ORIGINAL **2025 OK 48**

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

ALICIA STROBLE,

Protestant/Appellant,

v.

OKLAHOMA TAX COMMISSION,

Respondent/Appellee.

No. 120,806

FOR OFFICIAL PUBLICATION

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

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

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

tribe's reservation has not been preempted by federal law, and no Oklahoma statute or regulation exempts Stroble from paying income tax. The Oklahoma Tax Commission properly rejected Stroble's claimed tax exemption under Oklahoma Administrative Code (O.A.C.) § 710:50-15-2(b) and denied her protest.

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

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

A. Ordinary principles of preemption

¶4 Stroble has not identified a treaty or federal statute that preempts Oklahoma's taxing authority.[1] Rather, she argues, when it comes to the special area of state taxation of Indians in Indian country, the ordinary preemption analysis is reversed. Stroble relies on *Oklahoma Tax Commission v. Sac & Fox Nation*,

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

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

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

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

Castro-Huerta, 597 U.S. at 636 (quoting *Lessee of Pollard v. Hagan*, 3 How. 212, 228, 11 L.Ed. 565 (1845)). Then Justice Kavanaugh, writing for the majority,

rejected the reversal of the preemption analysis, as urged by Justice Gorsuch and now Stroble:

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

Id. at 653 (emphasis in original).

¶6 The United States Supreme Court's most recent statement on preemption in *Castro-Huerta* undermines Stroble's *Sac & Fox* argument. I am persuaded that, in light of *Castro-Huerta,* the default is the State has jurisdiction *unless that jurisdiction is preempted.*

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

comes to state taxation of tribal members.[2] Stroble asserts that, in *McClanahan*, the United States Supreme Court held "absent express authorization from Congress," states are preempted from imposing personal income taxes on tribal members living and working on the tribe's reservation. Brief in Chief, at 12. The United States Supreme Court did not actually write those words in *McClanahan*.

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

Second, the tribal member in *McClanahan* was, presumably, not the beneficiary of state-provided goods and services in the way that Stroble is. *See* Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 Tax Law. 897, 1211-12 (2010). Whereas the Navajo Reservation in Arizona was widely recognized and under general federal jurisdiction, it was generally believed there were no Indian reservations in Oklahoma from 1907 to 2020 when *McGirt v. Oklahoma*, 591 U.S. 894 (2020), was decided. For 118 years the State has undertaken the provision of infrastructure and public services to all people throughout Oklahoma's entire territory. Unlike the tribal member in *McClanahan*, the state-provided goods and services within the Creek Reservation are no different than state benefits provided in other parts of the State.

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

The language to which Stroble refers first appeared in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), which was decided at the same time as *McClanahan*:

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

Id. at 148 (emphasis added). It should be noted that *Mescalero* concerned taxes imposed on activities outside the boundaries of a reservation. Therefore, *Mescalero's* brief discussion about income from activities carried on within the boundaries of the reservation and reference to *McClanahan* is dicta.[3]

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

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

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

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

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

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

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.

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

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

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "(t)he relation of the Indian tribes living within the borders of the United States . . . (is) an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

McClanahan, 411 U.S. at 172-173 (citations and footnotes omitted). *McClanahan*, when read closely, does not begin with a presumption that tribal members living and working on the reservation are immune from state taxation. *McClanahan* begins with an understanding that a State has jurisdiction over all its citizens, including tribal members. State law applies unless the State's jurisdiction is preempted by federal law or infringes on tribal self-government. The *McClanahan* Court does not apply a reversed preemption analysis. Rather, the Court undertakes an ordinary preemption analysis "[looking] instead to the applicable treaties and statutes which define ***the limits of state power***." *Id.* at 172 (emphasis added). The *McClanahan* Court examined treaties and federal statutes to discern

whether the State's sovereign authority to tax tribal members living and working on the reservation had been preempted, not whether immunity from state taxation had been preempted. The Court looked to see if Congress had expressly provided a tax exemption or prohibited Arizona from taxing Indians, not if Congress had expressly authorized Arizona to tax Indians.[5] As one commentor has said:

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

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

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[5] *See, e.g.*, *McClanahan*, 411 U.S. at 175 ("It is thus unsurprising that this Court has interpreted the Navajo treaty to *preclude extension of state law*—including state tax law—to Indians on the Navajo Reservation.") (emphasis added); *id.* at 176 ("It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed. But we have in the past construed language far more ambiguous than this as *providing* a tax exemption for Indians.") (emphasis added); *id.* at 177 ("While the Buck Act itself cannot be read as *an affirmative* grant of tax-exempt status to reservation Indians . . . .") (emphasis added); *id.* at 177-178 (noting 25 U.S.C. § 1322(a) "cannot be read as *expressly conferring* tax immunity upon Indians") (emphasis added).

relevant treaty and statutes leave for the Federal Government and for the Indians themselves.").

¶9 Therefore, I would not apply a reversed preemption analysis in matters of state taxation. Just as Oklahoma does not need a permission slip from Congress to exercise criminal jurisdiction within its territory, *see Castro-Huerta*, 597 U.S. at 653, Oklahoma does not need a permission slip from Congress to exercise taxing jurisdiction within its territory. Oklahoma has taxing jurisdiction within the boundaries of a reservation unless that jurisdiction has been preempted by a treaty or federal statute. Again, Stroble has not identified a treaty or federal statute that preempts Oklahoma's taxing authority. Oklahoma's sovereign authority to tax the income of its residents, who are tribal members living and working within the boundaries of the tribe's reservation, has not been preempted under ordinary principles of federal preemption.

B. Infringement on tribal self-government

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

¶11 Stroble objects to the use of the *Bracker* balancing test in this case. Stroble argues the *Bracker* balancing test does not apply when, as here, the State seeks to impose a tax directly on a tribal member inside Indian country. Stroble contends the *Bracker* balancing test applies only when the State imposes taxes on non-Indians inside Indian country. Stroble relies on *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995). One of the issues[6] in *Chickasaw Nation* was whether a State could impose its motor fuels excise tax upon fuel sold by the Tribe's retail stores on tribal trust land. *See id.* at 452-453. After assuming Congress had not expressly authorized the imposition of Oklahoma's fuels tax on fuel sold by the Tribe on tribal trust land, the Court turned to whether the state tax was nonetheless permitted because it did not infringe on tribal self-government. *Id.* at 457. The Court denied the State's request to balance the state and tribal interests:

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

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

Id. at 458 (citing *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992)) (internal quotations and brackets omitted). The Court focused on whether the legal incidence of the excise tax rested on the Tribe or tribal members (retailers) or non-Indians (wholesaler or non-Indian consumers). *Id.* at 458-459. Because it rested on the Tribe, the Court applied the categorical rule that the tax cannot be enforced absent clear congressional authorization. *Id.* at 459. The Court explained, "[b]ut if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy . . . ." *Id.* Stroble asserts that, because Congress has not expressly authorized Oklahoma to tax the income of tribal members living and working within the boundaries of the tribe's reservation, the categorical rule that the State is without such power applies. Stroble argues there are no interests to balance, and she is exempt.

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

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

> In the area of state taxation, however, Chief Justice Marshall's observation that "the power to tax involves the power to destroy," has counseled a more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it," we have held, a State is without power to tax reservation lands and reservation Indians. And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has "made its intention to do so unmistakably clear."

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

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

Castro-Huerta, 597 U.S. at 636. The *McClanahan* Court also recognized this shift away from the *Worcester* principle that States have no role to play within

reservation boundaries toward state sovereignty and federal preemption. *See McClanahan*, 411 U.S. at 168-173.

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

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

Castro-Huerta, 597 U.S. at 639, n.2 (citing *Bracker*, 448 U.S. at 142-143; *McClanahan*, 411 U.S. at 171-172) (emphasis added). Furthermore, this Court and the Oklahoma Court of Criminal Appeals, thus far, have applied *Bracker* in matters involving only Indians in Indian country. *See Milne v. Hudson*, 2022 OK 84, ¶¶ 17-20, 519 P.3d 511, 515-516 (analyzing whether state jurisdiction to issue civil protection orders in matters involving only Indians in Indian country infringes on tribal self-government); *Deo v. Parish*, 2023 OK CR 20, ¶¶ 13-16, 541 P.3d 833, 837-838 (applying *Bracker* balancing test in determining that the Oklahoma district court's subject matter jurisdiction over Indians in Indian country had not been preempted); *City of Tulsa v. O'Brien*, 2024 OK CR 31, ¶¶ 31-35, --- P.3d ---

(applying *Bracker* balancing test and finding the City's jurisdiction to prosecute non-member Indians for misdemeanor traffic offenses in Indian country did not infringe on tribal self-government); *Stitt v. City of Tulsa*, 2025 OK CR 5, ¶ 8, 565 P.3d 857, 860 (same).

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

> [W]e reject the suggestion that the Williams test was meant to apply in this situation. It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians. In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The Williams test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.
>
> The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves.

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

¶16 I am not persuaded that *McClanahan* dispensed with the infringement test for every situation where the State imposes a tax on an Indian in Indian country or

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

¶17 Second, the *McClanahan* Court indicated that Arizona had no interest when it came to Navajo Indians within the Navajo Reservation. While that may have been true in Arizona, where certain lands were reserved "for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision," *McClanahan*, 411 U.S. at 174-175, that is not the case here in Oklahoma. In light of *Castro-Huerta's* recent reiteration of state sovereignty with respect to reservations recognized in *McGirt* and its progeny and Oklahoma's unique history with respect to the Creek Reservation,

both the State of Oklahoma and the Muscogee (Creek) Nation can "fairly claim an interest in asserting their respective jurisdictions," over Indians in Indian country. *Id.* at 179. The *Williams* infringement test and the *Bracker* balancing test were designed to resolve such conflict by providing that the State can protect its interest up to the point where tribal self-government would be affected. *See id.*

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

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

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

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

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

> specific context, the exercise of state authority would violate federal law.

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

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

502 U.S. at 265. The Court surmised that the State's power to assess and collect ad valorem taxes on fee land within the reservation is not "significantly disruptive of tribal self-government." *Id.* at 265.

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

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

boundaries. I would find the Oklahoma income tax does not unlawfully infringe on the Muscogee (Creek) Nation's right to tribal self-government.

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

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

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

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

¶23 In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the United States Supreme Court examined a history similar to Oklahoma's history of long-time state sovereign control over the territory. The Oneida Indian Nation of New York's aboriginal homeland was in central New York. *See id.* at 203. In 1788, the Tribe ceded their lands to New York but retained a reservation of 300,000 acres. *Id.* Throughout the 19th century, the Federal Government and State of New York

implemented policies to pressure or remove tribes to the west and open reservation lands in New York to white settlement. *Id.* at 205-207. The Tribe sold the subject parcels of land to one of its members in 1805, who then sold the land to a non-Indian in 1807. *Id.* at 211. By 1920, the Tribe had sold all but 32 acres of their reservation. *Id.* at 207. For 200 years, the State of New York and its county and municipal units continuously governed the territory which included the historic Oneida Reservation. *Id.* at 202. Non-Indians owned and developed the area that once composed the Tribe's reservation. *Id.* During this time the land converted from wilderness into cities like Sherrill and property values greatly increased. *Id.* at 214-215. New York's sovereignty over the area was generally accepted or a matter of indifference until the 1970s. *Id.* at 214. Over 99% of the area's present-day population is non-Indian. *Id.* at 211.

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

¶25 Justice Ginsburg, writing for the majority, held the "standards of federal Indian law and federal equity practice preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214 (internal quotations and footnote

omitted). The Supreme Court evaluated the Tribe's claims "in light of the long history of state sovereign control over the territory." *Id.* The Court "observed in the different, but related, context of the diminishment of an Indian reservation that '[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use,' may create 'justifiable expectations.'" *Id.* at 215 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977)). The Court found "[s]imilar justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by [the Tribe], merit heavy weight here." *Id.* at 216-217.

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

added). The Court found the Oneidas had not exercised regulatory control over the properties for two centuries and, therefore, "[p]arcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor the historic wisdom in the value of repose." *Id.* at 219 (internal quotations and citation omitted).

¶27 Finally, the Court discussed "the impracticability of returning to Indian control land that generations earlier passed into private hands." *Id.* The Court found "these pragmatic concerns about restoring Indian sovereign control over land magnified exponentially here, where development of every type imaginable has been ongoing for more than two centuries." *Id.* (internal quotations and citation omitted). The Court concluded:

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

Id. at 219-220 (internal citations and quotations and brackets omitted). The Court further warned: "If [the Tribe] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other

regulatory controls that protect all landowners in the area." *Id.* at 220. The Court concluded that "the distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Id.* at 221 (footnote omitted).

¶28 In some respects, Oklahoma's situation parallels that of the city of Sherrill. The Creek Reservation was established in 1832 in Indian Territory in present-day Oklahoma. Pursuant to the Treaty of 1866, the Federal Government bought back some of the reservation lands and the Creeks held fee patent to "the reduced Creek Reservation." In the late 19th century, the allotment era began, and white settlers flooded into Indian Territory. By 1901, alienation restrictions were lifted, and tribal members could freely sell their fee land to Indians and non-Indians. Oklahoma achieved statehood in 1907 and what had been Indian Territory became a part of the State's territory. For more than a century, Oklahoma and its county and municipal units have continuously governed the territory which includes the Creek Reservation recognized in *McGirt*. During this time, the land developed into towns and cities like Tulsa.[8] The Creek Reservation covers roughly 3 million acres

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

where more than 1 million people reside. The property where Stroble resides and tribal members' income and activities thereon have been subject to state and local taxation for generations. Today, the Creek Reservation is predominately non-Indian. Only 10-15% of Oklahoma residents are Indian. *See McGirt*, 591 U.S. at 938 (Roberts, C.J., dissenting).

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

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

changed with the stroke of a pen in 2020.[9] Justice Gorsuch acknowledged that upon *McGirt* being released most Oklahomans would be surprised to find out they had been living on an Indian reservation. *See McGirt*, 591 U.S. at 933. Since *McGirt*, several other tribes have had their historic reservations affirmed by the Oklahoma Court of Criminal Appeals.[10] Collectively, "[t]he rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians." *Id.* at 938 (Roberts, C.J., dissenting) (accounting for reservations of Muscogee (Creek), Chickasaw, Choctaw, Cherokee, and Seminole tribes only).

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

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[9] There are a handful of other non-Indian communities that exist within reservation boundaries, but none have the population size or land area affected here. *See McGirt*, 591 U.S. at 932 ("But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today."). The Saginaw Chippewa Reservation includes Mount Pleasant, Michigan, which had a population of 21,243 in 2021. The Puyallup Reservation includes sizeable portions of the City of Tacoma, Washington, which has a population of 200,000, and other predominantly non-Indian cities. The Omaha Reservation includes Pender, Nebraska. *See Nebraska v. Parker*, 577 U.S. 481 (2016). Pender's population was 1,051 in 2021.

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

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

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

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

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

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

¶34 In summary, applying precedent of the United States Supreme Court, I conclude that federal law does not preempt Oklahoma from imposing income tax on tribal members who live on unrestricted, non-trust, private fee land within

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

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

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

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

¶37 In their briefs, the parties discuss in detail whether the Commission exempted Stroble from income taxation by promulgating O.A.C. § 710:50-15-2(a)(1) and (b)(1). This is largely a moot point. Because no federal law prohibits

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

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

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

¶39 In my view, even if the Commission could create such an exemption, it did not adopt 18 U.S.C. § 1151 of the Major Crimes Act's definition of "Indian country"

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

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

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

¶41 The Major Crimes Act provides:

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

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

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

O.A.C. § 710:50-15-2(a)(1). Notably, the Commission does not define "Indian country" as "however the term is defined in 18 U.S.C. § 1151" or the like. Congress has demonstrated how to define "Indian country" as synonymous with 18 U.S.C. § 1151, but that is not what the Commission chose to do.[13] For instance, Congress

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

adopted the Major Crimes Act's definition in 18 U.S.C. § 2265(e), which provides that state and tribal courts have concurrent jurisdiction to issue and enforce civil protection orders "in the Indian country of the Indian tribe ***(as defined in Section 1151)*** . . . ." 18 U.S.C. § 2265(e) (emphasis added); *see Milne v. Hudson*, 2022 OK 84, ¶¶ 11-16, 519 P.3d 511, 513-515 (applying the Major Crimes Act's definition prescribed in 18 U.S.C. § 2265(e)).

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

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

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

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68 O.S.Supp.2014, § 500.3(38) ("'Indian country' means . . . The term shall also include the definition of Indian country as found in 18 U.S.C., Section 1151 . . . .").

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

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

The Bluebook: A Uniform System of Citation 62 (Columbia Law Review Ass'n *et al.* eds., 21st ed. 2020). The proposition stated in *Sac & Fox* was that Congress has defined the term "Indian country" broadly. The inferential step between 18 U.S.C. § 1151 and the proposition is that the definition at 18 U.S.C. § 1151, which includes all lands within the limits of any Indian reservation, all dependent Indian communities, and all Indian allotments, is a broad definition. Therefore, the broad definition in 18 U.S.C. § 1151 clearly supports the proposition that Congress has defined the term broadly.[14]

¶44 *Sac & Fox* did not expressly adopt the definition from 18 U.S.C. § 1151 nor did the United States Supreme Court directly quote the Major Crimes Act's definition followed by a citation to 18 U.S.C. § 1151 with no signal. We know the

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

United States Supreme Court was not incorporating 18 U.S.C. § 1151 because §1151's "broad" definition does not actually include the words "trust land" and "informal reservation." *Sac & Fox* coined the term "informal reservation" when it determined that "trust land" constituted an "informal reservation" and was, therefore, considered "Indian country" for purposes of state taxing authority. *See Sac & Fox*, 508 U.S. at 124-125, 128; *see also Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 511 (1991) (finding no distinction between tribal trust land and reservations, because trust land has been validly set apart for Indian use under the superintendence of the federal government). In 2004, the Commission promulgated O.A.C. § 710:50-15-2. The rule's definitions of "Indian country" and "informal reservation" are primarily based on *Sac & Fox,* not 18 U.S.C. § 1151.[15]

¶45 Finally, there is a critical difference between the statutory language in 18 U.S.C. § 1151 and the language used in O.A.C. § 710:50-15-2(a)(1). The United States Supreme Court has said the statutory language "notwithstanding the issuance of any patent" in the Major Crimes Act "expressly contemplates private land ownership within reservation boundaries." *McGirt*, 591 U.S. at 906. The Oklahoma tax rule, however, makes no reference to land patents or fee land within a reservation. Unlike the Major Crimes Act, the state tax regulation's definition of

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[15] The Commission added to the *Sac & Fox* definition the emphasized language "and Indian allotments, *the Indian titles to which have not been extinguished* . . . ." O.A.C. § 710:50-15-2(a)(1) (emphasis added). This language modifying Indian allotments is included in 18 U.S.C. § 1151's definition.

"Indian country" does not expressly contemplate unrestricted, non-trust, private fee land within the boundaries of a reservation.

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

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

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

> (5) The member claims residence on ***unrestricted, non-trust property***, owned by an Indian Housing Authority. Such property does not fall within the definition of "Indian Country," nor does residence thereon constitute residence within a dependent Indian community.

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

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

V. Conclusion

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