No. 120,806

In the Supreme Court of the State of Oklahoma

ALICIA STROBLE,
APPELLANT

v.

OKLAHOMA TAX COMMISSION,
APPELLEE

ON APPEAL FROM THE FINAL ORDER OF DISPOSITION
OF THE OKLAHOMA TAX COMMISSION
T-21-014-S
STATE INCOME TAX PROTEST

BRIEF OF APPELLEE

ELIZABETH FIELD (OBA #22113)
TAYLOR FERGUSON (OBA #32027)
KIERSTEN HAMILL (OBA #33187)
OKLAHOMA TAX COMMISSION
P.O. Box 269056
Oklahoma City, OK 73126
(405) 522-9441
elizabeth.field@tax.ok.gov

KANNON K. SHANMUGAM
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

No. 120,806

In the Supreme Court of the State of Oklahoma

ALICIA STROBLE,
APPELLANT

v.

OKLAHOMA TAX COMMISSION,
APPELLEE

ON APPEAL FROM THE FINAL ORDER OF DISPOSITION
OF THE OKLAHOMA TAX COMMISSION
T-21-014-S
STATE INCOME TAX PROTEST

BRIEF OF APPELLEE

ELIZABETH FIELD (OBA #22113)
TAYLOR FERGUSON (OBA #32027)
KIERSTEN HAMILL (OBA #33187)
OKLAHOMA TAX COMMISSION
P.O. Box 269056
Oklahoma City, OK 73126
(405) 522-9441
elizabeth.field@tax.ok.gov

KANNON K. SHANMUGAM
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

INDEX

STATEMENT 1-3

City of Sherrill v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005) 2

McGirt v. *Oklahoma*, 140 S. Ct. 2452 (2020) 1-2

Oklahoma v. *Castro-Huerta*, 142 S. Ct. 2486 (2022) 2

OKLA. ADMIN. CODE § 710:50-15-2 1

OKLA. ADMIN. CODE § 710:50-15-2(a) 1-2

OKLA. ADMIN. CODE § 710:50-15-2(b) 1-2

ARGUMENT 3-30

Oklahoma v. *Castro-Huerta*, 142 S. Ct. 2486 (2022) 3

City of Sherrill v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005) 3

I. Appellant is Ineligible for the Tribal Income Tax Exemption Under State Law 3-10

A. The Tribal Income Tax Exemption Does Not Apply To Appellant 4-7

Ashikian v. *State ex rel. Oklahoma Horse Racing Commission*, 2008 OK 64, 188 P.3d 148 7

Cox Oklahoma Telecom, LLC v. *State ex rel. Oklahoma Corporation Commission*, 2007 OK 55, 164 P.3d 150 7

Keokuk v. *Ulam*, 4 Okla. 5, 38 P. 1080 (1894) 6

McGirt v. *Oklahoma*, 140 S. Ct. 2452 (2020) 6-7

Tinker v. *McLaughlin-Farrar Co.*, 1912 OK 430, 124 P. 296 6

TPQ Investment Corp. v. *State ex rel. Oklahoma Tax Commission*, 1998 OK 13, 954 P.2d 139 7

United States v. *Celestine*, 215 U.S. 278 (1909) 5

United States v. *Creek Nation*, 295 U.S. 103 (1935) 6

Woodward v. *De Graffenried*, 238 U.S. 284 (1915) 6

United States v. *McGowan*, 302 U.S. 535 (1938) 5

OKLA. ADMIN. CODE § 710:50-15-2 7

OKLA. ADMIN. CODE § 710:50-15-2(a) 4-5

OKLA. ADMIN. CODE § 710:50-15-2(b) 4

OKLA. ADMIN. CODE § 710:50-15-2(c) 6-7

OKLA. STAT. tit. 68, § 201 7

OKLA. STAT. tit. 68, § 203 7

OKLA. STAT. tit. 68, § 2362 7

Bureau of Indian Affairs, Department of the Interior, *Frequently Asked Questions: What Is a Federal Indian Reservation?* (Aug. 19, 2023) 5-6

Department of the Interior, *Report on Indians Taxed and Indians Not Taxed in the United States* (1894) 6

Department of the Interior, *Trust Acquisition Decision* (April 3, 2018) 7

Treaty With the Creeks, 7 Stat. 417 (1833) 6

B. *McGirt* Does Not Control The State-Law Meaning Of 'Indian Country' 7-10

CompSource Mutual Insurance Co. v. *State ex rel. Oklahoma Tax Commission*, 2018 OK 54, 435 P.3d 90 9

McGirt v. *Oklahoma*, 140 S. Ct. 2452 (2020) 7-10

PruneYard Shopping Center v. *Robins*, 447 U.S. 74 (1980) 8

Strate v. *A-1 Contractors*, 520 U.S. 438 (1997) 8

World Publishing Co. v. *Miller*, 2001 OK 49, 32 P.3d 829 10

OKLA. ADMIN. CODE § 710:1-1-2 10

OKLA. ADMIN. CODE § 710:50-15-2 9

OKLA. ADMIN. CODE § 710:50-15-2(a) 8-9

OKLA. ADMIN. CODE § 710:50-15-2(c) 9

OKLA. STAT. tit. 21, § 99a(5)(D) 9

OKLA. STAT. tit. 68, § 102 10

OKLA. STAT. tit. 68, § 500.3(38) 9

18 U.S.C. § 1151 8-9

18 U.S.C. § 1154 8

21 Okla. Reg. 2571 (June 14, 2004) 9

II. Federal Law Does Not Preempt The State's Authority To Tax Income Earned By Appellant 10-18

Milne v. *Hudson*, 2022 OK 84, 519 P.3d 511 10

Oklahoma v. *Castro-Huerta*, 142 S. Ct. 2486 (2022) 10

Oklahoma Tax Commission v. *Chickasaw Nation*, 515 U.S. 450 (1995) 10

White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980) 10

A. The State's Income Tax Is Not Preempted By Federal Law Under Ordinary Principles Of Preemption 11

Oklahoma v. *Castro-Huerta*, 142 S. Ct. 2486 (2022) 11

18 U.S.C. § 1151 11

B. The State's Income Tax Does Not Infringe Upon Tribal Self-Government 11-15

Atkinson Trading Co. v. *Shirley*, 532 U.S. 645 (2001) 12

City of Sherrill v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005) 14

Duro v. *Reina*, 495 U.S. 676 (1990) 13

Hernandez v. *Commissioner*, 490 U.S. 680 (1989) 11

Indian Country, U.S.A., Inc. v. *State of Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.3d 967 (10th Cir. 1987) 12-13

McGirt v. *Oklahoma*, 140 S. Ct. 2452 (2020) 12-14

Oklahoma v. *Castro-Huerta*, 142 S. Ct. 2486 (2022) 11-15

Oklahoma Tax Commission v. *Chickasaw Nation*, 515 U.S. 450 (1995) 11

Oklahoma Tax Commission v. *United States*, 319 U.S. 598 (1943) 12

Wagnon v. *Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) 14

Washington v. *Confederated Tribes of Colville Indian Nation*, 447 U.S. 134 (1980) 14

White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980) 11-15

OKLA. CONST. art. X, § 5(B) 12

OKLA. STAT. tit. 68, § 2352 12

OKLA. STAT. tit. 68, § 2355 12

C. No Precedent Dictates A Contrary Conclusion 15-18

Atkinson Trading Co. v. *Shirley*, 532 U.S. 645 (2001) 16, 18

DeCoteau v. *District County Court for Tenth Judicial District*, 420 U.S. 425 (1975) 18

Edmondson v. *Native Wholesale Supply*, 2010 OK 58, 237 P.3d 199 16

Indian Country, U.S.A., Inc. v. *State of Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.3d 967 (10th Cir. 1987) 17

McClanahan v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973) 16-17

McGirt v. *Oklahoma*, 140 S. Ct. 2452 (2020) 18

Milne v. *Hudson*, 2022 OK 84, 519 P.3d 511 15

Moe v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976) 17-18

Oklahoma v. *Castro-Huerta*, 142 S. Ct. 2486 (2022) 15-16

Oklahoma Tax Commission v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) 16

Oklahoma Tax Commission v. *Sac & Fox Nation*, 508 U.S. 114 (1993) 16, 18

Osage Nation v. *Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250 (N.D. Okla. 2009) 16

Strate v. *A-1 Contractors*, 520 U.S. 438 (1997) 18

White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980) 15-17

18 U.S.C. § 1151 ..... 15, 18

18 U.S.C. § 2265 18

III. Appellant's Claims Are Barred By Equitable Principles 19-30

A. Equitable Principles Preclude Claims Based On Renewed Assertions Of Sovereignty 19-20

City of Sherrill v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005) 19-20

McGirt v. *Oklahoma*, 140 S. Ct. 2452 (2020) 19

B. *Sherrill* Precludes Appellant's Claims 20-28

City of Sherrill v. *Oneida Indian Nation of New York*:
544 U.S. 197 (2005) 20-28
337 F.3d 139 (2d Cir. 2001) 26
145 F. Supp. 2d 226 (N.D.N.Y. 2001) 27

Cayuga Nation v. *Tanner*, 6 F.4th 361 (2d Cir. 2021) 28

Cayuga Indian Nation v. *Village of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005) 27

Ellis v. *Bristow Muscogee Indian Community*, 11 Okla. Trib. 403 (Muscogee (Creek) Nation Dist. Ct. 2009) 23

Indian Country, U.S.A., Inc. v. *State of Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.3d 967 (10th Cir. 1987) 23

McClanahan v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973) 20

McGirt v. *Oklahoma*, 140 S. Ct. 2452 (2020) 21, 23, 25, 28

Montana v. *United States*, 450 U.S. 544 (1981) 28

Muscogee (Creek) Nation ex rel. Beaver v. *American Tobacco Co.*, 5 Okla. Trib. 401 (Muscogee (Creek) Nation Dist. Ct. 1998) 23-24

Oklahoma Tax Commission v. *United States*, 319 U.S. 598 (1943) 21

Oneida Indian Nation of New York v. *County of Oneida*, 617 F.3d 114 (2d Cir. 2010) 21

OKLA. STAT. tit. 70, § 3-172 25

CREEK NATION CODE § 1-101(D) 24

Cross-Deputization Agreement Between the United States, the Creek Nation, and the State of Oklahoma (May 2, 2006) 24

Cherokee Office of Justice, Legal Opinion No. 93-01 (Sept. 30, 1993)..... 24

Discord Reaches Fever Pitch at BA Council Meeting, Tulsa World (Feb. 8, 2012)..... 27

Muscogee (Creek Nation) Completes $734K Improvement on Public Intersection, The Muscogee Nation (Nov. 14, 2019) 25

Muscogee (Creek Nation) Signs Fountainhead Land Into Trust After Nearly 13 Years, The Muscogee Nation (May 4, 2018)..... 22

C. Appellant's And Amici's Efforts To Distinguish *Sherrill* Fail.....28-30

Cayuga Indian Nation v. *Pataki*, 413 F.3d 266 (2d Cir. 2005) 29

City of Sherrill v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005).....28-30

McClanahan v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973)..... 29

Oklahoma Tax Commission v. *Sac & Fox Nation*, 508 U.S. 114 (1993)..... 29

25 U.S.C. § 465..... 30

CONCLUSION **30**

STATEMENT

In the wake of the United States Supreme Court's decision in *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020), thousands of taxpayers have claimed exemptions from Oklahoma income tax under a regulation that governs the application of the tax to tribal members. *See* OKLA. ADMIN. CODE § 710:50-15-2. That regulation provides for an exemption from state income tax where the taxpayer: (1) is an enrolled member of a federally recognized tribe; (2) earned income from sources within "Indian Country" under the tribe's jurisdiction; and (3) lives in "Indian Country" under the tribe's jurisdiction. *See id.* § 710:50-15-2(b). The regulation defines "Indian Country" as "formal and informal reservations, dependent Indian communities, and [certain] Indian allotments." *Id.* § 710:50-15-2(a)(1).

Appellant Alicia Stroble is an enrolled member of the Muscogee (Creek) Nation. ROA, Doc. 15, p. 21. During tax years 2017, 2018, and 2019, she was employed by the Creek Nation. *Id.* Her office was located on land held in trust by the federal government for the benefit of the tribe. ROA, Doc. 24, p. 256. Appellant lived in Okmulgee, within the boundaries of land conveyed to the tribe by the Muscogee (Creek) Treaty of 1866. ROA, Doc. 24, pp. 263-265. Her home was not located on trust or tribal land, but on fee land. *Id.* Appellant acquired title to that property from a non-tribal grantor. ROA, Doc. 23, p. 246.

After *McGirt* was decided, appellant claimed a tribal exemption from state income tax for the disputed tax years. ROA, Doc. 15, pp. 22-24. She contended that Oklahoma could not tax her income because she was "an enrolled member" of the Creek Nation who "live[d] and worke[d] in the territory set aside" for that tribe. ROA, Doc. 1, p. 1. The Audit Services Division of the Oklahoma Tax Commission denied the exemption, and appellant filed a protest. ROA, Doc. 26, p. 280. An administrative law judge recommended granting the requested

exemption, but the Oklahoma Tax Commission heard the case en banc and vacated that recommendation. ROA, Doc. 26, pp. 300-301; ROA, Doc. 36, p. 456.

In determining that appellant was ineligible for the tax exemption, the Commission first concluded that appellant did not live in "Indian Country," as defined by the relevant Oklahoma regulation. ROA, Doc. 36, p. 449. The Commission noted that appellant did not contend that she lived within a "dependent Indian community" or "Indian allotment," and found that she did not live within a "formal reservation" or "information reservation." ROA, Doc. 36, pp. 448-449. The Commission reasoned that appellant did not reside on "a formal reservation owned by the federal government" because she "acquired fee title to the property in 2008, from a non-tribal grantor." ROA, Doc. 36, p. 449. Appellant did not reside on an "informal reservation"—which includes only land held by the tribe, trust land held by the federal government, or land "subject to any restrictions"—for the same reason. *Id.*

The Commission also concluded that Oklahoma had authority to tax appellant's income. Citing the United States Supreme Court's recent decision in *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486 (2022), the Commission explained that "the State is entitled to exercise authority over the whole of its territory" absent preemption by federal law. ROA, Doc. 36, p. 452. The Commission determined that no federal law preempted state authority, rejecting appellant's argument that *McGirt* should be extended to tax cases. ROA, Doc. 36, p. 453.

According to the Commission, the United States Supreme Court's decision in *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005), supported the same conclusion. ROA, Doc. 36, p. 454. That decision recognized that equitable principles prohibit the reassertion of tribal sovereign authority over territory long governed by a State. *See Sherrill*, 544 U.S. at 203. The Commission determined that, given the "longstanding, non-Indian

character of the area and the inhabitants, the history of state control over the area, and the Tribe's long delay" in reasserting its sovereignty, appellant could not raise the Creek Nation's residual sovereignty as a defense against state taxation. ROA, Doc. 36, p. 454.

The Commission therefore concluded that appellant's income is "fully taxable by the State of Oklahoma." ROA, Doc. 36, p. 457. This appeal followed.

ARGUMENT

Appellant is not exempt from paying state income tax. The Commission—which is entitled to deference in interpreting its own regulations—correctly determined that appellant does not qualify for a narrow administrative tax exemption for income earned by tribal members living and working on certain tribal land. Nor does federal law prohibit the State from taxing appellant's income. The United States Supreme Court's recent decision in *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486 (2022), explains that a State's sovereign authority—which includes taxing authority—extends into Indian country unless it is preempted by federal law or the State's authority interferes with tribal self-government. Appellant cannot make either showing, and none of the precedents on which appellant relies supports a contrary result. Appellant's claims are also barred under the equitable principles articulated by the United States Supreme Court in *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005). That decision compels the conclusion that appellant cannot invoke the Creek Nation's renewed sovereignty as a defense against state income taxation, because generations have passed since the Creek Nation ceased to exercise sovereign authority over the land in question. The Commission's order denying appellant's requested exemption should be affirmed.

I. APPELLANT IS INELIGIBLE FOR THE TRIBAL INCOME TAX EXEMPTION UNDER STATE LAW

The Commission has promulgated an administrative regulation exempting from state

taxation the income earned by tribal members who live and work on tribal land. The Commission correctly interpreted the plain text of the regulation to conclude that, as a matter of state law, appellant is not entitled to the tribal exemption. And even if the text were ambiguous, the Commission's interpretation of its own regulation is entitled to great deference.

A. The Tribal Income Tax Exemption Does Not Apply To Appellant

1. Appellant does not qualify for the tribal income tax exemption under its plain text. That exemption provides that the income of an enrolled member of a federally recognized Indian tribe shall be exempt from tax when the member lives and earns the income "within 'Indian Country' under the jurisdiction of the tribe to which the member belongs." OKLA. ADMIN. CODE § 710:50-15-2(b). There is no dispute that appellant is an enrolled member of a federally recognized Indian tribe or that she earns her income in "Indian Country" under the jurisdiction of her tribe. *See* Appellant Br. 1.

But appellant must also establish that she lives in "Indian Country" within the meaning of the regulation. The regulation provides a three-part definition of "Indian Country": "[1] formal and informal reservations, [2] dependent Indian communities, and [3] Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States." OKLA. ADMIN. CODE § 710:50-15-2(a). It is undisputed that appellant does not reside in a "dependent Indian community" or an "Indian allotment," ROA, Doc. 26, p. 448-449, and that unrestricted fee land does not meet either definition of "Indian Country." *See* OKLA. ADMIN. CODE § 710:50-15-2(a)(1), 2(a)(3).

Appellant states (Br. 12) that she is a "reservation Indian," but she does not explain whether she resides on a formal or informal reservation under the regulation. Appellant cannot establish that she lives on either type of reservation. Although the Commission's regulation does not define the phrase "formal reservation," it does define "informal reservation." *See*

OKLA. ADMIN. CODE § 710:50-15-2(a)(2). That definition provides that an "informal reservation" includes "lands held in trust for a tribe by the United States and those portions of a tribe's original reservation which were neither allotted to individual Indians, nor ceded to the United States as surplus land, but were retained by the tribe for use as tribal lands." *Id.* Appellant's land does not meet that definition. Appellant's deed indicates that she acquired fee title to the property from a non-tribal grantor. ROA, Doc. 23, p. 183. The land is not held by the federal government, retained by the Creek Nation, or subject to any restrictions. To the contrary, appellant's purchase from a non-tribal grantor shows that, although the parcel may once have been conveyed to the Creek Nation, it was long ago allotted and sold. Appellant's land thus does not fall within an "informal reservation."

Appellant's land likewise does not fall within a "formal reservation" under the regulation. As an initial matter, it would be exceedingly strange if the definition of "formal reservation" included unrestricted fee land, but "informal reservation" did not. The fact that unrestricted, allotted land is excluded from the definition of "informal reservation" under the regulation is thus good evidence that such land cannot be a "formal reservation" either.

Moreover, the historical Creek territory was *never* a "formal reservation." The Supreme Court has explained that the word "reservation" is used to describe lands "reserved from sale" under federal law, *United States* v. *Celestine*, 215 U.S. 278, 285 (1909), and that a reservation must generally be "under the superintendence of" the federal government, *United States* v. *McGowan*, 302 U.S. 535, 539 (1938). Contemporary Bureau of Indian Affairs documents also define reservation land as "land reserved for a tribe or tribes" by federal law and to which "the federal government holds title . . . in trust on behalf of the tribe." Bureau of Indian Affairs, Department of the Interior, *Frequently Asked Questions: What Is a Federal Indian*

Reservation? (Aug. 19, 2017) <tinyurl.com/mrxb7y59>. The historical territory of the Creek was never held in trust by the federal government; instead, the federal government conveyed title to the land by granting "a patent, in fee simple, to the Creek nation of Indians." Treaty With the Creeks, Art. III, 7 Stat. 417, 419 (1833); *see also Woodward* v. *De Graffenried*, 238 U.S. 284, 293-294 (1915); *Keokuk* v. *Ulam*, 4 Okla. 5, 38 P. 1080, 1082 (1894).

The federal government has long distinguished between the Creeks living on their historical land and so-called "reservation Indians." For example, an 1894 report by the Department of the Interior recommended that the "allotment of Five Tribe lands can not be proceeded with in the manner that lands of the reservation . . . Indians are allotted," in part because the Five Tribes "are not on reservations, but on lands patented to each nation." Census Office, Department of the Interior, *Report on Indians Taxed and Indians Not Taxed in the United States* 283-284 (1894); *see also United States* v. *Creek Nation*, 295 U.S. 103, 109 (1935) (noting that the "Creek Tribe had a fee-simple title, not the usual Indian right of occupancy with the fee in the United States"). This Court has recognized the same distinction, contrasting the "status of the Five Civilized Tribes," on the one hand, with "reservation Indians," on the other. *Tinker* v. *McLaughlin-Farrar Co.*, 1912 OK 430, 124 P. 296, 298. When the Commission included the term "formal reservation" within its regulatory definition of "Indian Country" years before *McGirt*, it could not have intended to include unrestricted fee land within the historical territory of the Creek Nation.

Other provisions of the regulation confirm that interpretation. The regulation specifically 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." OKLA. ADMIN. CODE § 710:50-15-2(c). The regulation also states that a tribe's "service area"—which was

understood before *McGirt* to mean a tribe's historical treaty territory—does not qualify as "Indian Country" simply because the tribe provides "general federal aid" or tribal programs over that area. *Id.*; *see* Department of the Interior, *Trust Acquisition Decision*, 5 & n.42 (Apr. 3, 2018) (defining "service area") <tinyurl.com/yz3e7y65>.

2. The plain text of the regulation precludes appellant's argument that she lives in "Indian Country," but even if there were any ambiguity, the Court should defer to the Commission's interpretation of the regulation. State statutory law imposes a tax on all "Oklahoma taxable income" and does not exempt income earned by tribal members on Indian land. OKLA. STAT. tit. 68, § 2362. The exemption at issue is an administrative regulation promulgated by the Commission. *See* OKLA. ADMIN. CODE § 710:50-15-2; OKLA. STAT. tit. 68, §§ 201, 203.

Two principles dictate that this Court construe the exemption narrowly. First, the Court has made clear that tax exemptions "depend entirely on legislative grace and are strictly construed." *TPQ Investment Corp.* v. *State ex rel. Oklahoma Tax Commission*, 1998 OK 13, ¶ 8, 954 P.2d 139, 141. Second, the Court shows "great deference to an agency's interpretation of its own rules." *Cox Oklahoma Telecom, LLC* v. *State ex rel. Oklahoma Corporation Commission*, 2007 OK 55, ¶ 23, 164 P.3d 150, 160; *see also Ashikian* v. *State ex rel. Oklahoma Horse Racing Commission*, 2008 OK 64, n.38, 188 P.3d 148, 156. Therefore, contrary to appellant's assertion (Br. 6) that the Commission's decision is subject to "plenary, independent" review, appellant bears a heavy burden in establishing that the Commission erred in its conclusion that appellant's place of residence is not "Indian Country" within the meaning of the regulation. ROA, Doc. 36, pp. 448-450.

B. *McGirt* Does Not Control The State-Law Meaning Of 'Indian Country'

Rather than arguing that her land fits any of the categories of "Indian Country" under the Commission's regulation, appellant and her amici suggest that *McGirt*'s interpretation of

"Indian country" in a federal criminal statute controls the meaning of the same phrase in the Oklahoma Administrative Code. But there is no requirement that this Court must interpret state law in the same manner that a federal court interprets a similar phrase in a federal statute. *See, e.g., PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 81 (1980). That is particularly true here, where even the federal definition of "Indian country" varies across different statutes. *See Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 n.9 (1997); *see also* 18 U.S.C. § 1154.

In a related vein, appellant and her amici argue that the Commission's regulations "incorporat[e]" federal criminal law—specifically, 18 U.S.C. § 1151 and *McGirt*'s interpretation of that statute—into state administrative law. *See* Br. 10; Creek Br. 12. That argument is incorrect.

As an initial matter, the state regulation and the federal criminal statute use different language. The regulation sets out specific categories of "Indian Country" that are distinct from, and narrower than, 18 U.S.C. § 1151. The state regulation speaks of "formal and informal reservations" and defines even the latter as land "held in trust" that was never allotted or ceded but retained by the tribe. OKLA. ADMIN. CODE § 710:50-15-2(a). By contrast, the federal criminal statute reaches "*all* land within the limits of *any* Indian reservation . . . notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151 (emphases added). The two provisions also differ markedly in their definitions of "dependent Indian communities." The state regulation defines that term as "a *limited category* of Indian lands that are neither reservations *nor allotments*, and . . . have been set aside by the federal government for the use of the Indians as Indian land." OKLA. ADMIN. CODE § 710:50-15-2(a)(3) (emphases added). The federal criminal statute, on the other hand, reaches "*all* dependent Indian communities within the borders of the United States

whether within the original or subsequently acquired territory thereof." 18 U.S.C. § 1151 (emphases added). Finally, the regulation expressly excludes from its definition of "Indian Country" certain types of land that Section 1151 would cover, including historical treaty land over which the tribe operates federal programs. *See* OKLA. ADMIN. CODE § 710:50-15-2(c).

Those distinctions are not accidental. The Commission's definition of "Indian Country" is applicable only to a single section of the administrative code, *see* OKLA. ADMIN. CODE § 710:50-15-2(a), and deviates not only from the broader definition in 18 U.S.C. § 1151, but also from other state-law definitions. *See, e.g.*, OKLA. STAT. tit. 21, § 99a(5)(D); OKLA. STAT. tit. 68, § 500.3(38). In defining the authority of the Bureau of Indian Affairs and tribal law enforcement officers, for example, the relevant state statute empowers those officials to "enforce state laws on fee land purchased by a federally recognized American Indian tribe or in Indian country, as defined in Section 1151 of Title 18 of the United States Code." OKLA. STAT. tit. 21, § 99a(5)(D). State officials thus know how to adopt 18 U.S.C. § 1151 when they so intend, but they did not do so in Section 710:50-15-2. The regulation's use of a "see" citation to 18 U.S.C. § 1151 suggests only a general similarity, not equivalence, of the two definitions.

Even if the state regulation did incorporate the 18 U.S.C. § 1151 definition, it would still not require this Court to adopt *McGirt*'s novel interpretation. The relevant regulations were promulgated many years before *McGirt* was decided. *See* 21 Okla. Reg. 2571 (June 14, 2004). Those regulations would thus incorporate only the meaning of Section 1151 as it was understood "at the time of" the incorporation, *CompSource Mutual Insurance Co.* v. *State ex rel. Oklahoma Tax Commission*, 2018 OK 54, ¶ 21, 435 P.3d 90, 99, and not as it was expanded almost two decades later. At the time of promulgation, the Commission could not have imagined, let alone intended, that its use of the term "Indian Country" would apply to the entire

eastern half of the State. The Commission's contemporaneous understanding should be respected. *See, e.g., World Publishing Co.* v. *Miller*, 2001 OK 49, ¶ 7, 32 P.3d 829, 832.[1]

II. FEDERAL LAW DOES NOT PREEMPT THE STATE'S AUTHORITY TO TAX INCOME EARNED BY APPELLANT

In *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486 (2022), the United States Supreme Court reaffirmed that "the Constitution allows a State to exercise jurisdiction in Indian country" because "Indian country is part of the State." *Id.* at 2493. As "a matter of state sovereignty," Oklahoma has "jurisdiction over all of its territory," *id.*, including the authority to tax "*all* the income of its residents," *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450, 462-463 (1995).

A State may exercise its sovereign authority over Indian country within the State's own territory "unless that jurisdiction is *preempted*" by federal law. *Castro-Huerta*, 142 S. Ct. at 2503. *Castro-Huerta* instructs that there are two ways state jurisdiction 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"—also known as "*Bracker* balancing." *Id.* at 2494, 2500; *see White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 141-145 (1980); *see also Milne* v. *Hudson*, 2022 OK 84, ¶ 14, 519 P.3d 511, 515. Appellant cannot show preemption under either approach.

---

[1] Appellant's extensive reliance on the Commission's report on the potential impact of *McGirt* (Br. 14-16) also fails. That report was issued by the Executive Director of the Commission, not the Commission itself, and so does not amount to an official position of the Commission. *See* OKLA. STAT. tit. 68, § 102; OKLA. ADMIN. CODE § 710:1-1-2; ROA, Doc. 36, p. 450 ("The Commissioners were not aware the Report was being prepared, and the Commissioners did not review, issue or approve the Report prior to its publication and distribution."). In any event, the report did not purport to offer legal guidance, but instead simply analyzed the potential economic impacts of *McGirt* for the purpose of informing policymakers. The report cannot alter the plain meaning of the Commission's regulation.

A. The State's Income Tax Is Not Preempted By Federal Law Under Ordinary Principles Of Preemption

Appellant has not identified any statute or treaty that displaces the State's jurisdiction under "ordinary" rules of preemption. *See Castro-Huerta*, 142 S. Ct. at 2494-2500. The only federal statute appellant invokes is 18 U.S.C. § 1151, but appellant does not argue that it affirmatively preempts state taxing authority. *See* Br. 8-11. In any event, such an argument could not succeed. The Supreme Court instructs that, under ordinary principles of preemption, "the text of a law controls." *Castro-Huerta*, 142 S. Ct. at 2497. Section 1151 simply defines "Indian country" for purposes of federal criminal law, and its text says nothing about any State's taxing jurisdiction.

B. The State's Income Tax Does Not Infringe Upon Tribal Self-Government

Appellant does not attempt to apply the *Bracker* balancing test to show preemption of Oklahoma's income tax. The *Bracker* test weighs state, tribal, and federal interests—preemption occurs "if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government." *Castro-Huerta*, 142 S. Ct. at 2501. Under that test, the balance of interests does not bar Oklahoma from taxing appellant's income. The State's interest in imposing a non-discriminatory individual income tax on its citizens living on unrestricted fee land outweighs the minimal tribal interest in avoiding such a tax. No federal interest compels a contrary result.

1. The State has a "strong sovereign interest" in collecting tax revenue from its citizens in a non-discriminatory manner. *Castro-Huerta*, 142 S. Ct. at 2501; *see generally Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989) (noting the "broad public interest in maintaining a sound tax system"). It is a "well-established principle" that a State "may tax *all* the income of its residents," and even the income of non-residents "earned within the jurisdiction." *Chickasaw Nation*, 515 U.S. at 462-463 & n.11. The State also has an interest in using

tax revenue to "provide[] services" to its citizens, including its tribal-member citizens. *Indian Country, U.S.A., Inc.* v. *State of Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.3d 967, 987 (10th Cir. 1987). Oklahoma imposes its income tax in a non-discriminatory manner on "every resident or nonresident individual," OKLA. STAT. tit. 68, § 2355, which ensures that the burden of funding the "general governmental functions of state government," *id.* § 2352, is borne proportionately by those who benefit from state services. *See* OKLA. CONST. art. X, § 5(B) ("Taxes shall be uniform upon the same class of subjects."). Appellant is a resident of Oklahoma who earned income within Oklahoma, *see* ROA, Doc. 15, pp. 21-22, and the State undoubtedly has an interest in taxing her income.

The State's sovereign interest is not diminished by the fact that appellant is a tribal member living and working in the Creek Nation's historical treaty territory. As *Castro-Huerta* makes clear, "Indian country" is part of the State and subject to the State's sovereign authority. 142 S. Ct. at 2493. The vast majority of residents in historical Creek territory (more than 90% of them) are not members of the Creek Nation, *see* ROA, Doc. 23, p. 202, and the vast majority of the land (around 95% of it) is fee land, not restricted land or trust land, *see McGirt*, 140 S. Ct. at 2497 (Roberts, C.J., dissenting). The State has a responsibility to provide governmental services to *all* of those residents—tribal members and nonmembers alike—that the Creek Nation could not possibly discharge, and the tribe generally lacks "civil authority over nonmembers on non-Indian fee land," even if the land is "Indian country." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 653-654 & n.5 (2001). Tribal members, too, are "full fledged citizens of the State of Oklahoma," and the State uses tax revenue to provide them with "schools, roads, courts, police protection and all the other benefits of an ordered society." *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 609-610 (1943). Oklahoma has an obligation to

continue providing those services, regardless of any changes to the definition of "Indian country" under federal criminal law. *See McGirt*, 140 S. Ct. at 2480.

The State's interest is particularly strong because of its long-held sovereign control over unrestricted fee land within historical treaty territory. For over a century, Oklahoma continuously exercised criminal and civil jurisdiction over Indians and non-Indians within the area. *See* pp. 21-25, *infra*. The State has long assessed a state income tax over tribal members who (like appellant) reside on fee land within treaty territory. *See* ROA, Doc. 23, p. 188. And because that fee land constitutes almost half of Oklahoma, divesting the State of taxing authority would significantly "undermine the state economy or tax base." *Indian Country, U.S.A.*, 829 F.2d at 986. Not only would the State have to pay millions of dollars in tax refunds to tribal members who live and work on fee land, but it would also be deprived of that tax revenue in perpetuity. *See* ROA, Doc. 23, p. 188. The State's loss of tax revenue would be extraordinarily disruptive for its citizens, who have reasonably relied on the assumption that the State will continue to provide services funded by those taxes.

2. The tribe's interest does not outweigh the State's. The Supreme Court has explained that the relevant interest is "tribal self-government," *Castro-Huerta*, 142 S. Ct. at 2501—that is, "the right of reservation Indians to make their own laws and be ruled by them," *Bracker*, 448 U.S. at 142 (citation omitted). Critically, Oklahoma's individual income tax does not prohibit the Creek Nation from making rules and regulations, operating its courts, providing governmental services to its members, controlling its own internal relations, preserving its social order, or exercising other quasi-sovereign functions. *See, e.g.*, *Duro* v. *Reina*, 495 U.S. 676, 685-686 (1990). The State's income tax also does not impose a tax on the tribe itself, and it does not displace whatever retained sovereign authority the tribe has to collect its own taxes.

See, e.g., *Washington* v. *Confederated Tribes of Colville Indian Nation*, 447 U.S. 134, 155-158 (1980); *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 114 (2005).

Neither appellant nor the Creek Nation explains how the state income tax would interfere with tribal self-government. They have not argued that the tax is discriminatory, that it has impermissible "nonrevenue" purposes, or that the economic burden of the tax would so diminish the tribe's revenues that the tribe would be unable to perform the functions of self-government. *See Colville*, 447 U.S. at 156-158. Certain tribes might have a "policy preference" that tribal members avoid state income taxes, but that preference "does not factor into the *Bracker* analysis." *Castro-Huerta*, 142 S. Ct. at 2501 n.6.

Any tribal interest is further diminished by the tribe's long failure to assert its civil and regulatory authority over fee land. For generations, there was no question that Oklahoma's income tax could be—and in fact was—imposed on tribal members who lived or worked on fee land. Until recently, the Creek Nation did not challenge those taxes, and any argument that the taxes would severely diminish its revenues cannot be taken seriously: in 2020, the Creek Nation told the Supreme Court that it operated a quasi-sovereign tribal government and provided essential governmental services to tribal members, yet it gave no indication that state taxation on unrestricted fee land interfered with those functions. Creek Br. at 37-38, *McGirt*, *supra*, 2020 WL 774430. Any tribal interest in "rekindling embers of sovereignty that long ago grew cold" merits minimal weight. *City of Sherrill*, 544 U.S. at 214.

3. The federal interest at stake also does not support preemption. In *Castro-Huerta*, the Court reasoned that the State's exercise of prosecutorial authority would not "harm the federal interest in protecting Indian victims" because state jurisdiction did not "oust[] federal jurisdiction." 142 S. Ct. at 2501. The same is true with regard to taxing authority. The

State's authority to impose an income tax on its citizens and residents has no bearing on the federal government's authority to impose its own income tax.

The balance of interests thus favors the State, whose interest is even weightier given its century-long governance of fee land within state territory. Because the tax does not infringe on tribal government, the Court should hold that no federal law preempts Oklahoma's authority to tax the income of tribal members who live on fee land within historical treaty territory.

C. No Precedent Dictates A Contrary Conclusion

1. Without engaging in any meaningful preemption analysis, appellant simply contends that "[S]tates are preempted from taxing [r]eservation Indians on income derived solely from [r]eservation sources." Br. 11. To support that contention, appellant purports to derive, from several precedents of the United States Supreme Court, the proposition that no State can *ever* tax tribal members who live and work in "Indian country" within the meaning of 18 U.S.C. § 1151. *See* Br. 11-14. That proposition is unfounded.

As an initial matter, such a categorical rule would be incompatible with the analysis required by the Supreme Court in *Castro-Huerta*. Just last year, the Court explained that a State's sovereign authority extends to Indian country except under two circumstances: (1) where "ordinary preemption analysis" precludes the exercise of state authority, or (2) where state jurisdiction "would unlawfully infringe upon tribal self-government" under *Bracker* balancing. *Castro-Huerta*, 142 S. Ct. at 2501; *see also Milne*, 2022 OK 84, ¶¶ 15-20, 519 P.3d at 515-516. There is no third option. Appellant's failure to satisfy either preemption test is fatal to her argument that federal law preempts the State's sovereign authority to tax.[2]

[2] As this Court has recognized, the United States Supreme Court has sometimes made inconsistent statements on whether "balancing" is the correct approach to resolve conflicts between "Indian sovereignty and state authority" in the context of "state taxation of tribes and

Appellant's cases do not support the ambitious rule she proposes. Appellant cites several cases involving the State's authority to tax tribal members in "Indian country," but none of them involved "Indian country" with any resemblance to eastern Oklahoma: where the vast majority of land is non-tribal fee land. In *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the United States Supreme Court held that a tribal convenience store's cigarette sales to tribal members were not subject to the State's sales tax. *See id.* at 511. The tribal convenience store was located "on land held in trust" by the federal government for the tribe, the Court explained, so the State's taxing authority was preempted as to the activities of tribal members on that land. *Id.* Similarly, in *Oklahoma Tax Commission* v. *Sac & Fox Nation*, 508 U.S. 114 (1993), the land in question was restricted land that would, by the terms of the relevant treaty, "remain the property of said Sac and Fox Nation" or remain trust or restricted land. 508 U.S. at 117; *see also Osage Nation* v. *Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1264 (N.D. Okla. 2009) (distinguishing *Sac & Fox* on this basis). In *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973), the Court held that Arizona could not impose an income tax imposed on a "reservation Indian whose entire income derives from reservation sources," *id.* at 165, but the Court never considered whether its rule applied to non-tribal fee lands, and the vast majority of the land within the reservation in *McClanahan* was tribally owned. *See Atkinson Trading*, 532 U.S. at 657 n.11 (noting that "96.3 percent of the Navajo Nation's 16,224,896 acres is tribally owned"). In addition, the *McClanahan* Court expressly based its preemption decision

---

tribal members." *Edmondson* v. *Native Wholesale Supply*, 2010 OK 58, ¶ 38 & nn. 64-65, 237 P.3d 199, 212. To the extent there is any ambiguity, *Castro-Huerta* clarifies that States may exercise their sovereign authority in Indian country unless their jurisdiction is preempted under ordinary preemption analysis or *Bracker* balancing.

on its interpretation of statutes and treaties, holding that "the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves." 411 U.S. at 165. Finally, in *Indian Country, U.S.A., supra*, the Tenth Circuit applied *Bracker* balancing to hold that a state tax on a tribal gaming facility was preempted, where the facility was located on tribal lands "still owned by the Creek Nation pursuant to the patents and promises dating back to the treaties." 829 F.2d at 972.

Appellant resides on fee land—not trust, restricted, or tribal land. ROA, Doc. 23, p. 183. That distinction matters because the State has a greater interest in asserting sovereign authority over, and the tribe has a lesser interest in self-governance in, fee land. As the Tenth Circuit has explained while applying *Bracker* balancing, unallotted "Indian tribal lands" are similar to trust land because they are generally "protected against conveyance." *Indian Country, U.S.A.*, 829 F.2d at 976 n.4. "The State's interest is particularly minimal when it seeks to raise revenue by taking advantage of activities that are wholly created and consumed within *tribal lands* and over which it has no control," especially if the State provides "no services . . . that would justify the tax." *Id.* (emphasis added). Here, by contrast, there is no dispute that the State has exercised sovereign control over fee land for more than a century and that it has consistently provided services within the area.

Moe v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), does not alter the analysis. *See* Creek Br. 11. *Moe* concluded that state taxing authority was preempted by "treaty and statutes" even as to Indians living and working on fee land, but the Court explained that it was doing so largely to avoid the impracticalities of "checkerboard jurisdiction" in an area where half of the land was held in trust. 425 U.S. at 477-478. By contrast, the overwhelming majority of treaty land in Oklahoma is *not* held in trust, *see* p. 12,

supra, so any "checkerboard" concerns are substantially diminished. While it may be reasonable to treat pockets of fee land like the surrounding restricted, trust, or tribal land, it makes little sense to adopt the same approach where it is the fee land that dwarfs the tribal land.

2. Appellant also argues that *McGirt*—which held that treaty land in Oklahoma is "Indian country" under 18 U.S.C. § 1151—should be extended to taxation cases. *See* Br. 10-11. But the "only question" in *McGirt* "concern[ed] the statutory definition of 'Indian country' as it applies in federal criminal law," and the Court declined to consider the "civil and regulatory" implications of its decision. 140 S. Ct. at 2480.

While the United States Supreme Court has looked to Section 1151 to resolve some "questions of civil jurisdiction," *DeCoteau* v. *District County Court for Tenth Judicial District*, 420 U.S. 425, 427 n.2 (1975), it has declined to borrow from that criminal statute in other civil contexts. *See, e.g.*, *Atkinson Trading*, 532 U.S. at 653 n.5; *Strate*, 520 U.S. at 454 n.9. And while certain civil statutes expressly incorporate Section 1151's definition of "Indian country," *see* 18 U.S.C. § 2265, appellant does not identify any such statute in the taxation context. In cases about state taxing authority, the Supreme Court has discussed Section 1151's definition of "Indian country" in some cases, *see, e.g.*, *Sac & Fox*, 508 U.S. at 126, but not in others, *see, e.g.*, *Moe*, 425 U.S. at 477-479. The Court has never held that, under Section 1151, States are barred from taxing tribal members on "Indian country" of any kind, and anything the Court has said in other cases about other kinds of land, for which the State's interest is lesser and the tribe's greater, does not control here.[3]

---

[3] The Creek Nation's contention that Oklahoma's recent effort to seek certain EPA approvals amounts to recognition that "*McGirt* applies equally to matters of civil jurisdiction," Br. 9, is likewise without merit. The State's effort to secure its environmental programs against potential post-*McGirt* legal challenges does not indicate that the State agrees with those possible extensions of *McGirt*, much less extensions into tax law.

III. APPELLANT'S CLAIMS ARE BARRED BY EQUITABLE PRINCIPLES

Appellant's claims are barred for an additional, independent reason: under the equitable principles articulated in *City of Sherrill*, *supra*, appellant cannot raise the Creek Nation's residual sovereignty as a defense against state income taxation.

A. Equitable Principles Preclude Claims Based On Renewed Assertions Of Long-Dormant Tribal Sovereignty

Appellant's argument boils down to the contention that *McGirt* altered her tax liability to the State. There is no dispute that, before *McGirt*, the settled understanding was that Oklahoma had authority to tax tribal members on fee land. After *McGirt* was decided, appellant sought a tax refund on the basis that she is now a "reservation Indian." Br. 12. But *McGirt* expressly declined to define "Indian country" for the purposes of "civil and regulatory law," and indeed, recognized the significant "reliance interests" of people in the area, grounded in the longstanding assumption of state civil jurisdiction over fee land. 140 S. Ct. at 2480-2481. Equitable principles, the Court observed, would protect those reliance interests, pointing to several "doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—[that] are designed to protect those who reasonably labored under a mistaken understanding of the law." *Id.*

In *Sherrill*, the United States Supreme Court applied those equitable principles to protect the interests of New Yorkers who had long relied on the State's governance of Indian land. 544 U.S. at 217-221. There, the land was part of the "aboriginal homeland" of the Oneida Indian Nation, and it was once reserved for the tribe by treaty with the federal government. *Id.* at 203-205. That land was later sold to New York—in violation of federal law, according to the Oneidas—and was held by non-Indians and governed by the State for almost two centuries. *See id.* at 205, 215-216. In 1997 and 1998, the Oneida Nation repurchased parcels of the land.

See id. at 202, 211. The tribe claimed "present and future sovereign immunity from local taxation" on the repurchased lands, arguing that the repurchase revived its "sovereign dominion over the parcels" because the land was once again "Indian country." *Id.* at 213-214.

The Court rejected that argument, holding that equitable principles barred the Oneidas' reassertion of sovereignty over the lands. During the "long lapse of time" between the Oneidas' historical possession of the land and the present day, the area was "continuously governed" by the State and the Oneidas "did not seek to revive their sovereign control." *Sherrill*, 544 U.S. at 216. The Court observed that the "longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, in both population and land use, may create justifiable expectations." *Id.* at 215 (internal quotation marks and citation omitted). As a result, reasserting tribal sovereignty would have "disruptive practical consequences." *Id.* at 219. The Court concluded that those circumstances "evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance th[e] suit [sought] unilaterally to initiate." *Id.* at 221. Those principles apply, the Court continued, regardless of whether tribal sovereignty is "asserted affirmatively or defensively." *Id.* at 214 n.7.

B. *Sherrill* Precludes Appellant's Claims

Sherrill compels the conclusion that appellant cannot assert the Creek Nation's residual sovereignty to avoid state taxation. Appellant argues that the State cannot tax her income because she is a "reservation Indian," Br. 12, invoking the "Indian sovereignty doctrine" that individual Indians are immune from state taxation when their tribe has territorial sovereignty over the land on which they live and work, *McClanahan*, 411 U.S. at 170-171.

Under *Sherrill*, "[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations." 544 U.S. at 218. The *Sherrill* analysis focuses on three factors: (1) the length of time

since the tribe exercised sovereignty over the land in question; (2) the "justifiable expectations" of the people living in the area; and (3) the disruptiveness of a revival of tribal sovereignty today. *Id.* at 215; *see Oneida Indian Nation of New York* v. *County of Oneida*, 617 F.3d 114, 127 (2d Cir. 2010). Applied here, *Sherrill*'s equitable principles bar the reassertion of Creek territorial sovereignty over fee lands within historical treaty territory.

1. There has been a "long lapse of time, during which [the State's] governance [of historical Creek lands] remained undisturbed." *Sherrill*, 544 U.S. at 215 n.9. Since statehood, Oklahoma has exercised civil and regulatory authority—including taxing authority—over treaty territory within state boundaries. Tribal members are "full fledged citizens of the State of Oklahoma," and benefit equally from state governance. *Oklahoma Tax Commission*, 319 U.S. at 608-609. For over a century, the State has provided tribal members with "schools, roads, courts, police protection and all the other benefits of an ordered society." *Id.*

By contrast, Creek sovereign authority was effectively nonexistent in Oklahoma by the turn of the twentieth century. Allotment-era statutes and policies distributed tribal land, abolished tribal taxes, dissolved tribal courts, and extinguished essential functions of tribal government. *See McGirt*, 140 S. Ct. at 2465-2466. By the 1940s, the Supreme Court had observed that Oklahoma's Five Tribes (including the Creek Nation) had no "effective tribal autonomy" and their members were "actually citizens of the State with little to distinguish them from all other citizens." *Oklahoma Tax Commission*, 319 U.S. at 603.

Beginning in the 1980s, the Creek Nation reestablished some functions of tribal government, such as tribal courts and regular elections. *See McGirt*, 140 S. Ct. at 2467. But the Creeks never regained territorial sovereignty over fee land, which the tribe considered to be its "former" territory. Creek Reply Br. at 5, *Muscogee (Creek) Nation* v. *Oklahoma Tax*

Commission, 611 F.3d 1222 (10th Cir. 2010) (No. 09-5123), 2009 WL 5069097. As the Creek Nation told the Tenth Circuit in 2009, modern tribal "government operations" were limited to "its 'checkerboard' Indian country within its former reservation boundaries." *Id.* Federal allotment policies "creat[ed] an Indian country composed of islands of land within the Creek reservation boundaries," and it was only over those "islands"—trust land, restricted land, and tribal land—that the Creek Nation exercised jurisdiction. Creek Br. at 1, *Muscogee (Creek) Nation*, *supra*, 2009 WL 3443246. By contrast, "most of the Creek reservation lands eventually became fee land," which was "subject to State jurisdiction." *Id.* Recognizing that its jurisdiction is dependent on land status, the Creek Nation has consistently petitioned the federal government to take land into trust. *See, e.g.*, *Muscogee (Creek) Nation Signs Fountainhead Land Into Trust After Nearly 13 Years*, The Muscogee Nation (May 4, 2018) <tinyurl.com/mry7m6n8>. Today, around 95% of the land within the historical treaty territory is fee land, and more than 90% of residents are non-Indian. *See* p. 12, *supra*. The Creek Nation has not exercised sovereign authority over fee land for over a century, during which "[g]enerations have passed," "non-Indians have owned and developed the area," and the State has "continuously governed the territory." *Sherrill*, 544 U.S. at 202, 216.

Appellant and the Creek Nation contend that the tribe "continually governed its [r]eservation lands . . . for the past 200 years." Appellant Br. 20; Creek Br. 15. But appellant identifies examples of tribal "governance" only after 1979, when the modern Creek Constitution was adopted, and does not account for the eighty or so years following allotment and Oklahoma statehood. Appellant Br. 20. The Creek Nation, for its part, cites *McGirt*'s discussion of Creek history and asserts that allotment policies "left the Tribe with significant sovereign functions,' including 'the power to collect taxes.'" Creek Br. 16 (quoting *McGirt*, 140 S.

Ct. at 2466). But the Creek Nation misreads *McGirt*, which discussed a series of federal statutes and policies that successively reduced tribal authority. *See* 140 S. Ct. at 2465-2466. The Court explained that initial policies focused on land distribution and "left the Tribe with significant sovereign functions," but then went on to describe subsequent statutes that "cut[] away further at the Tribe's autonomy"—including the Five Tribes Act of 1906, which abolished tribal taxes. *Id.* at 2466; *see id.* at 2491 (Roberts, C.J., dissenting).

The Creek Nation is thus incorrect when it says that *McGirt* recognized the tribe's "continuous exercise of sovereignty over" its historical territory for the last 200 years. Creek Br. 16. As *McGirt* made clear, even though Congress never "withdrew its recognition of the tribal government," the Creek Nation lost its territorial sovereignty by the early twentieth century. 140 S. Ct. at 2466. It was not until 1936—when Congress "authorized the Creek to adopt a constitution and bylaws"—that the tribal government was permitted to "resume" some of its "previously suspended functions." *Id.* at 2467. And it was not until several decades later—beginning in the 1980s—that the Creek Nation actually attempted to reestablish certain functions of tribal government. *Id.* This eighty-year period of dormancy is in itself a "long lapse of time," *Sherrill*, 544 U.S. at 216, and it belies any argument of continuous tribal sovereignty.

Appellant next contends (Br. 20) that today's Creek government exercises authority over casinos and smoke shops, but those examples only prove that tribal jurisdiction is limited to "islands" of trust, restricted, or tribal land within historical treaty territory. *See, e.g.*, *Indian Country, U.S.A.*, 829 F.2d at 972-973 (holding that state regulations do not apply to a gaming facility on unallotted tribal land); *Ellis* v. *Bristow Muscogee Indian Community*, 11 Okla. Trib. 403 (Muscogee (Creek) Nation Dist. Ct. 2009) (noting that Creek gaming facilities are located "on land held in trust by the United States"); *Muscogee (Creek) Nation ex rel. Beaver* v.

American Tobacco Co., 5 Okla. Trib. 401 (Muscogee (Creek) Nation Dist. Ct. 1998) (noting that tribal smoke shops "are located on restricted or trust land"); *see also* Cherokee Nation Office of Justice, Legal Opinion No. 93-01, *Jurisdiction of the Cherokee Nation Over Criminal Offenses Within the Cherokee Nation*, 8-16 (Sept. 30, 1993) (listing restricted or trust land parcels over which the Cherokee tribe could exercise jurisdiction) <tinyurl.com/2p9de5vz>.

Appellant also argues that Creek law-enforcement officers operate on fee land within the treaty area. Appellant Br. 20. But tribal officers do so because the State allows them to, not because the tribe has sovereign authority over fee land. Cross-deputization agreements provide for the cooperation of federal, state, and tribal officers within treaty territory, in order to address the practical law enforcement problems arising from checkerboard jurisdiction. *See, e.g.*, Cross-Deputization Agreement Between the United States, the Creek Nation, and the State of Oklahoma (May 2, 2006) <tinyurl.com/3fvka2p6>. Those agreements acknowledge checkerboard jurisdiction, authorizing cross-deputized officers to "provide law enforcement services and make lawful arrests *on or near Indian country* within" the historical treaty area. *Id.* at 2 (emphasis added). And they expressly do not "alter or convey any judicial jurisdiction" or "impair, limit or diminish the status of any Agency or the sovereignty of any government of which such Agencies are a part." *Id.* at 9. As defined by Creek legislation, 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) (emphasis added) <tinyurl.com/4nayt35h>.

Similarly, the modern Creek Nation's provision of other services within the treaty area—such as infrastructure, healthcare, and educational programs—is not evidence of sovereign authority over fee land. *See* Creek Br. 23. For one, private parties and non-profits often

provide similar services, and the provision of services alone does not demonstrate sovereign control. Moreover, tribal services are generally provided in partnership with federal and state governments, and they often rely on federal and state funding. For example, the Creek Nation, the State, and local governments have entered into agreements providing for road construction and improvement. *See, e.g.*, *Muscogee (Creek) Nation Completes $734K Improvement on Public Intersection*, The Muscogee Nation (Nov. 14, 2019) <tinyurl.com/2p89rmyv>. Tribal students, many of whom attend Oklahoma's public schools, benefit directly from cooperative programs with the State. *See, e.g.*, OKLA. STAT. tit. 70, § 3-172. Those examples thus do not show tribal sovereign control, much less continuous tribal sovereignty over the last century.

2. The State and its people have formed "justifiable expectations" based on the "longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use." *Sherrill*, 544 U.S. at 215 (citation omitted). Neither appellant nor the Creek Nation addresses this factor. And in arguing that "*McGirt* applies equally to matters of civil jurisdiction," Creek Br. 9, neither articulates a limiting principle to their proposed divestment of state civil jurisdiction.

A State's exercise of civil jurisdiction touches almost every aspect of its citizens' lives, "ranging from zoning and taxation to family and environmental law." *McGirt*, 140 S. Ct. 2482 (Roberts, C.J., dissenting). Under the long-settled understanding of state jurisdiction, Oklahomans have paid taxes to the State, received services from the State, and otherwise relied on the State's regulatory control and governance. To give just a few examples: on fee land, patients have relied on the State's licensing of their doctors, lawyers have studied state law to take the Oklahoma bar exam, renters have relied on state and local governments to enforce fire codes, and homeowners have relied on zoning regulations that do not apply on tribal land. Businesses

have relied on the assumption of state regulatory jurisdiction when deciding whether to locate to Oklahoma and how to invest resources. These Oklahomans are generations removed from any "ancient wrongdoing" at the turn of the twentieth century, and their justifiable expectations "merit heavy weight." *Sherrill*, 544 U.S. at 202, 216.

3. The revival of tribal sovereignty over fee lands within treaty territory would have serious "disruptive practical consequences." *Sherrill*, 544 U.S. at 219. *Sherrill* was clear that this factor considers "present-day and future disruption," *id.* at 215 n.9, including consequences far beyond taxes: "If [the Oneida Nation] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *Id.* at 220.

In Oklahoma, the disruption would be even greater. In *Sherrill*, the Oneida Nation attempted to reassert sovereignty over thirteen parcels of its own land on which the Oneidas operated tribal businesses. *See Sherrill*, 544 U.S. at 211; *City of Sherrill* v. *Oneida Indian Nation of New York*, 337 F.3d 139, 145 (2d Cir. 2001). The most disruptive consequences were thus the creation of a "checkerboard of alternating state and tribal jurisdiction," the resulting burden on state and local governments, and the "adverse[] [effect on] landowners neighboring the tribal patches." 544 U.S. at 218-220. But in Oklahoma, the historical treaty territory encompasses almost half of the State, and the vast majority of that land is not owned by the tribes. Unlike in *Sherrill*, appellant seeks to reassert tribal sovereignty over non-tribal land and the hundreds of thousands of people who live on it. The reassertion of tribal sovereignty would be disruptive for every Oklahoman residing within the historical treaty territory.

At a minimum, a state tax exemption for appellant and similarly situated tribal members

would require the State to pay tens of millions of dollars in tax refunds and deprive the State of billions more in future taxes. *See* ROA, Doc. 23, p. 188. Further, appellant and the Creek Nation argue that the State lacks civil jurisdiction generally, *see* Appellant Br. 10, Creek Br. 9, and *Sherrill* requires consideration of disruptions beyond taxation. Take zoning as an example: *Sherrill* considered disruption to zoning regulations, and federal courts applying *Sherrill* have noted that "avoidance of complying with local zoning and land use laws" is "even more disruptive" than avoidance of taxation. *Cayuga Indian Nation* v. *Village of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005). Under Oklahoma's traditional checkerboard jurisdiction, land-use issues have caused occasional disruptions in the past—for example, neighbors have protested the construction of tribal casinos or smoke shops on restricted lands next to their own fee land. *See, e.g.*, *Discord Reaches Fever Pitch at BA Council Meeting*, Tulsa World (Feb. 8, 2012) <tinyurl.com/458nxpy9>. Those disruptions would surely multiply if fee land were given the same jurisdictional status as restricted land.

Disruptive consequences would affect Indians and non-Indians alike. If the State were to lose civil and regulatory jurisdiction over Indians throughout all treaty territory, residents will hesitate to use the services of tribal professionals without state licenses, renters will hesitate to live or work in buildings owned by tribal members, and businesses will hesitate to operate and invest in eastern Oklahoma. Moreover, *Sherrill* recognized that litigation over civil and regulatory jurisdiction is itself disruptive. *See* 544 U.S. at 220. Even if future courts were to hold that the State can continue to regulate tribal doctors on fee land or that tribal landlords must continue to follow local fire codes, regulatory uncertainty and the ensuing litigation would seriously disrupt the area. That uncertainty would be compounded by questions of tribal authority over non-members, including whether the tribes can regulate non-members on fee

land or whether non-members are subject to the jurisdiction of tribal courts. *See generally* *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981).

Appellant does not dispute that she seeks a remedy with radically disruptive consequences. The Creek Nation insists that any disruption would be "comparatively modest," arguing that "if every eligible Creek citizen" sought a similar refund, the State would suffer an estimated "one-time impact of $64 million . . . with a corresponding figure of $218 million for all Five Tribes"—a fraction of the State's total tax revenue. Creek Br. 21-22. That argument fails under *Sherrill*, in which the Oneida Nation claimed property tax exemption for only thirteen parcels of land, and the "total tax liability . . . [was] approximately $15,000." *Sherrill*, 145 F. Supp. 2d 226, 233 (N.D.N.Y. 2001). The Court did not compare that modest sum to New York's total tax revenue; instead, it considered "disruptive practical consequences" beyond the immediate tax claim. *Sherrill*, 544 U.S. at 219.

Under the principles articulated in *Sherill*, the Creek Nation cannot "rekindl[e] embers of sovereignty that long ago grew cold." 544 U.S. at 214. The tribe has not exercised territorial sovereignty over fee lands for over a century, and reviving that sovereignty would upset the justifiable expectations of Oklahomans and cause serious disruption across the State.[4]

C. Appellant's And Amici's Efforts To Distinguish *Sherrill* Fail

Appellant does not meaningfully address the *Sherrill* factors. She discusses only one factor of the three, and she does not identify a single example of continuous tribal sovereignty

[4] The Creek Nation argues that *McGirt* limited *Sherrill*'s applicability, citing the Second Circuit's decision in *Cayuga Nation* v. *Tanner*, 6 F.4th 361 (2021). Creek Br. 17. But *McGirt* pointed to the very equitable principles articulated in *Sherrill* and said nothing about limiting them. In any event, the Second Circuit's decision concerned express preemption of state authority over "Indian lands" under the Indian Gaming Regulatory Act, and did not squarely address the *Sherrill* analysis. *Tanner*, 6 F.4th at 378. Instead, the court's holding was based on the statutory definition of "Indian lands," which did not require an Indian tribe to "exercise governmental power" over an Indian reservation. *Id.*

over fee land. Instead, appellant argues that *Sherrill* does not apply because she is an individual, not a tribe, and because this case is "not an action brought by the Nation to unilaterally assert its sovereign interests over property the Nation purchased in fee." Appellant Br. 20.

That argument fails. *Sherrill* did not turn on the specific type of tax at issue, and the Court instructed that its principles are broadly applicable. The Court explained that *Sherrill*'s equitable principles apply to any claim with an "equitable cast"—not strictly to claims in equity—and regardless of whether tribal sovereignty is "asserted affirmatively or defensively." 544 U.S. at 214 n.7. As the Second Circuit has observed, "the broadness of the Supreme Court's statements indicates . . . that *Sherrill*'s holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to 'disruptive' Indian land claims more generally." *Cayuga Indian Nation* v. *Pataki*, 413 F.3d 266, 274 (2d Cir. 2005).

Appellant is not a tribe, but her claims rely on the reassertion of Creek sovereignty. *See* Appellant Br. 11-12. She argues that she is exempt from state taxes under *McClanahan*, a decision that "relied heavily on the doctrine of tribal sovereignty." *Sac & Fox Nation*, 508 U.S. at 123. A ruling in her favor necessarily involves a determination that the Creek Nation has sovereign authority over fee land within treaty territory. That determination would apply "more generally" to future claims, *Pataki*, 413 F.3d at 274, with consequences far beyond appellant's taxes. Indeed, the Creek Nation expects that this case will affect the tax liability of other Creek citizens, as well as members of other Oklahoma tribes. *See* Creek Br. 31.

Appellant also contends that *Sherrill* is inapplicable because this case does not involve a "unilateral" revival of tribal sovereignty. *See* Br. 20. But she does not explain why her claim is not unilateral. It is true, of course, that the Creek Nation's historical territory was originally

conveyed by "bilateral" treaties, Creek Br. 18, but so too was the Oneida land in *Sherrill*. *Sherrill*'s focus is on the "unilateral *reestablishment* of present and future Indian sovereign control," not on the original conveyance. 544 U.S. at 219 (emphasis added).

In *Sherrill*, the Court explained that the Oneida Nation's reassertion of sovereignty was unilateral because it did not "tak[e] account of the interests of others with stakes in the area's governance and well-being," including state and local governments and neighboring landowners. 544 U.S. at 220-221. The Oneidas' proper course of action, the Court instructed, was through 25 U.S.C. § 465, which provides that the Secretary of the Interior may "acquire land in trust for Indians" and exempts that land from state and local taxation. 544 U.S. at 220-221. Under that statute and its implementing regulations, the Secretary must consider multilateral interests, including the tribe's need and use for the land, the future impact on state and local governments, and "jurisdictional problems and potential conflicts of land use which may arise." *Id.* at 221 (citation and alteration omitted). The Creek Nation is not unfamiliar with the procedures to take land into trust, *see* p. 22, *supra*, but there is no dispute that it did not do so with respect to the unrestricted, non-tribal fee land here. *Sherrill* is thus squarely applicable and bars appellant's claim for tax immunity.

Finally, the Creek Nation's argument that equitable considerations cannot unsettle clearly established rights or play a role in "the administration of tax laws" is misplaced. Creek Br. 19 (citations omitted). Appellee relies on *Sherrill* to preserve and define longstanding legal rights and duties, not to unsettle them, and as a defense against renewed claims of dormant sovereignty, not against collection of taxes. In any event, *Sherrill* is a principle of federal law, and it is not confined by the limitations this Court has placed on state-law equitable defenses.

CONCLUSION

The order of the Oklahoma Tax Commission should be affirmed.

Respectfully submitted,

KANNON K. SHANMUGAM
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300

ELIZABETH FIELD
TAYLOR FERGUSON
KIERSTEN HAMILL
OKLAHOMA TAX COMMISSION
P.O. Box 269056
Oklahoma City, OK 73126
(405) 522-9441
elizabeth.field@tax.ok.gov

APRIL 17, 2023

CERTIFICATE OF SERVICE

I certify that a true and correct copy of appellee's answering brief was mailed on April 17, 2023, to Michael D. Parks, P.O. Box 3220, McAlester, Oklahoma, 74502, by depositing it in the U.S. mail, postage prepaid.

KANNON K. SHANMUGAM