Se Rule.*

Finally, the OTC claims that the categorical rule does not apply because the State "has consistently provided services within the area" and "the State has exercised sovereign control over fee land for more than a century[.]" Resp. 17. *McGirt* emphatically rejected such arguments as "a meaningless guide for determining what count[s] as Indian country," 140 S. Ct. at 2471. So did *Moe*, where Montana asserted that *McClanahan* did not preempt its taxes because the "reservation Indians benefitted from expenditures of state revenues" and "the

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jurisdiction over *nonmembers*. 597 F. Supp. 2d at 1262; *see infra* pp. 21-22. And its reliance on "the unique and uncommon history of Oklahoma tribes," 597 F. Supp. 2d at 1263, is foreclosed by *McGirt*, which found such reasoning "little help in discerning the law's meaning," 140 S. Ct. at 2474. On appeal, the Tenth Circuit only affirmed the District Court's holding regarding disestablishment. *See Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010)

Indian and non-Indian residents within the reservation were substantially integrated as a business and social community." 425 U.S. at 476. The Court rejected this, noting that "the Tribe's own income contributed significantly to its economic well-being" and that the Tribe "had not abandoned its tribal organization," *id.* The same is true here. As detailed by the Appellant and Tribal amici, not only is the Muscogee (Creek) Nation's independence unquestionable, but the Nation engages in substantial expenditures and activities that benefit non-Indian and Indian citizens alike, that assist neighboring units of government, and that contribute greatly to the economy in eastern Oklahoma. *See* Op. Br. 20-21; MCN Br. 22-23; Cherokee Br. 1-3. The OTC cannot refute this.

* * *

To be clear, the categorical rule that resolves this case does not preempt *all* forms of state taxation within the Creek Reservation, and there are circumstances when the fee status of reservation lands *is* relevant to the question of tax jurisdiction. For example, the Supreme Court has consistently held that states may impose taxes on real property owned in fee simple by tribal members within their reservations. *See, e.g., Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106 (1998) (upholding property tax on fee land); *Yakima*, 502 U.S. at 266-68 (same). Indeed, the Appellant pays property taxes on her fee land (ROA, Doc. 20, p. 129), and in doing so pays for the various services provided to all county residents.

In addition, the fee status of land can be relevant to an Indian nation's authority over *nonmembers.* For example, the Supreme Court has struck down a tribal hotel occupancy tax imposed on nonmembers at a hotel on non-Indian reservation fee lands, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001); upheld a tribal cigarette tax imposed on nonmembers on trust land, *Colville*, 447 U.S. at 152; struck down tribal zoning regulations imposed on allotted reservation lands owned by non-Indians, but upheld zoning of a small non-Indian fee parcel

located in the heart of 800,000 acres of closed tribal land, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 440, 446-49 (1989); and struck down tribal court jurisdiction over claims challenging non-Indians' sale of non-Indian reservation fee land, *Plains Comm. Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2721 (2008).

Thus, if the question before the Court was whether the State could tax the Appellant's fee land or whether the Muscogee (Creek) Nation could impose its own tribal tax on a nonmember on the Creek Reservation, then the fee status of the lands could bear on the answer. But land status has *never* been relevant to a state's jurisdiction to tax the income of tribal members living and working on their own reservation. Because the Appellant is a Muscogee (Creek) Nation citizen who lives and works on the Creek Reservation, the State's income tax is preempted as applied to her.

IV. The OTC's *City of Sherrill* Arguments Are Without Merit.

The OTC contends that *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), bars the Appellant's claim to a tax exemption. It misfires badly.[14]

A. The OTC Premises Its *Sherrill* Argument on a Fundamental Error.

According to the OTC, "appellant and the Creek Nation argue that *the State lacks civil jurisdiction generally*" within the Creek Reservation, Resp. 27 (emphasis added) (citing Op. Br. 10 and MCN Br. 9), and "seek[] to reassert tribal sovereignty over non-tribal land and the hundreds of thousands of people who live on it," *id.* at 26, all without " articulat[ing] a limiting principle to their proposed divestment of state civil jurisdiction," *id.* at 25. From there, the OTC contends that "almost every aspect of [Oklahoma's] citizens' lives" will be subjected to

[14] If the Court decides the case on statelaw grounds, it need not address the OTC's equitable arguments at all, as they cannot alter positive state law. *See* MCN Br. 19 ("Where...the rights of parties are clearly defined and established by law, equity has no power to change or unsettle those rights." (quoting *Mehdipour v. Holland*, 2007 OK 69, ¶ 13, 17 P.3d 544, 550-51))

"radically disruptive consequences" as the State loses jurisdiction over taxation, zoning, licensing, fire codes, and business regulation, to name "just a few examples," *id.* at 25-28.

The widespread disruption and interference with settled expectations that the OTC warns of as a basis for applying *Sherrill* rests on *an argument no one has made*. Neither Appellant's brief nor the Muscogee (Creek) Nation's contains the slightest suggestion that the State will generally lose civil jurisdiction within the Reservation if Appellant prevails. As the OTC surely knows, tribal civil jurisdiction over non-Indians on reservation fee land is "presumptively invalid," *Plains Commerce Bank*, 554 U.S. at 330 (citation omitted); *see, e.g.*, *supra* pp. 21-22. Meanwhile, States retain full civil jurisdiction over non-Indians absent preemption under *Bracker*, 448 U.S. at 142-43. *See, e.g.*, *Colville*, 447 U.S. at 159 (taxes); *Brendale*, 492 U.S. at 432, 447 (zoning). Indeed, the Supreme Court has *never* held invalid a state tax on non-Indian activities on reservation fee lands. And reservation fee land held by non-Indians *and Indians* remains subject to state and local property taxes. *Supra* p. 21.[15]

Given these precedents, the OTC's assertion that "[t]oday, around 95% of the land within the historical treaty territory is fee land, and more than 90% of residents are non-Indian," Resp. 22, makes its threats of widespread disruption and interference with settled expectations illusory and instead confirms *McGirt's* limited impact for State civil jurisdiction: For the vast majority of people within the Reservation, nothing will change.

Moreover, this case is only about the "special" rule preempting income taxes, *supra* pp. 13-16, not all matters of civil jurisdiction. The actual impact at issue in this case—the Indian

[15] The Creek Nation is on record acknowledging these and other safeguards for state civil jurisdiction in its briefing to the United States Supreme Court in *McGirt* and *Murphy*. *See* Brief for Amicus Curiae Muscogee (Creek) Nation at 43-44, *McGirt* (No. 18-9526), 2020 WL 774430; Brief for Amicus Curiae Muscogee (Creek) Nation at 32-36, *Carpenter v. Murphy*, No. 17-1107 (U.S. 2018), 2018 WL 5429227.

income tax exemption—amounts to one quarter of one percent of Oklahoma's annual revenue. MCN Br. 21-22 & n.15. The OTC concedes the point by desperately urging that *Sherrill* requires consideration of disruption "beyond the immediate tax claim." Resp. 28. All it can point to in this regard are strawmen, and for this reason alone its *Sherrill* claim should fail.

B. *McGirt* Forecloses the Application of *Sherrill* To Disestablish the Muscogee (Creek) Reservation for Civil Jurisdictional Purposes.

The OTC contends that even if the Muscogee (Creek) Reservation was established as Indian country for civil purposes, this Court can, consistent with *McGirt*, apply *Sherrill*'s equitable bar to divest it of that status, and not just for the taxes at issue here but for all civil purposes. *See, e.g.*, Resp. 25-27. No plausible reading of *McGirt* allows for such an outcome. *McGirt* states that legal doctrines exist "to protect those who have reasonably labored under a mistaken understanding of the law," including "procedural bars, res judicata, statutes of repose, and laches[.]" 140 S. Ct. at 2481. Each of these doctrines could operate on a case-by-case basis to mitigate individual injury from reasonable reliance on past unlawful assertions of state jurisdiction. But none can be applied by a court to render unlawful state jurisdiction lawful. This, *McGirt* makes clear, courts "may never do." *Id.* at 2478. "The federal government promised the Creek a reservation in perpetuity.... Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law." *Id.* at 2482.

The OTC seeks to diminish this language by asserting that while the Muscogee (Creek) Reservation was established by treaty, "so too was the Oneida land in *Sherrill*." Resp. 29-30. This fundamentally misapprehends *Sherrill*. Unlike *McGirt*, *Sherrill* does not involve the application of any treaty and does not inquire into whether the land at issue retained reservation or Indian country status, much less conclude that it did. Indeed, *Sherrill* recognizes Congress's exclusive role with respect to reservation status and expressly declines to treat the case as one

involving a claim to lands within an extant reservation, *see* 544 U.S. at 215 n.9, or to any other form of Indian country still acknowledged by Congress. Justice Ginsburg, writing for the Court, instead framed the issue as whether the Oneida could "unilaterally" establish sovereignty over land, *id.* at 202-03—i.e., create Indian country—*without* the involvement of Congress:

> OIN and the United States argue that because the Court in *Oneida II* recognized the Oneidas' aboriginal title to their ancient reservation land and because the Tribe has now acquired the specific parcels involved in this suit in the open market, it has unified fee and aboriginal title and may now assert sovereign dominion over the parcels.

Id. at 213.[16] The answer was no. *See id.* at 203 ("[T]he Tribe cannot unilaterally revive its ancient sovereignty ... over the parcels[.]"); *id.* at 219 (rejecting "the unilateral reestablishment of ... Indian sovereign control ... over [the] land"); *cf.* MCN Br. 18 (citing cases admonishing against unilateral establishment of Indian country). Instead, the Court stated that if Oneida wanted their lands declared Indian country, they had to do so with the authorization of Congress. *See* 544 U.S. at 221 (25 U.S.C. § 465 "provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago").

By contrast, the question in *McGirt* was not whether the Muscogee (Creek) Nation could unilaterally establish its land as Indian country. The question was whether Congress had already done that. The answer was yes, and because Congress had never undone that act, the State's equitable arguments—reprised by the OTC here and including modern demographics,

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[16] Aboriginal title is a right of "mere possession not specifically recognized as ownership by Congress," *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955), which exists apart from "treaty, statute, or other formal government action," *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941); *see also Pueblo of Jemez v. United States*, 63 F.4th 881, 894 (10th Cir. 2023) (aboriginal title is lost by "voluntary abandonment" of land by tribe); *Sherrill*, 544 U.S. at 216 n.10 ("The Oneidas last occupied the parcels here at issue in 1805.").

longstanding state jurisdiction, and economic disruption—fell on deaf ears, including those of *Sherill* author Justice Ginsburg, who joined the *McGirt* majority's holding that

> Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so.

McGirt, 140 S. Ct. at 2482.

In other words, because the Muscogee (Creek) Reservation was established by Congress, equitable considerations, as a matter of law, may not be judicially applied to diminish it in any way. This bedrock separation-of-powers principle posed no obstacle to the application of such considerations in *Sherrill*, given the effort there to derive Indian country status not from treaty or statute but from the unilateral action of the Oneida Indian Nation.

The Muscogee (Creek) Reservation, by contrast, is protected by both treaty and statute. *McGirt* confirmed "the Creek Nation's nearly 200-year occupancy of these lands," 140 S. Ct. at 2476, and that "Congress expressly recognized the Creek's tribal existence" and "never withdrew [that] recognition," *id.* at 2466 (quotation marks omitted). These conclusions of continuous occupancy and continuous tribal existence are not stray comments. Rather, they are indispensable to *McGirt*'s holding since they represent the two express conditions on which the Reservation promise was based. *McGirt* explains that in the 1830 statute authorizing the Reservation, Congress provided that reservations established under it would endure unless "the Indians [1] become extinct, or [2] abandon the same," *id.* at 2460 (quoting 4 Stat. 411, 412); and the 1833 Treaty formally establishing the Reservation thus promised that "the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall

[1] exist as a nation, and [2] continue to occupy the country hereby assigned to them," *id.* at 2461 (quoting 7 Stat. 417, 419).

Thus, *McGirt*'s conclusions regarding the Nation's continuous occupancy and continuous tribal existence are the Court's *controlling* confirmation of federal statutory and treaty rights in a reservation that only Congress may diminish, including for civil jurisdiction purposes; and if it wishes to do so, "it must say so," 140 S. Ct. at 2462. It hasn't. *See id.* *Sherrill* accordingly provides no lawful means for courts to apply equitable considerations "to finish work Congress has left undone [and] usurp the legislative function in the process," *id.* at 2470; *see Nat. Gas Pipeline Co. of Am. LLC v. Foster OK Res. LP*, 2020 OK 29, ¶ 12, 465 P.3d 1206, 1210 (where "[i]t is the function of Congress to decide" an issue, "[t]his Court must defer to Congress"); *Umber v. Umber*, 1979 OK 24, 591 P.2d 299, 301-02 (state courts may not "reach a result different from the one Congress intended").

C. The Fee Status of the Land Is Again Irrelevant.

The OTC contends that *Sherrill*'s equitable considerations nevertheless may be applied here in light of the fee status of the land on which the Appellant resided. *See* Resp. 21-23. This argument rests on the same fundamental error, debunked above, that fee lands within a reservation do not form part of that reservation. As discussed, § 1151, whose "terms extend to civil jurisdiction," *Lewis*, 896 P.2d at 507 n.18, defines "all land within the limits of any Indian reservation" as Indian country "notwithstanding the issuance of any patent," 18 U.S.C. § 1151(a). The OTC has no answer for this unambiguous text, and the involvement of fee lands accordingly provides the OTC's *Sherrill* argument with no greater support than its other efforts to evade the force of federal and state law.

D. The OTC's Tribal Governance Arguments Are Meritless.

The OTC's arguments about the quantum of Muscogee (Creek) Nation governance activities over the Reservation fare no better. It asserts that "Creek sovereign authority was effectively nonexistent in Oklahoma by the turn of the twentieth century." Resp. 21. Yet again, the OTC is parroting arguments raised by the *McGirt* dissent, 140 S. Ct. at 2491 (Roberts, C.J. dissenting) ("Congress erased the Nation's authority at the turn of the century"), and rejected by the Court, *id.* at 2466 (Creek enjoyed "significant sovereign functions over the lands" at turn of century). From its rejected premise, the OTC asserts that the "functions of [Creek] tribal government" thereafter underwent an "eighty-year period of dormancy," Resp. 23. For this, the OTC relies on Part III.C. of *McGirt*. But nowhere in that section does the Court purport to recount a history of Creek governance. It instead discusses acts of Congress recognizing Creek territorial sovereignty. That Congress did not legislate each and every year on the subject is hardly surprising, and is certainly no basis for the divestiture of powers.

Indeed, the OTC's tale of eighty years of Creek governmental "dormancy" exemplifies "the perils of substituting stories for statutes," *McGirt*, 140 S. Ct. at 2470. If periods of inactive tribal governance were sufficient to divest any aspect of reservation status, few reservations would remain in the United States. Between the 1880s and the 1930s, federal executive branch policy nationwide sought to "end the tribe as a separate political and cultural unit," which federal agents viewed as a "battle to the death[.]" Cohen's Handbook of Federal Indian Law ("Cohen's Handbook") § 1.04, p. 75 (N. Newton ed. 2012). These policies were applied to the Creek Nation. *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1130-38 (D.D.C. 1976) (discussing Interior Department's "deliberate" efforts to "debilitate" Creek government and "pre-empt[] the constitutional processes of the tribe," and referring to same as "the Department's successful destruction of the Creek National Council during the first two decades of the twentieth

century"), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).[17] But rather than go dormant, as the OTC would have it, the Creek formed an alternative governing body, which "met regularly," passed legislation, and—when federal policy shifted to more respect for tribal sovereignty in the 1930s—held elections with federal approval. *Id.* at 1135-37. In 1946, the Department recognized that governing body as having "acted as the official governing body of the Tribe since 1924," *id.* at 1137-38 (quotation marks omitted), and described it as "the competent legislative authority of the tribe," *id.* at 1138.

The early 1950s saw the dawn of the Termination era, during which federal officials again implemented policies designed to end tribal self-government around the Nation. *See* Cohen's Handbook § 1.06 at 89-91. Again, these policies were applied to the Creek Nation, and again the Creek resisted. *See Harjo*, 420 F. Supp. at 1138-39 (describing Termination-era efforts to suppress functions of Creek government until 1970). But none of these executive branch actions reflect the will of Congress. To the contrary, "the influence and control of the Bureau over the various incarnations of the Creek national government between 1920 and 1970 was exercised wholly *without the benefit of any specific Congressional mandate*." *Id.* at 1139 (emphasis added). And that period "demonstrates the continued vitality and resilience of Creek political life and institutions[.]" *Id.* Narratives such as those advanced by the OTC "are never enough to amend the law," *McGirt*, 140 S. Ct. at 2482, particularly when they are fictional.

The problems with the OTC's accounting of the Muscogee (Creek) Nation's powers continue to the present day. When the OTC contends—in a rare textual argument—that the Nation's law enforcement officers operate on fee lands within the Reservation only "because

[17] This Court has described the historical accounts set forth in *Harjo* as "excellent." *Oklahoma ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 1985 OK 54, n.16, 711 P.2d 77.

the State allows them to," Resp. 24, it doctors text to support the point. According to the OTC, the Nation's code states that "cross-deputization agreements 'authorized [tribal officers] to act as law enforcement officers to enforce the law of another governmental entity within *that entity's territorial jurisdiction.*' 14 Creek Nation Code § 1-101(D) (brackets in original)[.]" Resp. 24. The OTC inserts a period (without acknowledgement) when the sentence in fact continues, stating that the agreements also allow "that entity's law enforcement officers ... to enforce [Muscogee (Creek) Nation law] within Muscogee (Creek) Nation Indian Country," 14 Creek Nation Code § 1-101(D), and then defining "Indian Country" as including all land "within the Nation's constitutional boundaries which ... constitutes Indian Country as that term is used in 18 U.S.C. §1151," *id.* § 1-101(G).[18]

* * *

The OTC's *Sherrill* arguments provide no lawful basis by which this Court can pare back the rights, privileges, and immunities that attach as a matter of law to the Muscogee (Creek) Reservation. This Court should reject those arguments and reverse the OTC's ruling below.

CONCLUSION

The Oklahoma Supreme Court should reverse the Final Order of the Oklahoma Tax Commission, and allow the Appellant's claim for the Tribal Exempt Income Exclusion.

[18] http://www.creeksupremecourt.com/wp-content/uploads/title14.pdf. The OTC also points to the Creek Nation's references to its "former" reservation in briefing to the Tenth Circuit. Resp. 22. But again, those same statements were highlighted by the *McGirt* dissent, 140 S. Ct. at 2500 (Roberts, C.J., dissenting), and rejected by the Court as "thin gruel to set against treaty promises enshrined in statutes," *id.* at 2473 n.14.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Reply Brief was mailed this 8th day of May, 2023, to Kiersten Hamill, Oklahoma Tax Commission, ATTN: Legal, P.O. Box 269056, Oklahoma City, OK 73126; Elizabeth Field Oklahoma Tax Commission, ATTN: Legal, P.O. Box 269056, Oklahoma City, OK 73126, and Kannon K. Shanmugam, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, ATTN: 2001 K Street, N.W., Washington, DC 20006, by depositing it in the U.S. Mail, postage prepaid:

Michael D. Parks