UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OSAGE NATION, *Plaintiff,* v. MARK WOOD, *et al.*, *Defendants.*	Case No. 01-CV-0516-JDR-MTS

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT AND BRIEF IN SUPPORT

Defendants, Oklahoma Tax Commission Chairman Mark Wood, Vice Chairwoman Shelly Paulk, and Secretary Charles Prater, in their official capacities, offer the following Response to Plaintiff's Motion for Relief from Judgment [Doc. 148] and Brief in Support. [Doc. 149]. Defendants respectfully request that this Court deny the Motion because it was not filed within a reasonable time. Alternatively, Defendants ask that this Court deny the Motion because it is without merit.

INTRODUCTION

This nearly twenty-five-year-old case arises out of Plaintiff's attempt to avoid the imposition of state income tax on members of the Osage Nation. On January 23, 2009, the Honorable James H. Payne entered summary judgment in favor of Defendants. [Doc. 113] ("the Judgment"). Plaintiff appealed, and the Tenth Circuit affirmed. *See Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010). Now, approximately sixteen (16) years after this Court entered final judgment, rather than filing a new lawsuit based on perceived changes in the legal landscape, Plaintiff asks this Court to vacate the Judgment as a matter of equity because, in Plaintiff's view, "*Irby* cannot be reconciled with the Supreme Court's subsequent decision in *McGirt*;" a decision issued nearly five years ago. [Doc. 149, p. 13].

This Court need not address Plaintiff's Motion for Relief from Judgment ("Plaintiff's Motion") on the merits because, as a threshold matter, motions under Rule 60 "must be made within a reasonable time." *Kemp v. United States*, 596 U.S. 528, 538 (2022) (quotations omitted). Plaintiff admits

that it has articulated "essentially the same arguments advanced" in its Motion in "multiple for[ums]" for many years, yet it declined to raise such arguments here, in the one court that could grant relief. [Doc. 149, p. 58]. Thus, Plaintiff's Motion is untimely.

Even if this Court finds that Plaintiff's failure to file its Motion within a reasonable time should somehow be excused, Plaintiff's Motion should still be denied on the merits. Plaintiff is not entitled to relief under Rule 60(b)(5)[iii][1] because the Judgment lacks "prospective application" within the meaning of the Rule. Further, relief under Rule 60(b)(6) is not appropriate because "a change in case law doesn't justify vacatur under Rule 60(b)(6)." *Federal Trade Commission v. Elite It Partners, Inc.*, 91 F.4th 1042, 1049 (10th Cir. 2024). Because Plaintiff failed to file its Motion within a reasonable time and the Motion lacks merit, this Court should deny the Motion in its entirety.

Finally, consider the obvious: *Irby*, as Tenth Circuit precedent, remains binding "unless the Supreme Court has indisputably and pellucidly abrogated [it]." *Id.* at 1051 (quotations omitted). And *McGirt* did not indisputably and pellucidly abrogate *Irby*. To the contrary, *McGirt* disclaimed any application to the Osage Nation along with any tribe other than the Creek Nation. *McGirt v. Oklahoma*, 591 U.S. 894, 932 (2020) ("Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek."). Moreover, dicta aside, *Irby's* substantive analysis is consistent with *McGirt*. Thus, while this Court has authority to adjudicate Plaintiff's Motion on the merits, *Irby* remains binding on this Court, and it is not this Court's role to overturn the Tenth Circuit or to speculate as to how the Tenth Circuit might rule if *Irby* were decided today.

LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) provides a procedure whereby, under extraordinary circumstances, a party may be relieved of a final judgment. *Liljeberg v. Health Servs. Acquisition Corp.*, 486

[1] Plaintiff disclaims any application of the first two clauses of Rule 60(b)(5). [Doc. 149, p. 50] ("The Osage Nation does not contend that reasons [i] or [ii] of paragraph (5) directly apply in this case."). For convenience, this Response refers to the third clause of Rule 60(b)(5) as Rule 60(b)(5)[iii].

U.S. 847, 863-64 (1988). Relevant to Plaintiff's Motion, the Rule provides as follows:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . applying [the judgment] prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Again, "[r]elief under Rule 60(b) 'is extraordinary and may only be granted in exceptional circumstances.'" *Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1241 (10th Cir. 2010) (quoting *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005)). "[T]he district court has substantial discretion in connection with a Rule 60(b) motion. However, it is an abuse of discretion to grant relief where no basis for that relief exists." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 580 (10th Cir. 1996) (quotations and citation omitted).

The movant bears the burden of showing that relief is warranted under Rule 60(b). *See Klein v. United States*, 880 F.2d 250, 258 (10th Cir. 1989). "The standard for relief under [Rule 60(b)(5)[iii]] is an exacting one and requires a strong showing." *Id.* Rule 60(b)(5)[iii] requires "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions. Thus, modification is to be granted cautiously, and only where there is a showing of changed circumstances resulting in extreme and unexpected hardship or oppression." *Villescas v. Abraham*, 285 F.Supp.2d 1248, 1253-54 (D. Colo. 2003) (quotations and citations omitted).

Moreover, Rule 60(b)(5)[iii] "doesn't allow a court to provide relief from *any* judgment, even assuming it's inequitable; it only allows for relief from judgments that have prospective application or effect." *United States v. Melot*, 712 Fed. Appx. 719, 720-21 (10th Cir. 2017) (unpublished) (citing *Dowell ex rel. Dowell v. Bd. of Educ.*, 8 F.3d 1501, 1509 (10th Cir. 1993)). Only decrees which "involve the supervision of changing conduct or conditions and are thus provisional and tentative" have "prospective application" within the meaning of Rule 60(b)(5)[iii]. *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). "That plaintiff remains bound by the dismissal is not a 'prospective effect' within the meaning of Rule 60(b)(5) any more than if plaintiff were continuing to

feel the effects of a money judgment against him." *Gibbs v. Maxwell House*, 738 F.2d 1153, 1156 (11th Cir. 1984). Thus, "[i]t is difficult to see how an unconditional dismissal could ever have prospective application within the meaning of Rule 60(b)(5)." *Twelve John Does*, 841 F.2d at 1139.

Rule 60(b)(6) "requires a showing of 'extraordinary circumstances.'" *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005). Generally, "a change in law or in the judicial view of an established rule of law does not justify relief under Rule 60(b)(6)." *Johnston v. Cigna Corp*, 14 F.3d 486, 497 (10th Cir. 1993) (quotations and citation omitted). There are only two exceptions to this rule, neither of which is implicated in this case. A change in law may warrant relief under Rule 60(b)(6) "where the claims at issue were still pending" at the time of the change in law or where "there was a change in law 'arising out of the same incident as that in which the plaintiffs seeking Rule 60(b)(6) relief were injured.'" *Farrel v. Detavis*, No. 15-CV-1113, 2021 WL 6050338, at *3 (D.N.M. Dec. 21, 2021) (quoting *Sindar v. Garden*, 284 F. App'x 591, 596 (10th Cir. 2008)). "Any broader rule would judicially abolish the concept of finality in litigation and make every lawsuit winner vulnerable to additional litigation if and when the law is changed." *Id.*

ANALYSIS

I. PLAINTIFF'S MOTION IS UNTIMELY.

"[A]ll Rule 60(b) motions must be made within a reasonable time." *Kemp v. United States*, 596 U.S. 528, 538 (2022) (quotations omitted). Whether a Rule 60(b) motion has been filed within a reasonable time is a fact-intensive inquiry under which this Court must consider 1) the moving party's knowledge of the grounds for relief; 2) the reason for delay; 3) the practical ability of the litigant to learn earlier of the grounds relied upon; and 4) prejudice to the non-moving party. *See Crow Tribe of Indians v. Repsis*, 74 F.4th 1208, 1217 (10th Cir. 2023).

Each relevant factor indicates that Plaintiff's Motion was not filed within a reasonable time. As to the first and third factors, Plaintiff's Motion is untimely because, by its own admission, Plaintiff

has known of the arguments raised in its Motion for several years but declined to present the same to this Court. Specifically, Plaintiff admits that it "has been diligent in raising the argument that *McGirt* compels the reversal of *Irby* in multiple for[ums]" including "advancing essentially the same arguments advanced herein, when the first opportunity arose to do so in *Young*, in 2021, and again in 2023, in *McCauley*." [Doc. 149, p. 58]. Whether raising the same arguments in other forums was a deliberate strategic decision or otherwise is irrelevant. Plaintiff not only knew of the alleged grounds for relief asserted in its Motion for several years, but also articulated "essentially the same arguments" in multiple unrelated proceedings while neglecting to raise such arguments in this Court. This establishes that Plaintiff's Motion was not filed within a reasonable time *in this Court*.

As to the second factor, Plaintiff makes a half-hearted attempt to explain the reason for its delay, arguing that it "was not until last year that the Tenth Circuit in *Repsis* clarified the availability of Rule 60(b) relief in these circumstances." [Doc. 149, p. 58]. But *Repsis* did not announce any new rule of law applicable to this case. *See infra* Section III. The "circumstances" Plaintiff refers to are when the trial court's order was affirmed on appeal long before a motion to vacate is filed. Yet, as Plaintiff recognizes, the rule that an appellate court's affirmance of a final judgment does not deprive the district court of its jurisdiction to hear a motion to vacate was established by the Supreme Court nearly fifty years ago. *See Standard Oil Co. of Calif. v. United States*, 429 U.S. 17 (1976); [Doc. 149, pp. 29, 50]. *Repsis* merely reiterates and applies this long-established rule. Therefore, *Respsis* does not provide an adequate excuse for Plaintiff's dilatory filing. Because Plaintiff fails to offer a defensible justification for its lengthy delay in filing the Motion, this Court should find Plaintiff's Motion untimely.

Finally, as to the fourth factor, Defendants will suffer substantial prejudice if this Court grants Plaintiff's tardy Motion. As a preliminary matter, if Plaintiff's Motion were granted, Defendants would suffer substantial prejudice in that the public's "'strong interest in protecting the finality of judgments' after they are entered" would be undermined. *Compañía de Inversiones Mercantiles S.A. v. Grupo Cementos*

de Chihuahua S.A. B. de C.V., 58 F.4th 429, 459 (10th Cir. 2023) (quoting *Nelson v. City of Albuquerque*, 921 F.3d 925, 929 (10th Cir. 2019)). Further, vacating the Judgment would unquestionably prejudice Defendants in that it could open the door to liability for taxes collected dating back to the filing of the original complaint in this matter nearly twenty-five years ago. Finally, vacatur risks significant disruption of the criminal justice system in Osage County, thereby presenting dangers to the safety of Oklahomans. *See* Declaration of Brett Mize, attached hereto as Exhibit 1. The substantial prejudice Defendants would suffer if this Court were to grant Plaintiff relief militates strongly against finding Plaintiff's Motion timely.

Because each of the relevant factors indicates that Plaintiff's Motion was not filed within a reasonable time, this Court should deny the Motion in its entirety.

II. PLAINTIFF IS NOT ENTITLED TO RULE 60 RELIEF ON THE MERITS.

If this Court finds that Plaintiff has somehow provided an adequate explanation for failing to file its Motion within a reasonable time, the Motion should still be denied on the merits. Importantly, the merits of Plaintiff's Motion must be evaluated independently of the merits of the Judgment. *See Davis v. Simmons*, 165 F. App'x 687, 690 (10th Cir 2006) (unpublished) ("Motions under Rule 60(b) 'are inappropriate vehicles to reargue an issue previously addressed by the court.'") (quoting *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)); *Markovich v. Correct Care Solutions*, No. 10-3097-SAC, 2011 WL 4376573, at *1 (D. Kan. Sept. 20, 2011) ("A Rule 60(b) motion is not a vehicle to reargue the merits of the underlying judgment.").

As set forth in detail below, Rule 60(b)(5)[iii] does not apply here because the Judgment lacks "prospective application" within the meaning of the Rule. Further, Plaintiff is not entitled to relief under Rule 60(b)(6) because an alleged change in law does not warrant vacatur of a final judgment.

a. RULE 60(b)(5)[iii] IS INAPPLICABLE TO THE JUDGMENT IN THIS CASE.

Rule 60(b)(5)[iii] "applies only to cases of prospective application, as it states by its own terms."

See Dowell v. Bd. of Educ. of Okla. City Public Schools, Indep. Dist. No. 89, 782 F. Supp. 574, 577 (W.D. Okla. 1992). "[T]he standard we apply in determining whether an order or judgment has prospective application within the meaning of Rule 60(b)(5) is whether it is 'executory' or involves 'the supervision of changing conduct or conditions.'" *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988) (quoting *U.S. v. Swift & Co.*, 286 U.S. 106, 114 (1932)). Accordingly, "[a] denial of relief and dismissal of a claim rarely qualifies as a 'prospective judgment' under Rule 60(b)(5)." *Villescas v. Abraham*, 285 F.Supp.2d 1248, 1253 (D. Colo. 2003).

Here, the Judgment does not have prospective application within the meaning of Rule 60(b)(5)[iii]. The Judgment is not in any sense executory, nor does it involve the supervision of changing conditions. It simply denied Plaintiff's requested relief and granted judgment in favor of Defendants on the merits. The Judgment is a final judgment, plain and simple. Because the Judgment does not have prospective application within the meaning of Rule 60(b)(5)[iii], this Court should deny Plaintiff's Motion.

Plaintiff's arguments to the contrary are unavailing. Plaintiff cites *Rufo v. Inmates of Suffolk County Jail* for the proposition that "a showing of 'grievous wrong' is not required" on a motion to vacate pursuant to Rule 60(b)(5)[iii], and this Court should instead apply "'flexible' equitable principles." [Doc. 149, p. 28]. However, *Rufo* is plainly inapplicable and therefore only serves to underscore the fact that Plaintiff's reliance on Rule 60(b)(5)[iii] is misplaced.

Rufo considered the appropriate standard of review when a party seeks to modify a *consent decree* under Rule 60(b)(5) because conditions have changed from what the parties expected at the time of their agreement. 502 U.S. 367, 384 (1992). Importantly, the consent decree at issue in *Rufo* unquestionably had prospective application within the meaning of Rule 60(b)(5)[iii] because it enjoined the defendants from using certain jail facilities and required the construction of new constitutionally adequate facilities. *See id.* at 373. The Supreme Court specifically noted that a "flexible approach" is

particularly important in the context of consent decrees with prospective application because "to refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion." *Id.* at 392. This case is readily distinguishable from *Rufo* in that the Judgment is not a consent decree, and it does not have prospective application within the meaning of Rule 60(b)(5)[iii].

Agostini is similarly of no aid to Plaintiff. There, the question was whether, based on significant changes in the Supreme Court's interpretation of the Establishment Clause, the petitioners were entitled to relief from a permanent injunction prohibiting public school teachers from working in parochial schools. *Agostini v. Felton*, 521 U.S. 203, 209 (1997). The Court held that "it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from *an injunction or consent decree* can show 'a significant change in either factual conditions or in law.' . . . A court errs when it refuses to modify *an injunction or consent decree* in light of such changes." *Id.* at 215 (quoting *Rufo*, 502 U.S. at 384) (emphasis added). Here, the Judgment is not an injunction or consent decree and lacks the prospective application inherent in such orders. As such, Rule 60(b)(5)[iii] is inapplicable.

Moreover, *Agostini* undermines the entire basis of Plaintiff's Motion. The *Agostini* Court was careful to note that "[t]he trial court acted within its discretion in entertaining the [Rule 60(b)] motion with supporting allegations, but it was also correct to recognize that **the motion had to be denied unless and until this Court reinterpreted the binding precedent**." *Id.* at 238 (emphasis added). Here, as set forth in detail in Section III below, neither the Tenth Circuit nor the Supreme Court have reinterpreted *Irby*, the relevant binding precedent. Accordingly, under *Agostini*, Plaintiff's Motion must be denied.

Finally, Plaintiff cites *Horne*, but it too only serves to demonstrate that Rule 60(b)(5)[iii] does not apply to the Judgment in this case. *Horne* is an institutional reform case wherein the district court

found that the State of Arizona violated the Equal Educational Opportunities Act by underfunding English Language-Learner classes within the state. *Horne v. Flores*, 557 U.S. 433, 441 (2009). After ruling in favor of the plaintiffs, the district court entered a series of orders and injunctions requiring Arizona to appropriately fund such classes and punishing state officials for refusing to implement the necessary reforms. *Id.* On review, the Supreme Court held that "in recognition of the features of institutional reform decrees, . . . courts must take a 'flexible approach' to Rule 60(b)(5) motions addressing such decrees." *Id.* at 450 (quoting *Rufo*, 502 U.S. at 381). This "flexible approach allows courts to ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant." *Id.* Clearly, institutional reform decrees have prospective application within the meaning of Rule 60(b)(5)[iii] because, unlike the Judgment in this case, such decrees restrict or compel the power of state officials for so long as the order remains in place.

Defendants will not belabor the point further; unlike the injunctions and decrees at issue in *Rufo*, *Agostini*, and *Horne*, the Judgment in this case lacks prospective application. The Judgment neither prohibits nor requires any specific action by the parties. Because the Judgment is neither "executory" nor "prospective" within the meaning of the of meaning of Rule 60(b)(5)[iii], Plaintiff's Motion should be denied.

b. PLAINTIFF IS NOT ENTITLED TO RELIEF UNDER RULE 60(b)(6).

Plaintiff asserts in passing that, to the extent *McGirt* does not warrant vacatur of the Judgment pursuant to Rule 60(b)(5)[iii], relief is warranted under the "catchall provision," Rule 60(b)(6). [Doc. 149, p. 54]. Plaintiff's Rule 60(b)(6) argument fails because *McGirt* did not explicitly or implicitly overrule *Irby*, and even assuming *arguendo* that it did, "a change in case law doesn't justify vacatur under Rule 60(b)(6)." *Federal Trade Commission v. Elite It Partners, Inc.*, 91 F.4th 1042, 1049 (10th Cir. 2024); *Johnston v. Cigna Corp.*, 14 F.3d 486, 497 (10th Cir. 1994); *Collins v. City of Wichita*, 254 F.2d 837, 839

(10th Cir. 1958) ("A change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies [Rule 60(b)(6)] relief."). There are two exceptions to this rule, neither of which applies to this case. The first exception arises "when the change in case law arises between decisions in [factually] related cases." *Elite It Partners*, 91 F.4th at 1049. Under such circumstances, Rule 60(b)(6) relief may be warranted "to ensure consistency in the treatment of cases 'arising out of the same transaction or occurrence.'" *Id.* (quoting *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (en banc)). Second, a change in case law may justify vacatur "when the earlier ruling hasn't become final" because "[d]istrict courts generally retain power to revise rulings before entering a judgment." *Id.* at 1049-50.

Just last year, in *Federal Trade Commission v. Elite It Partners, Inc.*, the Tenth Circuit confirmed that, once final judgment has been entered, a subsequent change in case law "doesn't support vacatur when the cases are unrelated." *Id.* In that case, the appellants settled a lawsuit brought against them by the FTC through a stipulated judgment which provided equitable monetary relief under § 13(b) of the Federal Trade Commission Act. *Id.* at 1044. Approximately one year after the stipulated judgment was entered, the Supreme Court held in *AMG Capital Management, LLC v. FTC*, 593 U.S. 67 (2021), that § 13(b) of the Federal Trade Commission Act does not allow equitable monetary relief. *Id* at 1044-45. The appellants then moved to vacate the stipulated judgment based on *AMG*. *Id.* The district court denied appellants' motion to vacate, and the Tenth Circuit affirmed, holding that "the Supreme Court's issuance of *AMG* bears no factual relationship to our case. So *AMG* doesn't warrant vacatur under Rule 60(b)(6)." *Id.* at 1052.

Here, Plaintiff does not attempt to argue that this case falls under either exception to the general rule that subsequent case law does not warrant vacatur under Rule 60(b)(6). The first exception obviously does not apply because *McGirt* did not arise out of the same transaction or occurrence as *Irby*. The two cases concern—*inter alia*—different land, different treaties, and different tribes. The

second exception is equally plainly inapplicable because there is no question that the Judgment is a final judgment on the merits.

At root, Plaintiff's argument is that subsequent case law alone necessitates vacatur of the Judgment as a matter of equity. Specifically, Plaintiff argues that the Judgment must be vacated because, in its view, "it would plainly offend justice to maintain the *Irby* judgment in force notwithstanding that it is clearly irreconcilable with *McGirt*." [Doc. 149, p. 57]. As set forth in detail below, Defendants maintain that *Irby* is entirely consistent with *McGirt*. But the parties' disagreement on that issue is of no moment. Even if *Irby* were irreconcilable with *McGirt*—a finding no court has made to date— "the Supreme Court's issuance of [*McGirt*] bears no factual relationship to [this] case. So [*McGirt*] doesn't warrant vacatur under Rule 60(b)(6)." *See Elite It Partners, Inc.*, 91 F.4th at 1052.

Accordingly, because subsequent changes to case law arising from unrelated cases cannot justify relief from a final judgment under Rule 60(b)(6), this Court should deny Plaintiff's Motion.

III. *McGIRT* DID NOT OVERRULE *IRBY*, AND IT IS NOT THIS COURT'S ROLE TO OVERTURN TENTH CIRCUIT PRECEDENT.

It is axiomatic that Tenth Circuit "precedents remain good law unless the Supreme Court has indisputably and pellucidly abrogated them." *Id.* at 1051 (quotations and citation omitted). "[T]his Court's role is to apply Tenth Circuit precedent, not to reconsider it. In the absence of clear Supreme Court precedent overruling [Tenth Circuit precedent], this Court will 'follow the case which directly controls, leaving to the [Tenth Circuit] the prerogative of overruling its own decisions.'" *United States v. Hay*, 601 F. Supp. 3d 943, 952 (D. Kan. 2022) (quoting *Agostini*, 521 U.S. at 207).

Because *Irby* remains good law, this Court's role is to apply *Irby*, not reconsider it. *McGirt* did not indisputably and pellucidly abrogate *Irby's* holding that the former Osage Reservation was disestablished. To the contrary, *McGirt* disclaimed any application to the Osage Nation. *McGirt*, 591 U.S. at 932. ("Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek."). Further, *McGirt* did not repudiate the *Solem* test utilized by the Tenth

Circuit in *Irby*. Rather, *McGirt* held that the *Solem* test, which allows courts to consider extratextual evidence of disestablishment, is useful where "an ambiguous statutory term or phrase emerges" or if "any of the relevant statutes [] could plausibly be read as an Act of disestablishment." *Id.* at 914.

Irby is consistent with *McGirt's* instruction that the *Solem* test should only be employed where the relevant statutes are ambiguous. *Irby* found that the "operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." *Irby*, 597 F.3d at 1124. This statement, through its use of the double-negative ("does not unambiguously suggest"), indicates that the Tenth Circuit found the relevant statutes ambiguous as to disestablishment. If there were any doubt as to the meaning of the double-negative, the next sentence of *Irby* makes clear that the Tenth Circuit found the statutes ambiguous; "[i]f the statute is ambiguous, we turn to the circumstances surrounding the passage of the act . . ." *Id.* After finding the statute "not unambiguous," the court turned to consider the circumstances surrounding the passage of the act, including "[t]he legislative history and negotiation process." *Id.* at 1125. Thus, the *Irby* court did exactly what *McGirt* now requires; the court found the relevant statutes ambiguous before turning to circumstances surrounding their passage to resolve the ambiguities. Accordingly, *McGirt* does not repudiate *Irby's* reliance on the *Solem* test or consideration of extratextual evidence in the face of statutory language which is "not unambiguous." In fact, *McGirt* endorses this approach.

For its part, Plaintiff relies extensively on *Crow Tribe of Indians v. Repsis* to argue that this Court should vacate the Judgment because of its alleged inconsistencies with *McGirt*. 74 F.4th 1208 (10th Cir. 2023) (*Repsis II*). Plaintiff's reliance on *Respsis II* is misplaced. *Respsis II* did not declare open season on final judgments related to tribal affairs. Rather, *Repsis II* only reaffirms what was already known from *Standard Oil*: appellate affirmance of a district court's order does not deprive the district court of jurisdiction to hear a motion to vacate. *See Standard Oil Co. of Cal. v. United States*, 429 U.S. 17 (1976).

In *Repsis I*, after one of its members was issued a citation for hunting elk in Big Horn National

Forest, the Crow Tribe sought a declaratory judgment to the effect that the Tribe's treaty hunting rights remained enforceable and that members of the Tribe retained "an unrestricted right to hunt in the Big Horn National Forest." *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 985 (10th Cir. 1995) (*Repsis I*). The district court found that the Tribe's treaty rights were extinguished at Wyoming's statehood, and the Tenth Circuit not only affirmed the district court but also found that multiple alternative rationales supported its finding that the Tribe's hunting rights were extinguished. *Id.* at 994.

Twenty-five years after *Repsis I*, in a case with virtually identical facts, a member of the Crow Tribe asserted that the Tribe's treaty hunting rights prevented the State of Wyoming from prosecuting him for hunting elk in Big Horn National Forest. *Herrera v. Wyoming*, 587 U.S. 329, 332 (2019). The Supreme Court noted that *Repsis I* "review[ed] the same treaty right," and that the Tenth Circuit correctly applied binding precedent to conclude that the treaty rights were extinguished. *Id.* at 336, 344 ("When the Tenth Circuit reached its decision in [*Repsis I*], it had no authority to disregard this Court's holding in *Race Horse* . . ."). However, the Court overturned *Race Horse* and found that the Crow Tribe's treaty hunting rights did in fact survive statehood, thereby directly repudiating the district court's judgment in *Repsis I*. *See id.* at 352.

After the Supreme Court recognized the continued enforceability of the Crow Tribe's treaty rights in *Herrera*, the Tribe moved to vacate the district court's judgment in *Repsis I* pursuant to Rule 60(b)(5). *Repsis II*, 74 F.4th at 1211. Because the Tenth Circuit relied on alternative grounds for affirmance in *Repsis I*, the district court found "that it lacked the power to review the Tribe's Rule 60(b) motion" and denied relief. *Id.* On appeal, the Tenth Circuit held that the "district court abused its discretion when it determined that it lacked the authority to review the Tribe's [Rule 60(b)] motion for post-judgment relief" and remanded the case to the district court to evaluate the Tribe's motion on the merits. *Id.* at 1221.

Properly understood, the holding of *Repsis II* is narrow: the district court retains the power to

consider a Rule 60(b) motion on the merits even when the judgment in question was affirmed on alternative grounds on appeal. Thus, in *Repsis II*, the district court "erred when it attempted to use [the Tenth Circuit's] initial disposition of a case as a threshold test for whether it could conduct a Rule 60(b) analysis." *Id.* at 1220. Because Defendants do not dispute that this Court has authority to adjudicate Plaintiff's Motion on the merits, *Repsis II* is not implicated.

Finally, *Repsis II* is readily distinguishable from this case on both the law and the facts. Most fundamentally, *Repsis II* is distinguishable in that it considered the effect of a Supreme Court decision which upheld the enforceability of the *exact same treaty rights* which the Tenth Circuit previously found unenforceable. *Crow Tribe v. Repsis*, 92-CV-1002-ABJ, 2024 WL 1478580, at *4 (D. Wy. Mar. 28, 2024) (*Herrera* involved "the same treaty at issue in [*Repsis I*]" and found that the treaty "is not extinguished by statehood."). Here, Plaintiff relies on *McGirt*, but *McGirt* only considered the treaty rights of the Creek Nation, not the Osage. *McGirt*, 591 U.S. at 932. ("Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek."). Thus, this case is fundamentally different from *Repsis II* on both the law and the facts because *McGirt* did not consider the treaty rights of the Osage Nation and there is no appellate court decision overturning *Irby*'s recognition of the disestablishment of the former Osage Reservation.

It is not this Court's role to reconsider Tenth Circuit precedent. Because *McGirt* did not indisputably and pellucidly overturn *Irby*, Plaintiff's Motion should be denied.

CONCLUSION

This Court should deny Plaintiff's Motion because it was not filed within a reasonable time, the Judgment does not have "prospective application" as required by Rule 60(b)(5)[iii], and Plaintiff's perceived changes in case law arising out of unrelated cases do not warrant relief under Rule 60(b)(6).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February 2025, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants with entries of appearance filed of record.

s/*Sam Black*
SAM BLACK