IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OSAGE NATION, *Plaintiff,* *v.* **Mark WOOD, Chairman, Oklahoma Tax Commission; Shelly PAULK, Vice Chairwoman, Oklahoma Tax Commission; and Charles PRATER, Secretary, Oklahoma Tax Commission, in their official capacities,** *Defendants.*	**Case No. 01-CV-0516-JDR-MTS** **PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT**

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INTRODUCTION AND SUMMARY

Only Congress can disestablish a reservation, *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020), and the Supreme Court in *McGirt* set clear rules for determining whether Congress has done so. The Nation demonstrated in its opening brief that this Court's judgment, as affirmed by the Tenth Circuit in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) ("*Irby*"), applied a very different set of rules to conclude that the Nation's Reservation had been disestablished. Under the *McGirt* standard, the Osage Reservation clearly would be held to be intact. But the Oklahoma Court of Criminal Appeals has held that *Irby* precludes any argument to that effect outside of this Court. *See McCauley v. State*, 548 P.3d 461, 464 (Okla. Crim. App. 2024) ("[*Irby*] applies here because of its preclusive effect."). Thus, absent relief from this Court, the Nation will be deprived in perpetuity of its Reservation not because of congressional action, but because of a judgment that is contrary to law. *See generally* D.E. 149 ("Pl. Mem.").

The State[1] takes the position that this Court cannot grant relief. It makes no serious effort to defend *Irby* on the merits. It spends barely a page arguing that "*McGirt* did not indisputably and pellucidly abrogate *Irby*'s holding," Def. Resp. at 11; it ignores multiple irreconcilable conflicts between *Irby* and *McGirt* that the Nation identified, *see* Pl. Mem. at 17-36; and it ultimately claims that whether *Irby* is clearly wrong "is of no moment," Def. Resp. at 11.

As for remedies, the State criticizes the Nation for not "filing a new lawsuit," *id.* at 1 (though the State would no doubt assert preclusion, as it did successfully in *McCauley*), and then immediately says the Nation could not do so: this Court is "the ***one*** court that could grant

[1] While formally the Defendants are the Oklahoma Tax Commissioners, the State of Oklahoma is the real party in interest. Defendants are represented by the State Attorney General's Office, and the parties agree that this case will establish a rule of law determining State versus Osage and federal jurisdiction over criminal law and other matters. *See, e.g.,* D.E. 162, at 6 ("Def. Resp.").

relief," *id.* at 2 (emphasis added). The State then urges supposed limitations on Rule 60(b)(5) and (6) (with no basis in the text of the Rule) to assert that this Court could ***never*** grant relief. *Id.* at 6-11. In other words, the State's position is that no court can correct the profound injustice stemming from this Court's judgment. Never mind that *Irby* is plainly wrong under *McGirt,* that *Irby* will profoundly harm an entire tribal Nation in perpetuity, or that *Irby's* effects on territorial sovereignty, criminal law enforcement, federal programs and taxation are sweeping.

A court of equity should not tolerate such a conclusion. Rule 60(b) amply provides the tools this Court needs to correct this injustice. *Irby* can and must be vacated.

ARGUMENT

I. The Osage Nation's Rule 60(b) Motion Was Filed Within A Reasonable Time, And Is Not Barred By Rule 60(c)

The State asks this Court to make a discretionary judgment call under Rule 60(c) that the Nation waited too long after *McGirt* to file its motion and, on that basis, to condemn the Nation to a future without its Reservation, regardless of whether Congress in fact disestablished it. Def. Resp. at 4-6. The State's Rule 60(c) argument is meritless.

Under Rule 60(c)'s "reasonable time" standard, "the litigant's knowledge of the grounds for relief is only one factor for the district court to weigh." *Crow Tribe of Indians v. Repsis*, 74 F.4th 1208, 1217 (10th Cir. 2023) ("*Repsis*") (citation omitted).[2] ***First,*** the reasonableness of the time taken by a movant depends on the "reason[s] for delay," *id.,* including any "confusion leading to the delay," *id.* (quoting *Sec. Mut. Cas. Co. v. Century Cas. Co.,* 621 F.2d 1062, 1067-68 (10th Cir. 1980)). When *McGirt* changed the law a decade after *Irby*, the Nation had to hire new counsel, analyze potential remedies, and review afresh the 138-entry, 10-year prior record in

[2] While *McGirt* was decided in 2020, the Nation's grounds for Rule 60(b) relief—which the State still vigorously disputes—only became fully clear when *Repsis* (2023) and *McCauley* (2024) were decided.

this case. That included navigating the legal confusion created by a decision issued a year after *McGirt* that held that a district court cannot grant a tribe's Rule 60(b)(5) or (6) motion based on intervening Supreme Court precedent where (as in this case) the tribe seeks to vacate a judgment affirmed by the Tenth Circuit based on reasoning that went beyond the district court's original reasoning. *See Crow Tribe of Indians v. Repsis*, 2021 WL 3185778, *9 (D. Wyo. July 1, 2021). The State downplays that problem with the benefit of hindsight, Def. Resp. at 5, but it was not until the Tenth Circuit reversed that decision in July 2023, *Repsis*, 74 F.4th at 1219-21, that it was clear that the Nation could proceed in this Court under Rule 60(b).

In the interim, the Nation did not sleep on its rights. The Nation acted reasonably, and honored federalism principles, by seeking relief in state court. But that path was closed in April 2024, when the Oklahoma Court of Criminal Appeals ruled that it is (and, by implication, all courts are) bound by *Irby*'s preclusive effect unless and until *Irby* is vacated. *See McCauley,* 548 P.3d at 464; Pl. Mem. at 15-16, 46. The Nation filed the present motion only eight months later.

Second, the issue of prejudice is key to any equitable analysis. The State demonstrates no substantial prejudice from the time it took the Nation to file.[3] It complains that a victory here for the Nation "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." Def. Resp. at 6. But had the Nation filed its motion one day after *McGirt*, it would still, on the State's theory, have "open[ed] the door" to twenty years of tax issues. Further, any tax refund liability may be limited by statutes of limitations.[4] If, say, a three-year statute of limitations applies, *see* 68 Okla. Stat. §

[3] Prejudice from delay is what matters under Rule 60(c). "Prejudice requires a greater showing than the inability to rely on the judgment in the future; that is precisely the purpose of Rule 60(b)." *Repsis,* 2021 WL 3185778, at *7 (citation omitted).

[4] The Nation takes no position here on this or any other tax law issue.

2373(b), granting the Nation's motion now might lead to refund claims for the three years 2022, 2023, and 2024, whereas granting the Nation's motion in 2021 might have led to refund claims for the three years 2018, 2019, and 2020—hardly a material prejudice to the State.

In any event, the State's concerns about potential tax refunds are premature and speculative. The Nation's motion merely seeks vacatur of a judgment that holds its Reservation has been disestablished. Any potential tax implications of that vacatur are not currently before this Court, and may be determined elsewhere—for example, in the pending Oklahoma Supreme Court case addressing taxation of members of tribes whose reservations have already been held intact, *Stroble v. Oklahoma Tax Comm'n,* No. TC-120806. Further, this Court can grant the Nation's motion, while protecting the State from any unduly prejudicial retroactive effects, pursuant to its power under Rule 60(b) to grant appropriate relief "[o]n . . . just terms."

The State also complains that "vacatur risks significant disruption of the criminal justice system in Osage County," because it has continued since *McGirt* to prosecute crimes allegedly committed by Indians there. Def. Resp. at 6. Again, its concerns have little to do with the Rule 60(c) issue of prejudice relating to how long the Nation took to file its Rule 60(b) motion. Regardless of whether the Nation won confirmation of its Reservation in 2021 or 2025, transitional issues would arise regarding pending criminal cases. Prosecutors and courts have addressed those issues throughout much of Oklahoma since *McGirt. See, e.g., Bosse v. State,* 499 P.3d 771, 775 (Okla. Crim. App. 2021) (holding that *McGirt* does not have retroactive effect in postconviction review cases). They similarly can be addressed on the Osage Reservation.

Finally, the equitable judgment required under Rule 60(c) entails weighing all the interests at stake, considering "the circumstances warranting relief," *Repsis*, 74 F.4th at 1217 (quoting *Assoc. Builders & Contractors v. Mich. Dept. of Lab. & Econ. Growth*, 543 F.3d 275,

278 (6th Cir. 2008)), and "the nature of the dispute and whether it involves a purely private disagreement or a matter of public interest," *Assoc. Builders*, 543 F.3d at 278. The State's unconvincing claims of prejudice from a ***four-year*** filing "delay" pale in comparison to the profound prejudice the Nation will suffer if the *Irby* judgment ***permanently*** deprives it of a congressionally established Reservation that was never congressionally disestablished. The overwhelming public interest is in honoring the United States' commitments to tribal nations, in recognizing Congress' singular authority on questions of disestablishment, and in applying uniformly the law the Supreme Court established in *McGirt*. *See* Pl. Mem. at 40-41, 47.

II. Rule 60(b)(5) And (6) Apply Insofar As *Irby* Cannot Be Reconciled With *McGirt*

A. Rule 60(b)(5) Applies Because The Nation Seeks Relief Against Irby*'s Prospective Application*

The Nation's motion falls squarely within the plain language of Rule 60(b)(5), reason [iii]: it seeks relief from *Irby* because "applying it prospectively is no longer equitable." The Nation seeks "prospective" relief: it seeks to ensure that going forward into ***the future*** its Reservation will be recognized. The State itself stresses that this case will determine criminal jurisdiction going forward into ***the future*** in Osage County. Def. Resp. at 6 & Ex. 1, ¶7. The Nation seeks relief from the legal "appl[ication]" of *Irby*, not just its practical effects: it seeks to stop *Irby* from ***applying, as a binding decree, to preclude*** the Nation, and everyone in privity with it, from arguing that its Reservation exists, as occurred in *McCauley*, 548 P.3d at 464.[5]

The State claims, however, that this Court lacks authority to grant the Nation relief because of a dictum confining reason [iii] relief to judgments that are "executory or involve[] the supervision of changing conduct or conditions," Def. Resp. at 7 (quoting *Twelve John Does v.*

[5] Speaking of a judgment as "appl[ying] as *res judicata*" has long been common usage. *See, e.g., Yazoo & MVR Co. v. Adams,* 180 U.S. 1, 24 (1901); *Gaines v. Hennen,* 65 U.S. 553, 578 (1860).

District of Columbia, 841 F.2d 1133, 1138 (D.C. Cir. 1988)[6]). The State suggests that these include only "institutional reform decrees," *id.* at 9, and other "injunction[s] or consent decree[s]," *id.* at 8 (citation omitted), involving ongoing judicial supervision. It is wrong.

First, neither *Twelve John Does* nor any Tenth Circuit case holds that reason [iii] is confined to injunctions, and in any event, the Rule's plain language controls. When a statute or rule is intended to apply only to "injunctions," it says so.[7] Rule 60(b)(5) contains no such limitation. Reason [iii] "is not confined to that form of relief, nor even to relief that historically would have been granted in courts of equity." C. Wright & A. Miller, 11 Fed. Prac. & Proc.: Civ. § 2863 (3d ed. 2025).[8] Indeed, a case the State cites notes that sometimes, albeit "rarely," a "denial of relief and a dismissal of a claim" qualifies for reason [iii] relief. Def. Resp. at 7 (quoting *Villescas v. Abraham*, 285 F. Supp. 2d 1248, 1253 (D. Colo. 2003)). The better reading of the Rule is that in appropriate cases, reason [iii] supplies equitable authority to vacate even an order that just dismisses claims if that order "would bar a new and independent action . . . and thus denies the plaintiffs the right to retry their claims in light of the changes in the statutory and decisional law applicable to their action." *Kirksey v. City of Jackson*, 714 F.2d 42, 43 (5th Cir. 1983).[9] Given the preclusion ruling in *McCauley,* 548 P.3d at 464, that is precisely this case.

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[6] The actual holding in *Twelve John Does* has no bearing on this case: it merely held that a judgment with no effect beyond determining who remained as defendants in a particular case lacked "prospective application" within the meaning of Rule 60(b)(5), reason [iii].

[7] *See, e.g.,* 28 U.S.C. § 1292(a)(1). Even under § 1292(a)(1), a declaration is treated as an injunction if it is its "functional equivalent." *Committee on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008).

[8] Courts have even granted relief under reason [iii], albeit rarely, from judgments granting purely financial remedies for past conduct where the judgment has an inequitable prospective effect. *See, e.g., PCS Nitrogen, Inc. v. Ross Dev. Corp*., 2018 WL 11424153 (D.S.C. Mar. 8, 2018); *Stephen L. LaFrance Holdings, Inc. v. Sorensen*, 283 F.R.D. 499 (E.D. Ark. 2012).

[9] The Fifth Circuit's statement in *Kirksey* has been criticized as over-broad in some cases, including *Twelve John Does,* 841 F.2d at 1139-40. Consistent with the plain language of the

Second, *Twelve John Does,* 841 F.2d at 1138-39, recognizes that Rule 60(b)(5), reason [iii] encompasses "executory" decrees consistent with equitable practice pre-dating Rule 60(b). Particularly where issues of sovereignty and significant public interest concerns are implicated, that practice permits revision of decrees with prospective legal application regardless of their form: "a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *United States v. Swift & Co*., 286 U.S. 106, 114-15 (1932). For example, the Supreme Court has repeatedly modified final declaratory judgments adjudicating state boundary disputes based on changed circumstances. *See Arizona v. California*, 460 U.S. 605, 624 (1983) (citing examples).[10]

The case for relief here is overwhelming. Rule 60(b)(5), reason [iii] cases entail balancing "the sanctity of final judgments [against] the incessant command of a court's conscience that justice be done in light of all the facts." *Twelve John Does,* 841 F.2d at 1138 (citation omitted). Here, that balance plainly favors the Nation. Much like the state boundary

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Rule, it should only apply in cases—like this case—in which relief is sought against a judgment's prospective application (to future events) and the equities favor relief. But *Kirksey* is correct that reason [iii] is not confined to particular forms of judgment. It is well established that reason [iii] is not confined to relieving enjoined defendants from obligations enforceable by contempt—it is, for example, equally available to plaintiffs seeking to add new obligations to an injunction. *See, e.g., United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 251 (1968); *David C. v. Leavitt*, 242 F.3d 1206, 1211 (10th Cir. 2001). Nothing in the Rule indicates that it affords relief to plaintiffs who were wrongly denied a sufficient prospective remedy but categorically denies relief to plaintiffs who were wrongly denied any prospective remedy.

[10] The case from which *Twelve John Does* derived the "executory" criterion, *Pennsylvania v. Wheeling & Belmont Bridge Co*., 59 U.S. 421 (1856) ("*Wheeling*"), addressed a prior final judgment that had enjoined the defendants to abate a bridge and declared that it constituted a nuisance by impinging on Pennsylvania's navigation rights. *See id.* at 429. The Court vacated the judgment based on new law, notwithstanding that the bridge had already been destroyed, *see id.* at 422, thereby granting relief against what amounted to a declaration of property rights. *See also Polites v. United States*, 364 U.S. 426, 438 (1960) (Brennan, J., dissenting) (*Wheeling* exemplifies equity practice under which "a change in the law after the rendition of a decree was grounds for modification or dissolution of that decree insofar as it might affect future conduct.").

cases, *Irby* amounts in substance to a declaration determining who is sovereign over what. As *McCauley* exemplifies, *Irby* does not merely preclude re-litigation of a specific past event; it governs future issues as broad, varied and important as taxation, criminal jurisdiction and access to federal programs benefitting Indian reservations. Continued application of an erroneous judgment to deny an entire tribal nation's rights offends equity and harms the public interest in ways that outweigh finality. *See Herrera v. Wyoming*, 587 U.S. 329, 343 (2019).[11] Relief is plainly warranted here because *Irby* applies prospectively and inequitably by condemning the Nation to be treated in perpetuity as if Congress had disestablished its Reservation.

B. Alternatively Rule 60(b)(6) Applies, Because It Would Offend Justice To Deny The Nation Its Continuing Right To The Reservation Established By Congress

The State contends that even if *Irby* is plainly wrong under *McGirt,* and even if it effects an ongoing manifest injustice by judicially disestablishing the Osage Reservation with no proper statutory basis, that "is of no moment," Def. Resp. at 11. The State argues that the Nation cannot obtain relief outside this Court, *id.* at 2; Rule 60(b)(5) is not available because *Irby* is the wrong kind of judgment, *id.* at 6-9; and although Rule 60(b)(6) authorizes relief for "any other reason that justifies relief," it, too, is barred by an implied limitation on the Court's authority, *id.* at 9-11.

The final element of the State's Catch-22 proposition rests on the Tenth Circuit's holding in *Federal Trade Commission v. Elite IT Partners*, 91 F.4th 1042, 1049 (10th Cir. 2024) ("*Elite IT*"), that generally only a change in case law "between decisions in related cases" supports Rule 60(b)(6) relief. The Nation submits that *Irby* and *McGirt* are related cases, since *Irby* is

[11] The Rule 60(b)(5) analysis here mirrors *Repsis* on remand. There, the district court granted relief under Rule 60(b)(5), reason [iii], based on new Supreme Court precedent, from a judgment denying a tribe's claim for a declaration, citing a state court's application of that judgment as *res judicata* against a tribe member as demonstrating its inequitable prospective application, *Crow Tribe of Indians v. Repsis*, 2024 WL 1478580, *10 (D. Wyo. Mar. 28, 2024), and emphasizing that continued wrongful denial of tribal rights is "detrimental to the public interest," *id.* at *12.

expressly premised on the (incorrect) understanding that the Osage Allotment Act ("OAA"), the Creek Allotment Act (at issue in *McGirt*) and the Oklahoma Enabling Act were all together part of a coordinated scheme by Congress to disestablish all reservations in Oklahoma prior to statehood. *See Irby*, 597 F.3d at 1124-25. Alternatively, the Nation respectfully submits that *Elite IT* errs in grafting a "related case" requirement onto the plain language of Rule 60(b)(6).[12]

III. *Irby* Is Plainly Irreconcilable with *McGirt*

The State claims that "*Irby* remains good law" because "*McGirt* did not indisputably and pellucidly abrogate" it. Def. Rep. at 11. But it devotes only one page to the tensions between the two decisions, *id.* at 11-12, failing to address three of the four irreconcilable conflicts the Nation identified. And it offers no reasons, other than the bare fact of the *Irby* judgment, why the Osage Reservation should be deemed disestablished while the Reservations of the Creek Nation and many other similarly situated tribes in Oklahoma have been held intact under *McGirt*.

The only point the State addresses is the rule that no extratextual evidence can be relied upon unless a court first identifies in the statute "ambiguous language . . . that could plausibly be read as an Act of disestablishment." *McGirt,* 591 U.S. at 914. It claims the Tenth Circuit met that requirement by stating that the "operative language of the [OAA] does not unambiguously suggest . . . disestablishment of the Osage reservation." *Irby,* 597 F.3d at 1124. In fact, the Tenth Circuit identified no statutory language suggesting disestablishment (ambiguously or otherwise); to the contrary, it identified multiple aspects of the OAA that it found uniformly inconsistent with disestablishment. *See id.* at 1123-24; Pl. Mem. at 18. It is "pellucidly clear" that *Irby* did what

[12] The Nation recognizes that *Elite IT* binds this Court. However, it finds no support in the text of the Rule or in Supreme Court precedent, *see, e.g., Gonzales v. Crosby,* 545 U.S. 524, 536 n.9 (2005), and it conflicts with Rule 60(b)(6) law in other circuits, *see, e.g., Satterfield v. District Att'y Philadelphia*, 872 F.3d 152, 160-62 (3d Cir. 2017).

McGirt forbids: it relied on extratextual evidence without first finding an ambiguity.

It is equally clear that *Irby* is irreconcilable with *McGirt* on other points that the State ignores. First, under *McGirt,* extratextual evidence can ***only*** be used to clarify ambiguities in statutory language—not "as an alternative means of proving disestablishment," *McGirt*, 591 U.S. at 916. *Irby* used it for precisely the wrong purpose. *See* Pl. Mem. at 18-19, 21-22. Second, under *McGirt,* extratextual evidence can be used ***only*** if it is contemporaneous with the statute at issue. *McGirt*, 591 U.S. at 914. *Irby* violated this rule, too, relying on commentary, actions and demographic data from decades after the OAA's enactment. *See Irby,* 597 F.3d at 1126-27. Third, the Osage Nation demonstrated that in every respect considered by the Supreme Court, its case against disestablishment was at least as strong as that of the Creek Nation and those of the other tribes whose reservations have been recognized as intact since *McGirt*. *See generally* Pl. Mem. at 26-38. The State makes no effort to rebut that demonstration.

The State resorts to a truism: *McGirt* involved the Creek Nation, so the Supreme Court did not address directly the Osage Nation and *Irby*. Def. Resp. at 14. But in relying on *McGirt*, the Nation is invoking *stare decisis*, not *res judicata*. The application of *stare decisis* here is clear: *Irby* is irreconcilable with *McGirt*. And where, as here, a judgment clearly "would be decided differently" under new Supreme Court precedent, Rule 60(b) authorizes relief, based on *stare decisis*, regardless of whether *res judicata* applies or the Supreme Court directly addressed that judgment. *See, e.g., Agostini v. Felton,* 521 U.S. 203, 236 (1997) (vacating an Establishment Clause injunction under Rule 60(b)(5), reason [iii] based on Supreme Court precedent that neither addressed that order nor directly overruled the precedent on which it was based).

CONCLUSION

The *Irby* judgment should be vacated pursuant to Rule 60(b).

Dated: March 21, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2025, I effected service of the foregoing Plaintiff's Reply Memorandum in Support of Rule 60(b) Motion for Relief from Judgment on counsel for all parties by filing it on this Court's ECF system.

March 21, 2025

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