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NO. TC-120806

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ALICIA STROBLE,
Protestant/Appellant,

vs.

OKLAHOMA TAX COMMISSION,
Appellee.

2-13-23

AMICUS CURIAE BRIEF BY THE CHEROKEE NATION, CHICKASAW NATION, AND CHOCTAW NATION OF OKLAHOMA

Appeal from the Oklahoma Tax Commission
Commissioners Sitting *En Banc*
Case No. T-21-014-S

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STATUTES

INTEREST OF AMICI

Pursuant to Oklahoma Supreme Court Rule 1.12(a)(1), the Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma ("Nations"), with the consent of the parties, *see* Exs. 1-2, file this *amicus curiae* brief in support of Protestant/Appellant Alicia Stroble ("Stroble"). Each Nation is a federally recognized Indian tribe, *see* 88 Fed. Reg. 2112, 2112, 2114 (Jan. 12, 2023), occupying and governing a Reservation established for it by treaty, which is Indian country under federal law. *See* 18 U.S.C. § 1151(a); *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867, *cert. denied* 142 S. Ct. 935 (2022); *Spears v. State*, 2021 OK CR 7, 485 P.3d 873, *cert. denied* 142 S. Ct. 934 (2022); *Bosse v. State*, 2021 OK CR 30, ¶ 12, 499 P.3d 771, *cert. denied* 142 S. Ct. 1136 (2022); *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 15, 497 P.3d 686, *cert. denied sub nom. Parish v. Oklahoma*, 142 S. Ct. 757 (2022).

The Nations' exercise of sovereignty on their Reservations is good for Oklahoma. It improves the quality of life on their Reservations while reducing demands on state and local governments' budgets by, for example, paving roads, operating health clinics, providing local policing, and funding education. *See* Kyle D. Dean, *The Economic Impact of Tribal Nations in Oklahoma Fiscal Year 2019* 9-14, 19-20 (2022), https://bit.ly/38spRxH. In 2019, all Oklahoma tribes' expenditures on government, roads projects, and other capital expenditures exceeded $1.2 billion. *Id.* at 20. In their sovereign capacities, the Nations also engage in economic development activities that benefit Oklahoma. In 2019, Oklahoma tribes and tribal businesses directly employed approximately 54,200 Oklahomans and supported another 59,240 jobs through the multiplier effect of tribal economic output. *Id.* at 21. That is an increase of 30% from 2011, and "this growth is especially important in rural areas where the national trend is decline." *Id.* at 22. In 2019 alone, Oklahoma tribal governments and enterprises accounted for approximately $15.6 billion of goods and services and $5.4 billion

in wages and benefits in Oklahoma. *Id.* at 4. State taxation, both direct and arising from the multiplier effect of tribal economic activity, generated over $382 million in state tax revenue in 2019. *Id.* at 23. And thanks in part to tribal contributions, the State's economy is strong: Gross state revenue in the past 12 months is $17.48 billion, a 12.8% increase from the previous twelve months. *See Oklahoma State Treasurer: Gross Receipts Remain Resilient*, Duncan Banner (Feb 8, 2023), https://bit.ly/3lkRsXL.

The Nations have a special interest in the Appellee Oklahoma Tax Commission's ("OTC") claim of authority to tax Indians who live and work in Indian country—and, in this instance, *work directly for their own tribe*—as it threatens the Nations' sovereignty, the rule of law on which they Nations rely, and their productive relationship with the State.

The Nations' sovereignty is threatened because "the power to tax involves the power to destroy," *County of Yakima v. Confederated Tribes & Bands*, 502 U.S. 251, 258 (1992) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)). If the State has the power to convert reservation economic activity into state tax dollars, it would negate "the right of reservation Indians to make their own laws and be ruled by them," *see, e.g.*, *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Fisher v. Dist. Ct.*, 424 U.S. 382, 386 (1976) (per curiam); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 181 (1973), and jeopardize each Nation's ability to operate programs and services that benefit their members *and* the State.

The OTC's claim of authority in this case also undermines the rule of law by advancing claims that controlling U.S. Supreme Court decisions expressly reject. In *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114 (1993), the Court held that absent express congressional authorization, a State may not tax the income of a tribal member who lives and works in her tribe's Indian country, as that term is broadly defined in 18 U.S.C. § 1151. 508

U.S. at 123. Oklahoma integrated that ruling into its *own* laws, Okla. Admin. Code § 710:50-15-2, but the OTC then misapplied that ruling in this case. And *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), establishes that the Muscogee (Creek) Reservation ("MCN Reservation") continues to exist and is Indian country under 18 U.S.C. § 1151, 140 S. Ct. at 2460-68, but the OTC won't apply it here either.

In refusing to apply these clear rulings to this case, the OTC also threatens foundational principles on which the Nations' productive relationship with the State depends. The Nations have longstanding intergovernmental ties and special interests in negotiated frameworks that assist in resolving and even avoiding conflicts. After the Supreme Court ruled in favor of the Nations' position in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 455-56 (1995), by applying the rule against state taxation of Indian tribes in Indian country to motor fuel sales, and in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe*, 498 U.S. 505, 510 (1991), by ruling that tribal sovereign immunity barred Oklahoma from enforcing its tobacco taxes on tribal retail sales in Indian country, the State and tribal governments came together—in both instances—to form tax agreements to neutralize disputes and implement mechanisms for sharing tax revenues.[1] Those agreements have increased productive economic activity and tribal and state revenues. They are still in effect today but may be threatened by the OTC's abandonment of adherence to established law.

Productive tribal-state relations depend on adherence to the rule of law, including recognition of the Nations' sovereignty under federal law. As the OTC now seeks to extinguish a fundamental element of that sovereignty, the Nations file this brief to prevent that result.

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[1] These agreements are available at *Tribal Compacts and Agreements,* Okla. Sec'y of State, https://www.sos.ok.gov/gov/tribal.aspx (last accessed Feb. 12, 2023).

STATEMENT

In *In re Stroble* ("*Stroble*"), No. T-21-014-S (Okla. Tax Comm'n Oct. 4, 2022), the OTC, sitting *en banc*, held that Stroble, a member of the Muscogee (Creek) Nation ("MCN") who lived and earned her income on the MCN Reservation—indeed, she worked for MCN—during the 2017-19 tax years, was subject to state income tax for those years, reversing the Findings, Conclusions and Recommendations ("FCR") of an Administrative Law Judge. *Stroble* at 3-4, 18-19.

The OTC decided the case by applying its Exempt Tribal Income Exclusion rule (the "ETIR"), Okla. Admin. Code § 710:50-15-2. "[B]oth parties agree[d] that [Stroble] met two of the three requirements" set forth in the ETIR, as "[she] is an enrolled member of the [MCN]," and her "income was earned from sources within Indian country under the jurisdiction of the [MCN]," *id.* at 10. Accordingly, "the determinative issue [wa]s whether [Stroble] was living within Indian Country under the jurisdiction of the [MCN] during the 2017, 2018, and 2019 tax years for purposes of the [ETIR]." *Id.* at 9 (citation omitted).

Under the ETIR, "Indian country" means "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]." *Id.* at 10-11 (quoting Okla. Admin. Code § 710:50-15-2(a)(1)) (footnote omitted).[2] Stroble did not claim to live in a dependent Indian community or on an Indian allotment, so the OTC said she had to prove that she lived on a formal or informal reservation. *Id.* at 11. The ETIR does

[2] In the appended footnote the OTC stated that "[t]he inclusion of formal and informal reservations in the administrative rule comes directly from [*Sac & Fox*] wherein the Court included informal reservations in the definition of Indian Country." *Id.* at 11 n.6 (quoting *Sac & Fox*, 508 U.S. at 123).

not define "formal reservation," but the OTC said it means "federally owned land 'reserved from sale' under federal law," and "validly set apart for use by the Indians, under the federal superintendence of the government." *Id.* (quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909) and citing *United States v. McGowan*, 302 U.S. 535, 539 (1938)). The Rule does define "informal reservation," which means "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.* at 11 (quoting Okla. Admin. Code § 710:50-15-2(a)(2)).

The OTC held that Stroble did not satisfy either definition. She had "acquired fee title to the property . . . from a non-tribal grantor" in 2008, and her property therefore "[wa]s not a formal reservation owned by the federal government." *Id.* Her property was not an informal reservation either, as it was neither held in trust (by MCN or by the United States for MCN), nor held in restricted fee status. *Id.* at 11-12.

Stroble argued that she resided in Indian country during the relevant tax years because she resided within the boundaries of the MCN Reservation, which *McGirt* held was never disestablished and is Indian country under 18 U.S.C. § 1151(a). *Id.* at 12. But the OTC ruled that "the *McGirt* decision was limited to whether the defendant's crimes were committed within Indian Country, as defined by 18 U.S.C. § 1151, in order to determine whether the state's criminal jurisdiction was preempted by federal law, specifically, the Major Crimes Act," *id.* at 13 (citing *McGirt*, 140 S. Ct. at 2459) (footnote omitted), and that "under [*Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022)], Oklahoma clearly has concurrent jurisdiction, even under the *McGirt* boundaries, unless otherwise preempted," *id.* at 15.

In closing, the OTC stated *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005)), "supports the same conclusion," *Stroble* at 16-17 (citing *Sherrill*, 544 U.S. at 202-03), and that Stroble's claim would fail "*even if* the Supreme Court were to expand *McGirt* to state taxation matters," because it "is a new rule of criminal procedure (decided in July of 2020), and as such, is not retroactive," *id.* at 17 (citing *Matloff*, 2021 OK CR 21, ¶ 6, 497 P.3d 686).

I. AS STROBLE LIVES AND WORKS ON THE MCN RESERVATION FEDERAL LAW BARS STATE TAXATION OF HER INCOME.

A. The *Sac & Fox* Decision Bars State Taxation Of Indians Who Live And Work In Indian Country, Which Includes Indian Reservations.

Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114 (1993), bars state taxation in this case by reaffirming that "a State [i]s without jurisdiction to subject a tribal member living on the reservation, and whose income derived from reservation sources, to a state income tax absent an express authorization from Congress," *id.* at 123 (citing *McClanahan*)[3] and holding "that a tribal member need not live on a formal reservation to be

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[3] The holding of *McClanahan* became the basis of a categorical rule, also referred to as the *per se* rule, barring state taxation of Indians on Indian reservations. As the Court explained in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973),

> [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* . . . lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

The rule is now well settled. *E.g.*, *County of Yakima*, 502 U.S. at 258 ("[A]bsent cession of jurisdiction or other federal statutes permitting it, . . . a State is without power to tax reservation lands and reservation Indians." (first alteration in original) (quoting *Mescalero Apache*, 411 U.S. at 148)); *id.* at 267 ("[A]s the Court observed recently in *California v. Cabazon Band of Mission Indians*, [480 U.S. 202, 215 n.17 (1987)], we have traditionally followed 'a *per se* rule' '[i]n the special area of state taxation of Indian tribes and tribal members.'" (third alteration in original)); *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶ 38, 237 P.3d 199 ("[A]bsent congressional consent, there is a 'categorical bar' to state tax levies

outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country'" as broadly defined in 18 U.S.C. § 1151, 508 U.S. at 123.[4]

In *Sac & Fox*, the Court decided the extent to which the state income tax applies to Indians in Indian country in Oklahoma. The OTC "contend[ed] that the [state income] tax applies equally to members of Indian tribes and to nonmembers," including those who "reside within Sac and Fox jurisdiction." *Id.* at 119. The Tribe contended that the OTC was barred from "taxing the income of people who earn their income within Sac and Fox territory and of people who reside within the Tribe's jurisdiction," relying largely on *McClanahan*. *Id.* at 120. The OTC argued that "neither *McClanahan* nor any other of [the Court's] cases discussing Indian sovereign immunity were relevant," that those cases "applied only to tribes on established reservations," and that "unless the members of the Sac and Fox Nation live on a reservation the State has jurisdiction to tax their earnings." *Id.* at 120-21, 123.

The Court rejected the OTC's argument, holding that Indians who live and earn their income in Indian country, as defined by 18 U.S.C. § 1151, are immune from the state income tax, and that "a tribal member need not live on a formal reservation . . . ; it is enough that the

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whose legal incidence falls directly upon tribes or tribal members for conduct that takes place wholly on tribal land."), *abrogation on other grounds recognized by Montgomery v. Airbus Helicopters, Inc.*, 2018 OK 17, ¶¶ 34-36, 414 P.3d 824; *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012).

[4] 18 U.S.C. § 1151 provides that "Indian country" means:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (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.

member live in 'Indian country[,]'" which "Congress has defined . . . broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. *See* 18 U.S.C. § 1151." *Id.* at 123.

The Court further held that while "[t]he Indian sovereignty doctrine . . . did not provide 'a definitive resolution of the issues'" in *McClanahan*, "it did 'provid[e] a backdrop against which the applicable treaties and federal statutes must be read.'" *Id.* at 123-24 (third alteration in original) (quoting *McClanahan*, 411 U.S. at 172 and citing *Washington v. Confederated Tribes*, 447 U.S. 134, 178-79 (1980) (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part)). And while "exemptions from tax laws should, as a general rule, be clearly expressed," *id.* at 124 (citing *McClanahan*, 411 U.S. at 176), "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," *id.* That holding flatly rejects the OTC's assertion that a "rule" that "tax exemptions are not granted by implication" applies to determine the application of a state's income tax to reservation Indians. *Stroble* at 8 (quoting *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943),[5] and citing *Am. Airlines, Inc. v. Okla. Tax Comm'n*, 2014 OK 95, ¶ 30, 341 P.3d 56).

The Court also underscored that "[t]he residence of a tribal member is a significant component of the *McClanahan* presumption against state tax jurisdiction," and that "[t]o determine whether a tribal member is exempt from state income taxes under *McClanahan*, a

[5] *Oklahoma Tax Commission* did not consider the existence of Indian country in Oklahoma and was decided before the definition of Indian country was amended to include fee patented lands in 1948. *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357 n.15 (1962); *infra* at 9, 18 n.12. *Sac & Fox*, *McClanahan*, and 18 U.S.C. § 1151 now govern state taxation of Indians in Indian country in Oklahoma.

court first must determine the residence of that tribal member." 508 U.S. at 123-24. But the Court rejected the OTC's effort to establish that "*McClanahan*'s presumption against taxation" applies only to "those tribal members who live on the reservation," explaining that in *Citizen Band* the Court had "rejected precisely the same argument—and from precisely the same litigant." *Id.* at 124-25 (citing *Citizen Band*, 498 U.S. at 511). The Court held "we have never drawn the distinction Oklahoma urged. *Instead, we ask only whether the land is Indian country.*" *Id.* at 125 (emphasis added).

The *Sac & Fox* Court concluded as follows:

> On remand, it must be determined *whether the relevant tribal members live in Indian country—whether the land is within reservation boundaries, on allotted lands, or in dependent communities.* If the tribal members do live in Indian country, our cases require the court to analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty. Unless Congress expressly authorized tax jurisdiction in Indian country, the *McClanahan* presumption counsels against finding such jurisdiction.

Id. at 126 (emphasis added).

B. Stroble Resides In Indian Country And Is Therefore Immune From The State Income Tax Under *Sac & Fox* and *McGirt*.

"[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent" is Indian country. 18 U.S.C. § 1151(a). As the MCN Reservation continues to exist, and is Indian country, *McGirt*, 140 S. Ct. at 2460-68, and Stroble lived on the MCN Reservation during the relevant tax years, the State is barred from taxing her income for those years. *Sac & Fox*, 508 U.S. at 120, 123. The OTC once so agreed: "In *Oklahoma Tax Commission v. Sac and Fox Nation*, the Court applied the definition of 'Indian country' in 18 U.S.C. § 1151 for state tax purposes .... *McGirt* plainly held that the Creek Reservation survived allotment and remains intact today. Therefore, the provisions of Oklahoma Administrative Code § 710:50-15-2 now apply in *all*

lands within the Reservation boundaries described in the Muscogee (Creek) Treaty of 1866." Okla. Tax Comm'n, *Report of Potential Impact of McGirt v. Oklahoma* 8 (2020), https://bit.ly/3XBUxQZ ("OTC Rpt.") (emphasis added) (citations omitted). The OTC then changed course, wrongly relying on its own definition of Indian country, and denying effect to *McGirt*'s holding that the MCN Reservation continues to exist and is Indian country.

1. Under 18 U.S.C. § 1151(a) and settled federal law, an Indian reservation includes fee lands within its boundaries and Indians are immune from state taxation of their on-reservation activities.

To determine whether Stroble was exempt from the State income tax for the relevant tax years, the OTC applied the ETIR, Okla. Admin. Code § 710:50-15-2. Stroble met two of the ETIR's three requirements, as "both parties agree[d]" Stroble is an MCN member and during the relevant tax years earned her income "from sources within Indian country under the jurisdiction of the [MCN]." *Stroble* at 10; *see* Okla. Admin. Code § 710:50-15-2(b)(1). Thus, the only issue before the OTC was "whether [Stroble] was living within Indian country under the jurisdiction of the [MCN] during the 2017, 2018 and 2019 tax years for purposes of the [ETIR]." *Stroble* at 9 (citation omitted).

To resolve that issue, the OTC turned to the definition of Indian country set forth in the ETIR, which "defines Indian country as 'formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States.'" *Stroble* at 10-11 (quoting Okla. Admin. Code § 710:50-15-2(a)(1)) (footnote omitted). The OTC then stated Stroble's claim turned on whether she lived on a "formal or informal reservation," as she did not claim to reside within a dependent Indian community or Indian allotment. *Id.*

To decide that issue, the OTC crafted its own definition of "formal reservation" and applied the ETIR's definition of "informal reservation." The OTC defined "formal

reservation" to mean "federally owned lands 'reserved from sale' under federal law," and "land validly set apart for use by the Indians, under the federal superintendence of the government." *Id.* at 11 (quoting *Celestine*, 215 U.S. at 285 and citing *McGowan*, 302 U.S. at 539). The OTC found that Stroble's "land is not a formal reservation" because it was not "owned by the federal government." *Id.*[6] The ETIR defines "informal reservation" to mean "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.* (quoting Okla. Admin. Code § 710:50-15-2(a)(2)). But Stroble's land did not satisfy that definition either, as it was neither held by the MCN, nor in trust by the federal government, nor subject to any restrictions. *Id.* at 11-12.

The OTC's ruling that Stroble did not live in Indian country because her land is not owned by the federal government and is thus not a "formal reservation" under the OTC's definition, *Stroble* at 10, is contrary to federal law. Under 18 U.S.C. § 1151(a) "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent," and *Sac & Fox* establishes that "to be outside the State's taxing jurisdiction[,] it is enough that the member live in 'Indian country,'" 508 U.S. at 123. The OTC has no power to rewrite the definition of "Indian country" to exclude fee land within reservation limits, as it attempts to do by defining "formal reservation" to mean only federally owned land, *Stroble* at 10-11. *See Sac & Fox*, 508 U.S. at 126-28 (Oklahoma may not avoid precedent barring application of state personal property

[6] The OTC did not contend that the MCN Reservation is not "land validly set apart for use by the Indians, under the federal superintendence of the government." *id.* (citing *McGowan*, 302 U.S. at 539), and in any event, *McGirt* establishes that the MCN Reservation is a reservation under federal law, 140 S. Ct. at 2460-62, 2474-76.

taxes to Indians living on a reservation by "avoiding the name 'personal property tax' here anymore than Washington could in [*Confederated Tribes*, 447 U.S. at 162-63].").[7]

Neither can the OTC rely on *Celestine* to imply that a "formal reservation" does not include fee land, *Stroble* at 11 (quoting *Celestine*, 215 U.S. at 285). "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress," *Celestine*, 215 U.S at 285, and under that rule land held "under a patent in fee by a non-Indian" is Indian country, *Seymour*, 368 U.S. at 357-59 (quoting *Celestine*, 215 U.S. at 285). In sum, "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (citing *Celestine*, 215 U.S. at 285).[8]

Nor can the OTC avoid the plain language of 18 U.S.C. § 1151 by attributing the "inclusion of formal and informal reservations in [its] administrative rule" to the *Sac & Fox* decision. *Stroble* at 11 n.6 (quoting *Sac & Fox*, 508 U.S. at 123). The OTC quotes *Sac & Fox* as stating that "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Id.* (quoting *Sac & Fox*, 508 U.S. at 123). That broad description did not alter § 1151's plain language—which includes fee land within a reservation—as the

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[7] *See also Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930) ("Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.").

[8] Finally, if more were needed, the *McGirt* Court held that the MCN Reservation was "'reserved from sale' [under] *Celestine*, 215 U.S., at 285," as "the government could not 'give the tribal lands to others, or . . . appropriate them to its own purposes,' without engaging in 'an act of confiscation.'" 140 S. Ct. at 2475 (quoting *United States v. Creek Nation*, 295 U.S. 103, 110 (1935)).

"[Supreme] Court does not revise legislation," *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014), and "[w]hether the concept of Indian country should be modified is a question entirely for Congress," *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 534 (1998). The OTC has no power to make such a modification without congressional approval.

Furthermore, the *Sac & Fox* Court plainly did not use the term "formal reservation" to limit Indian tax immunity, as it held both that "a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction," and that a "formal reservation" is Indian country. *Sac & Fox*, 508 U.S. at 123-24. Instead, the *Sac & Fox* Court used "formal reservation" to refer to reservations which the OTC conceded were subject to the principles of *McClanahan*, whose "relevant boundary for taxing jurisdiction is the[ir] perimeter," and "informal reservation" to refer to "merely land set aside for a tribe or its members" which the OTC contended was not subject to the principles of *McClanahan*. *Sac & Fox*, 508 U.S. at 124. The Court had earlier made the same distinction in *Citizen Band*. *See* 498 U.S. at 511 (distinguishing "land held in trust for the [tribe]" from a "formally designated 'reservation'"). Both "formal and informal" reservations are Indian country. *Sac & Fox*, 508 U.S. at 124.

The *Sac & Fox* Court used the term "Indian allotments, whether restricted or held in trust by the United States," *see id.* at 123, simply to refer to the two forms of Indian allotments. "Indian allotments" may be in the form of "a trust patent, by the terms of which the government holds the land for a period of years in trust for the allottee with an agreement to convey at the end of the trust period," or "a patent conveying to the allottee the land in fee, but prohibiting its alienation for a stated period. Both have the same effect, so far as the power of alienation is concerned, but one is commonly called a trust allotment, and the other a restricted allotment." *United States v. Ramsey*, 271 U.S. 467, 470 (1926). So, in *Sac & Fox*, the phrase "whether

restricted or held in trust by the United States" simply modifies the immediately preceding term "Indian allotments" by reciting settled law describing their two forms. *See Bd. of Rev. v. Mid-Continent Petroleum Corp.*, 1943 OK 201, ¶ 10, 141 P.2d 69 (citing *Bd. of Trs. v. Templeton*, 1939 OK 53, ¶ 0, 86 P.2d 1000).

Finally, settled law establishes that Indians living on fee patented lands within reservation boundaries are immune from state taxation of their activities absent express congressional authorization. In *County of Yakima*, the Court reaffirmed the categorical rule barring state taxation of reservation lands and reservation Indians, 502 U.S. at 258, and then considered the validity of "two separate taxes *with respect to reservation fee lands*, an ad valorem tax and an excise tax on sales," both of which Yakima County sought to impose, *id.* at 266 (emphasis added). The Court held that Congress had explicitly authorized the ad valorem tax in the General Allotment Act, but that the excise tax on the sale of reservation fee land was "a tax upon the Indian's activity of selling the land, and thus is void," concluding that "it is eminently reasonable to interpret th[e] language [in the General Allotment Act] as not including a tax upon the sale of real estate, [and] our cases require us to apply that interpretation for the benefit of the Tribe." *Id.* at 269. And in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Court applied the rule that "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." *Id.* at 475-76 (quoting *Mescalero Apache*, 411 U.S. at 148). The *Moe* Court rejected the argument that the General Allotment Act established the State's "jurisdiction as to those Indians living on 'fee patented' lands," ruling that would mean that "for all jurisdictional purposes civil and criminal the . . . Reservation has been substantially diminished in size," and

noting that "[a] similar claim" was rejected in *Seymour*, in which the Court "concluded that '(s)uch an impractical pattern of checkerboard jurisdiction,' was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction." 425 U.S. at 478 (citing *Seymour*, 368 U.S. at 358).

The OTC's former treatment of the effect of *McGirt* under the federal law rules incorporated by the Oklahoma Administrative Code's reference to *Sac & Fox* was consistent with these rules. *See* OTC Rpt. at 6 ("The provisions of Section 710:50-15-2 accurately reflect existing United States Supreme Court precedent relating to a state's jurisdiction to impose state income taxes on a member of a federally recognized Indian tribe."). But in this case, the OTC improperly crafted its own new definition of a "formal reservation" to exclude reservation fee lands. As § 1151(a) expressly provides, fee lands on an Indian reservation are Indian country. And Indians, like Stroble, who live and work within their tribe's Indian country—including on fee land—are immune from state taxation. *Sac & Fox*, 508 U.S. at 123.

2. Stroble is immune from state taxation under *McGirt*'s holding that the MCN Reservation continues to exist and is Indian country.

The FCR recommended Stroble's protest be granted because she had shown "by a preponderance of the evidence, [that] she lived *within* the boundaries of the Muscogee (Creek) Nation reservation during the 2017, 2018, and 2019 tax years *notwithstanding the issuance of any patent. See* 18 U.S.C. § 1151(a))." *Stroble* at 12-13 (quoting FCR at 22). *Accord* OTC Rpt. at 8 ("[T]he State may not tax the income of individual Creek Nation citizens who reside within the Reservation boundaries, to the extent that the income is generated within those boundaries."). The OTC reversed that recommendation, holding it "hinges entirely upon an unauthorized expansion of . . . *McGirt* . . . to state taxation matters," *Stroble* at 12, as

> the *McGirt* decision was limited to whether the defendant's crimes were committed within Indian Country, as defined by 18 U.S.C. § 1151, in order to

> determine whether the state's criminal jurisdiction was preempted by federal law, specifically, the Major Crimes Act ("MCA").

Id. at 13 (citing *McGirt*, 140 S. Ct. at 2459) (footnote omitted). That ruling is plainly wrong.

The "key question" in *McGirt* was "[d]id [McGirt] commit his crimes in Indian country," in which case federal jurisdiction over those crimes was exclusive under the MCA, 18 U.S.C. § 1153. *McGirt*, 140 S. Ct. at 2459. That question, however, turned on whether a reservation was established for the Creek, and if so, whether that reservation continues to exist, in which case it constitutes Indian country under 18 U.S.C. § 1151(a). So, the *McGirt* Court's determination of the existence of the MCN Reservation, and its status as Indian country, *see id.* at 2459-68, was necessary to determine whether the MCA applied to McGirt's crimes.

Stroble's reliance on the *McGirt* Court's square holding that the MCN Reservation continues to exist and is Indian country was not an "unauthorized expansion of" *McGirt* because the definition of Indian country applied to state tax laws before *McGirt* was decided. As *Sac & Fox* held (before *McGirt*), absent express congressional authorization, a State may not tax the income of on a tribal member who lives and works in her tribe's Indian country, as that term is broadly defined in 18 U.S.C. § 1151. 508 U.S. at 123; *see also Mescalero Apache*, 411 U.S. at 148-49 ("Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State" and "[t]hat principle is as relevant to a State's tax laws as it is to state criminal laws"). Thus, it was not "an unauthorized expansion of [*McGirt*]" to apply its ruling that the MCN Reservation continues to exist and is Indian country "to state taxation matters." *See Stroble* at 12.

Furthermore, while the *McGirt* Court was "asked whether the land [that MCN's treaties] promised remains an Indian reservation for purposes of federal criminal law," *McGirt*, 140 S. Ct. at 2459, nothing in the opinion purports to make the existence of the MCN

Reservation irrelevant with respect to other questions of federal law. The OTC quotes *McGirt* as stating that "**[f]or MCA purposes,** land reserved for the Creek Nation since the 19th century remains 'Indian country." *Stroble* at 13-14 (purporting to quote *McGirt*, 140 S. Ct. at 2456) (emphasis added in *Stroble* opinion).[9] But that quote is of the Syllabus that precedes the *McGirt* decision, which "constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader." *McGirt*, 140 S. Ct. at 2456 n.* (citing *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906)).[10] The OTC also quotes the Court's statement that "**[t]he only question before us**, however, concerns the statutory definition of 'Indian country' **as it applies in federal criminal law under the MCA**," *Stroble* at 14 (quoting *McGirt*, 140 S. Ct. at 2480) (emphasis added in *Stroble* opinion), but it ignores the Court's immediately following statement that while "often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law[, o]f course, many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country," *McGirt*, 140 S. Ct. at 2480. So, the Court was plainly aware that its holding that the MCN Reservation continues to exist and is Indian country would be applied in the civil context, which is entirely proper.[11]

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[9] The OTC also relies on two statements that actually are from the *McGirt* opinion, *Stroble* at 14 (quoting *McGirt*, 140 S. Ct. at 2459 ("we are asked whether the land these Treaties promised remains an Indian reservation ***for purposes of federal criminal law***" and "Mr. McGirt's appeal ***rests on the federal Major Crimes Act***") (emphasis added in *Stroble* opinion)), but neither statement limits the relevance of the existence of the MCN Reservation for other purposes of federal law.

[10] The OTC's reliance on the same statement from the Syllabus to say what "[t]he Court ultimately held," *Stroble* at 13, is mistaken for the same reason.

[11] Although the definition of Indian country set forth in 18 U.S.C. § 1151, "by its terms relates only to federal criminal jurisdiction, [the Supreme Court] ha[s] recognized that it also generally applies to questions of civil jurisdiction such as the one at issue here." *Venetie*, 522 U.S. at 527 (applying Indian country definition set forth in 18 U.S.C. § 1151 to determine the existence

The *McGirt* Court also squarely held that the MCN Reservation includes allotted lands that later passed to non-Indians and are now held in fee, emphasizing that "for years courts have rejected" the "suggest[ion] that allotments automatically ended reservations," 140 S. Ct. at 2452, and pointing to 18 U.S.C. § 1151(a), in which "Congress has defined 'Indian country' to include 'all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation," explaining that it "expressly contemplates private land ownership within reservation boundaries." *Id.* (quoting 18 U.S.C. § 1151(a)). "[W]hether these individual parcels have passed hands to non-Indians" made no difference as "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464 (citing and quoting *Mattz v. Arnett*, 412 U.S. 481, 497 (1973) ("[A]llotment under the . . . Act is completely consistent with continued reservation status."); *Seymour*, 368 U.S. at 356-58 (allotment act "did no more than open the way for non-Indian settlers to own land on the reservation");[12] and *Nebraska v. Parker*, 577 U.S. 481, 489 (2016) ("[T]he 1882 Act falls into

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of tribal tax authority and citing *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 427 n.2 (1975)); *accord Cabazon Band*, 480 U.S. at 207 n.5. And as the Court explained in *DeCoteau*, "[w]hile § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." 420 U.S. at 427 n.2 (citing *McClanahan*, 411 U.S. at 177 n.17; *Kennerly v. Dist. Ct.*, 400 U.S. 423, 424 n.1 (1971) (per curiam); *Williams*, 358 U.S. at 220-22 nn.5-6, 10).

[12] As the Court had earlier explained in *Seymour*, "[t]he contention . . . that, even though the reservation was not dissolved completely by the Act permitting non-Indian settlers to come upon it, its limits would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians[,]" was "squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in § 1151 to include 'all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent * * *.'" 368 U.S. at 357-58. The definition of Indian country was amended to include fee patented lands in 1948. *Id.* at 357 n.15; *see supra* 8 n.5, 9.

another category of surplus land Acts: those that merely opened reservation land to settlement .... Such schemes allow 'non-Indian settlers to own land on the reservation.'")).

As *McGirt* establishes that the MCN Reservation continues to exist and is Indian country, Stroble properly relied on *McGirt* to establish that she lives in Indian country, and federal law therefore bars state taxation of income earned by her on the MCN Reservation.

C. Neither *Castro-Huerta* Nor *Sherrill* Support The OTC's Ruling.

The OTC also found further support for its decision in *Castro-Huerta* and *Sherrill*. *Stroble* at 14-17. Neither provides such support.

1. *Castro-Huerta* only addressed State criminal jurisdiction over crimes by non-Indians against Indians in Indian country.

The OTC asserts *Castro-Huerta* "further clarifies *McGirt* is limited to the [MCA]," and "ma[kes] clear that while federal law may preempt state authority in certain circumstances, (e.g., the [MCA] as determined by *McGirt*), the general rule remains that the State is entitled to exercise authority over the whole of its territory." *Stroble* at 14. That is not correct, except for the OTC's recognition that federal law may preempt state law.

First, in *Castro-Huerta*, the Court relied on *McGirt*, and its follow-on cases regarding other Indian reservations in Oklahoma, for the basic principle that all the land within the limits of Indian reservations in Oklahoma is Indian country. 142 S. Ct. at 2491-92 (citing *McGirt*, 140 S. Ct. at 2459-60, 2467-68, 2474; *Matloff*, 2021 OK CR 21, ¶ 15, 497 P.3d 686; *Grayson v. State*, 2021 OK CR 8, ¶ 10, 485 P.3d 250, *cert. denied* 142 S. Ct. 934 (2022)). The Court then relied on these holdings to consider "a jurisdictional question about the prosecution of crimes committed by non-Indians against Indians in Indian country," which did not arise under the MCA:

> Under current federal law, does the Federal Government have *exclusive* jurisdiction to prosecute those crimes? Or do the Federal Government and the State have *concurrent* jurisdiction to prosecute those crimes?

Id. at 2491. The OTC is therefore wrong in saying that *McGirt* is limited to the MCA.

Second, the *Castro-Huerta* Court went no further than to "conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country." *Id.* The Court explicitly limited its opinion to a determination of that question and repeatedly disclaimed any suggestion that its holding carried implications even for state criminal jurisdiction over Indians within Indian country. *Id.* at 2495 n.2 (referring to state prosecutorial authority over Indians who commit crimes in Indian country as "a question not before us"), 2498 n.3 (referring to "the distinct question we confront here: whether States have concurrent jurisdiction with the Federal Government over non-Indians"), 2500 (referring to "non-Indian on Indian crimes (the issue here)" as "the narrow jurisdictional issue in this case" and contrasting it with the question of state jurisdiction over Indians), 2501 n.6 (stating the Court "express[es] no view" on state authority over an Indian who commits a crime against a non-Indian victim in Indian country).

As the Court's opinion cannot be read to address state criminal jurisdiction over Indians, it plainly cannot be read to address the distinctly different and well settled question of state tax authority over Indians in Indian country. Nor can the Court's dicta be relied on to do so, as the *Castro-Huerta* Court explicitly disclaimed any precedential effect of its dicta. *Id.* at 2498 ("[t]he Court's dicta, even if repeated, does not constitute precedent" (citing *NCAA v. Alston*, 141 S. Ct. 2141, 2158 (2021)); *id.* ("Dicta that does not analyze the relevant statutory provision cannot be said to have resolved the statute's meaning.") These explicit limitations reject the OTC's contention that *Castro-Huerta* "made clear . . . [that] the general rule remains

that the State is entitled to exercise authority over the whole of its territory." *Stroble* at 14-15. In sum, "the effect of *Castro-Huerta* is limited exclusively to the narrow holding and specific facts of *Castro-Huerta*—'the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country,' provided Congress has not otherwise specifically precluded such state action in Indian Country." *United States v. Lussier*, No. 21-cr-145 (PAM/LIB), 2022 WL 17476661, at *14 (D. Minn. Oct. 11, 2022), *report & recommendation adopted without amendment* 2022 WL 17466284, at *1 (D. Minn. Dec. 6, 2022) (quoting *Castro-Huerta*, 142 S. Ct. at 2504-05).

Third, *Castro-Huerta* does not overrule any of the Court's decisions relied on *supra* at 6-19. Indeed, the OTC concedes that "federal law may preempt state authority in certain circumstances," and the categorical rule has done just that, and is not disturbed by *Castro-Huerta*. *Stroble* at 14-15; *see Lac Courte Oreilles Band v. Evers*, 46 F.4th 552, 558 (7th Cir. 2022) (While "*Castro-Huerta* shows that the Court continues to define and grapple with questions about the scope of state authority within Indian country more generally, . . . the Court has 'never wavered' from its commitment to the categorical presumption against state taxing authority." (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985))). Nor can the OTC argue for an anticipatory overruling of the Supreme Court's decisions relied on *supra*, as the Supreme Court has instructed lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 207 (1997) (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). "We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls.'" *Id.* at 237 (alteration in original); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5

(2020) (Kavanaugh, J. concurring in part) ("[T]he state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court." (citing *Rodriguez de Quijas*, 490 U.S. at 484)); *accord Schell v. Chief Just.*, 11 F.4th 1178, 1182 (10th Cir. 2021), *cert. denied sub nom. Schell v. Darby*, 142 S. Ct. 1440 (2022).

2. *Sherrill* has no application to Stroble's claim.

Sherrill does not help the OTC either. There, the Oneida Indian Nation argued that lands the Tribe had reacquired "in 1997 and 1998 . . . [that were] once contained within the Oneidas' 300,000-acre reservation, [and] were last possessed by the Oneidas as a tribal entity in 1805," *Sherrill*, 544 U.S. at 202 (citing *County of Oneida v. Oneida Indian Nation* (*Oneida II*), 470 U.S. 226 (1985)), were immune from local property taxation because the *Oneida II* Court had "recognized the Oneidas' aboriginal title to their ancient reservation land," and thus the Tribe's reacquisition of lands had "unified fee and aboriginal title," *id.* at 213-14. The Court rejected the Oneidas' "unification theory," holding 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.

Sherrill is inapposite because this case concerns the right of an individual Indian who lives and works on her reservation to be free from state taxation, which applies on "all land within the limits of" her reservation, "notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a); *McClanahan*, 411 U.S. at 181 (Indian's "rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose."). And only express congressional action can extinguish that right. *See supra* at 6-9. The existence of that

right does not depend on any sovereign action of MCN,[13] much less action akin to that on which the Oneidas relied.[14] In short, there is no tribal action here for equity to bar.

Nor did Stroble delay in asserting to the OTC that she is immune from the state income tax in the tax years at issue in this appeal. *Stroble* at 4-5 (Stroble filed income tax returns claiming Exempt Tribal Income on April 15 and December 17, 2020, the Audit Services Division disallowed her immunity claims on February 22, 2021, and Stroble timely protested on April 15, 2021). She could not have successfully protested to the OTC before *McGirt* established that the MCN Reservation continues to exist and is Indian country, as "until the Tenth Circuit's *Murphy* [*v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam)] decision a few years ago, no court embraced th[e] possibility" that "the Creek lands . . .were part of a reservation," *McGirt*, 140 S. Ct. at 2470, and *Murphy*'s conclusion was not binding on the state's tribunals until it was adopted by the Supreme Court in *McGirt*, *see Akin v. Mo. Pac. R.R.*, 1998 OK 102, ¶ 30 & n.63, 977 P.2d 1040. So there was no delay. Once *McGirt* resolved the continuing existence of the MCN Reservation, the categorical rule barring state income taxation of an Indian who lives and works on her reservation plainly applied to Stroble, and the OTC had no "justifiable expectations," *Sherrill*, 544 U.S. at 215-16, to the contrary.[15] Indeed, under state law, Stroble is entitled to a refund of "the tax paid during the three (3) years immediately preceding the

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[13] MCN is not a party to this case, and "the OTC has not asserted any jurisdiction over [MCN]." *Stroble* at 6 n.3.

[14] Furthermore, the *McGirt* Court found MCN's sovereignty continued, 140 S. Ct. at 2465-68, so Stroble's claim is not based on an effort to "revive" MCN's sovereignty.

[15] *Sherrill* is an affirmative defense to a cause of action, and "[e]ach year [of taxation] is the origin of a new liability and of a separate cause of action," *CIR v. Sunnen*, 333 U.S. 591, 598 (1948). For this reason, even assuming, *arguendo*, that *Sherrill* applied to tax years before *McGirt* was decided, it would not apply to tax years after *McGirt* was decided.

filing of the claim," Okla. Stat. tit. 68, § 2373, which covers the period of her claim. The OTC cannot rely on *Sherrill* to negate a claim for which the State has explicitly provided a remedy.

More fundamentally, Stroble's tax immunity claim turns on *McGirt*'s determination that the MCN Reservation continues to exist and is Indian country, and that determination cannot be unsettled by the considerations on which *Sherrill* relied, as *McGirt* plainly shows. In *Sherrill* Court found "the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns," and the Oneidas' long delay in seeking equitable relief, barred the Oneidas' claim. *Sherrill*, 544 U.S. at 202-03, 215-17, 221. By contrast, *McGirt* squarely holds that "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." 140 S. Ct. at 2462. Furthermore,

> Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States.

Id. *McGirt* further held that the State's arguments based on "historical practices or current demographics" were "'no help" in determining whether a reservation has been disestablished or diminished and rejected "the State's argument about its longstanding practice of asserting jurisdiction over Native Americans," which the Court found was based on a mistaken view of the law. 140 S. Ct. at 2468-69, 2470. And while "Oklahoma point[ed] to the speedy and persistent movement of white settlers onto Creek lands throughout the late 19th and early 20th centuries," the Court found that wasn't helpful either, stating that "[m]aybe, . . . some white settlers in good faith thought the Creek lands no longer constituted a reservation. But maybe, too, some didn't care and others never paused to think about the question." *Id.* at 2473. In sum, "the Court's forceful reaffirmation in *McGirt* of Congress's singular power to disestablish

a reservation" rejects reliance on *Sherrill* "to have effectively disestablished" a reservation, *Cayuga Nation v. Tanner*, 6 F.4th 361, 379 (2nd Cir. 2021), *cert. denied* 142 S. Ct. 775 (2022), and *McGirt* establishes that the historical and demographic arguments relied on in *Sherrill* are inapplicable to decide whether a reservation continues to exist.

CONCLUSION

For the foregoing reasons, the Nations respectfully request that this Court reverse the decision of the OTC.

Dated: February 13, 2023

Respectfully submitted,

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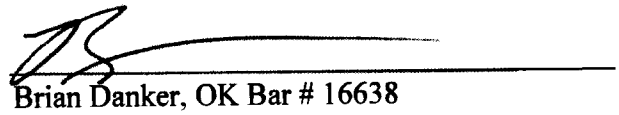

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CERTIFICATE OF SERVICE

On February 13, 2023, I caused true copies of the foregoing instrument to be mailed, postage prepaid, by Certified U.S. Mail, to:

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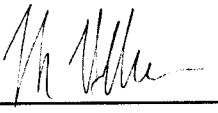

Frank S. Holleman

From: Frank S. Holleman
To: Taylor Ferguson; Elizabeth Field - General Counsel; Kiersten Hamill
Cc: Christina Devenney
Subject: RE: Stroble v. Oklahoma Tax Commission, No. TC-120806 - Request for Consent to File Amicus Briefs
Date: Sunday, February 12, 2023 1:12:00 PM
Attachments: image001.png
image002.png

Mr. Ferguson –

As a courtesy, I wanted to let you and your team know that my clients have decided to file one amicus brief. Thank you.

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Cc: Christina Devenney <cdevenney@sonosky.com>
Subject: Re: Stroble v. Oklahoma Tax Commission, No. TC-120806 - Request for Consent to File Amicus Briefs

Received. Thank you for your quick response and consent.

-Frank

Sent from my mobile device.

From: Taylor Ferguson <taylor.ferguson@tax.ok.gov>
Sent: Friday, January 13, 2023 6:36:54 AM
To: Frank S. Holleman <FHOLLEMAN@SONOSKY.COM>; Elizabeth Field - General Counsel <elizabeth.field@tax.ok.gov>; Kiersten Hamill <kiersten.hamill@tax.ok.gov>
Cc: Christina Devenney <cdevenney@sonosky.com>
Subject: RE: Stroble v. Oklahoma Tax Commission, No. TC-120806 - Request for Consent to File

Ex. 1

Amicus Briefs

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Mr. Holleman,

The Oklahoma Tax Commission is willing to consent to the filing of the two amicus briefs by the Cherokee and Chickasaw Nations and the Choctaw Nation. Please let me know if you have any additional questions.

Thank you,

OKLAHOMA Tax Commission

Taylor Ferguson
Senior Assistant General Counsel
405.522.9439
taylor.ferguson@tax.ok.gov | tax.ok.gov
P.O. Box 269056 | OKC, OK | 73126

From: Frank S. Holleman <FHOLLEMAN@SONOSKY.COM>
Sent: Thursday, January 12, 2023 2:47 PM
To: Taylor Ferguson <taylor.ferguson@tax.ok.gov>; Elizabeth Field - General Counsel <elizabeth.field@tax.ok.gov>; Kiersten Hamill <kiersten.hamill@tax.ok.gov>
Cc: Christina Devenney <cdevenney@sonosky.com>
Subject: [EXTERNAL] RE: Stroble v. Oklahoma Tax Commission, No. TC-120806 - Request for Consent to File Amicus Briefs

Thank you very much.

Frank S. Holleman
Sonosky, Chambers, Sachse, Endreson & Perry, LLP
145 Willow St., Suite 200
Bonita, CA 91902
fholleman@sonosky.com
Phone: (619) 267-1306
Fax: (619) 267-1388

From: Taylor Ferguson <taylor.ferguson@tax.ok.gov>
Sent: Thursday, January 12, 2023 12:30 PM

Ex. 1

To: Frank S. Holleman <FHOLLEMAN@SONOSKY.COM>; Elizabeth Field - General Counsel <elizabeth.field@tax.ok.gov>; Kiersten Hamill <kiersten.hamill@tax.ok.gov>
Cc: Christina Devenney <cdevenney@sonosky.com>
Subject: RE: Stroble v. Oklahoma Tax Commission, No. TC-120806 - Request for Consent to File Amicus Briefs

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Mr. Holleman,

We received your request yesterday evening but have not yet had an opportunity to discuss it. I am hopeful that we will be able to do so this afternoon and get a response to you either by the end of day today or tomorrow morning.

Thank you,

OKLAHOMA Tax Commission

Taylor Ferguson
Senior Assistant General Counsel
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taylor.ferguson@tax.ok.gov | tax.ok.gov
P.O. Box 269056 | OKC, OK | 73126

From: Frank S. Holleman <FHOLLEMAN@SONOSKY.COM>
Sent: Thursday, January 12, 2023 1:25 PM
To: Elizabeth Field - General Counsel <elizabeth.field@tax.ok.gov>; Taylor Ferguson <taylor.ferguson@tax.ok.gov>; Kiersten Hamill <kiersten.hamill@tax.ok.gov>
Cc: Christina Devenney <cdevenney@sonosky.com>
Subject: [EXTERNAL] RE: Stroble v. Oklahoma Tax Commission, No. TC-120806 - Request for Consent to File Amicus Briefs

Ms. Field and Ms. Hamill – I attempted to call you a few minutes ago but I had technical difficulties. Can you please let me know as soon as you can if you have a position on my clients' amicus participation? I appreciate your attention to this matter.

Frank S. Holleman
Sonosky, Chambers, Sachse, Endreson & Perry, LLP
145 Willow St., Suite 200
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fholleman@sonosky.com
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Fax: (619) 267-1388

Ex. 1

From: Frank S. Holleman
Sent: Wednesday, January 11, 2023 7:59 PM
To: elizabeth.field@tax.ok.gov; taylor.ferguson@tax.ok.gov; kiersten.hamill@tax.ok.gov
Cc: Christina Devenney <cdevenney@sonosky.com>
Subject: Stroble v. Oklahoma Tax Commission, No. TC-120806 - Request for Consent to File Amicus Briefs

Counsel –

I represent the Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma. The Cherokee Nation and Chickasaw Nation intend to file an amicus brief in support of Appellant in the Stroble v. Oklahoma Tax Commission case. The Choctaw Nation of Oklahoma also currently intends to file a separate amicus brief in support of Appellant. Each brief would present non-duplicative arguments. Does your client consent to the filings of these briefs? Please let me know as soon as possible.

Thank you.

Frank S. Holleman
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fholleman@sonosky.com
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Ex. 1

From: Michael Parks
To: Frank S. Holleman
Subject: Re: Stroble v. Oklahoma Tax Commission, No. TC-120806
Date: Sunday, February 12, 2023 2:32:12 PM

I consent Mr. Holleman. Sincerely, Michael Parks

From: Frank S. Holleman <FHOLLEMAN@SONOSKY.COM>
Sent: Sunday, February 12, 2023 2:58:55 PM
To: Michael Parks <Mike@mikeparkslaw.com>
Cc: Christina Devenney <cdevenney@sonosky.com>
Subject: Stroble v. Oklahoma Tax Commission, No. TC-120806

Mr. Parks –

I understand from our prior communication that you consented to the filing of amicus briefs by my clients the Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma. I wanted to let you know that the Nations have decided to file one amicus brief. Could you confirm your consent in response to this email?

Thanks very much.

Frank S. Holleman
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Ex. 2