No. 14-792

In The
Supreme Court of the United States

STATE OF WISCONSIN, et al.,

Petitioners,

v.

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* OF THE WISCONSIN COUNTY FORESTS ASSOCIATION, ET AL. IN SUPPORT OF PETITIONERS

[Additional *Amici* listed on inside cover]

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GREG RYSKEY, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE GOGEBIC COUNTY, MI FOREST AND PARKS COMMISSION AND

GREG BECK, IN HIS OFFICIAL CAPACITY AS THE LAND COMMISSIONER FOR PINE COUNTY, MN LAND DEPARTMENT.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2 the Wisconsin County Forests Association; Greg Ryskey, in his official capacity as the Director of the Gogebic County (Michigan) Forest and Parks Commission; and Greg Beck, in his official capacity as the Land Commissioner for Pine County (Minnesota) Land Department, respectfully submit this brief on behalf of themselves and their members, in support of Petitioners as *amici curiae*.[1]

The Wisconsin County Forests Association ("WCFA") is a nonprofit, public interest corporation located in Rhinelander, Wisconsin, formed in 1968 and dedicated to addressing the policies affecting forestry and public lands issues. Wisconsin County Forests are governed by the County Forest Law.[2] In addition to advocating for proper forest stewardship and sustainability, one of WCFA's central objectives is to promote multiple use management and encourage

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[1] Pursuant to Supreme Court Rule 37.2(a), letters indicating the intent to file this *amicus curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. The parties have consented to the filing of this *amicus curiae* brief, which have been lodged with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, no party, or counsel for a party, authored or made a monetary contribution intended to fund the preparation or submission of the brief. No one other than the *amici*, their members, and their counsel made such a contribution.

[2] County Forests are enrolled pursuant to the authority in Wis. Stat. §§ 28.10-28.11.

recreational opportunities to the general public. Fulfilling this statutory directive is the task of professional County Forest Administrators who are accountable to county residents through their County Boards. WCFA is made up of County Forest Administrators and their respective County Forest committees from twenty-nine Wisconsin counties. Twenty-five of these counties are situated within the ceded territory.[3]

The Gogebic County Forest and Parks Commission ("the Commission"), located in Bessemer, Michigan, was established in 1943 and is responsible for the governance of 50,290 acres of forest that provides multiple use opportunities and benefits to the people of Gogebic County as well as the region. Greg Ryskey is the director of the Commission and in his official capacity as such is responsible for planning, administration and oversight of the Gogebic County Parks and Forest. Gogebic County is the westernmost county in Michigan's Upper Peninsula and borders Lake Superior to the north and the Wisconsin counties of Vilas, Ashland and Iron to the south. Gogebic County is within the ceded territory. A notable American Indian population is located primarily in Watersmeet Township on the Lac Vieux Desert Band of Lake Superior Chippewa Indian Reservation. This Band was a signatory to the Treaty of St. Peters of 1837, the Treaty of La Pointe of 1842, and the Treaty

[3] Public lands where the off-reservation treaty rights at issue in this case may be exercised.

of La Pointe of 1854, and is also a member of the Great Lakes Indian Fish & Wildlife Commission ("GLIFWC"). In addition, the State of Michigan is party to a 2007 Inland Consent Decree with the Indian tribes subject to the 1836 Treaty of Washington, which governs usufructuary rights in that state.

The Pine County Land Department ("the Department") is located in Sandstone, Minnesota. Pine County, Minnesota borders northwestern Wisconsin and is also within the ceded territory. Greg Beck is the Land Commissioner of the Department and in his official capacity is responsible for the management of the approximately 48,000 acres of Tax Forfeited lands in Pine County, MN. Tax Forfeited lands are lands held in trust by the State of Minnesota. They are not directly owned by Pine County but are classified, managed, and controlled locally by the County Land Department. All Tax Forfeited lands are public land and open to the public for hunting, fishing and camping. The Mille Lacs Band of Chippewa Indians, also a member of the GLIFWC, possesses certain usufructuary rights to hunting, fishing, and gathering as outlined by this Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

The *amici* represent perspectives from Michigan, Minnesota and Wisconsin and have a special interest in preserving the status quo prohibition on nighttime deer hunting within the ceded territory, safeguarding the welfare of the public, and protecting the integrity of final judgments and consent decrees. The decision

below ignored Fed. R. Civ. P. 52(a) and created a new liberal standard of review for Fed. R. Civ. P. 60(b) motions under that rule, with the passage of time, too easily threatens the sanctity of final judgments and consent decrees. Further the decision below fails to recognize that night deer hunting is unsafe and jeopardizes the ability of the *amici* to control and manage their lands and ensure the safety of the public forest users. This case merits review by the Court.

SUMMARY OF THE ARGUMENT

A fundamental tenet of our legal system is the notion that appellate courts do not engage in factual evaluations and interventions. Thus, when a Court of Appeals, violates this tenet, such that its fact-finding quest betrays the evidence presented to the district court and the result threatens public safety, such unbridled enthusiasm must be checked.

The Seventh Circuit reversed and remanded the district court's ruling that denied Respondent's Rule 60(b)(5) motion to reopen a final judgment prohibiting night hunting of deer by tribal members on Wisconsin ceded territories. This final judgment was the product of decades of legal bouts, including a 1989 deer hunting trial that culminated in a 1990 decision and 1991

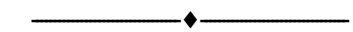
final judgment.[4] The district court found hunting deer at night to be fundamentally unsafe based on extensive trial evidence – giving Wisconsin a right to prohibit such an activity. But in 2012, the Tribes moved the court to reopen the 1991 judgment on the basis that there had been significant changed circumstances that made the prior judgment inequitable. However, after receiving evidence from the parties the district court concluded that such circumstances had not significantly changed to warrant reopening the judgment and denied the Tribe's motion. On appeal, the Seventh Circuit, without explanation, engaged in an unwarranted de novo review of the evidence while also searching out its own facts. Practically, the Seventh Circuit held that hunting deer at night did not present sufficient safety concerns to warrant forbidding the Tribes from participating in such an activity. In doing so, the court exceeded its appellate scope of review and became a de facto second-level trial court.

The Seventh Circuit's decision gives way to a dangerous precedent. By erroneously taking on a fact-finding role, without finding the district court's

[4] The original Deer Trial decision was issued in 1990 and was published as *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 740 F. Supp. 1400 (W.D. Wis. 1990). The Final Judgment entered in 1991 adopted all the principle holdings of the Deer Decision, including (as relevant here) granting Defendants the right to prohibit shining of deer. *Lac Courte Oreilles Indians v. State of Wisconsin*, 775 F. Supp. 321, 324 (W.D. Wis. 1991).

findings to be clearly erroneous, the Seventh Circuit directly violated the clearly erroneous rule found in Fed. R. Civ. P. 52(a). The decision does not pay due regard to the trial court's opportunity to intimately evaluate, firsthand, the credibility of witnesses and evidence. The decision undermines the legitimacy of lower courts and is bound to encourage litigants to retry facts of cases at the appellate level, thereby significantly truncating judicial efficiency.

Importantly, the Seventh Circuit's decision has the immediate effect of jeopardizing public safety. The court's decision ignores the fact that hunting deer in the dark is unsafe. It violates fundamental precepts of hunting and safe gun control because nighttime hunters cannot see beyond their target. Further, by relying on its own false assumptions about hunting and northern Wisconsin, the Seventh Circuit has put other forest users in jeopardy. Private landowners, hikers, cross country skiers, bird-watchers, winter-ATV riders, snowmobilers, logging, trucking and forestry professionals will have to worry about the constant and real threat of being killed or injured by deer hunters and their high caliber weapons at night. Although remanded, based on the instructions of the Seventh Circuit, the district court is left with no other choice but to accept the appellate court's factual finding that nighttime hunting is safe. Consequently, this Court should grant review.



ARGUMENT

The Seventh Circuit unnecessarily fashioned a new legal standard while at the same time managing to wreck a well-established principle of judicial review. The Seventh Circuit erroneously applied Fed. R. Civ. P. 60(b)(5) to shift the burden to the non-moving party and, without explanation, usurped a principal role of the district court as factfinder in concluding that tribal night deer hunting in ceded territory is safe. It is the latter misstep that the *amici* primarily address in this brief.[5] It is important to those charged with the stewardship of the public lands at issue and to the welfare of the public that this Court rejects these judicial missteps, which, left untampered, could have heavy consequences.

I. The Decision Below Creates a Dangerous Precedent Because It Erroneously Allows Appellate Courts to Undertake an Appellate Fact-Finding Role.

From time immemorial, the role of a federal court of appeals has been confined to deciding matters on appeal based only on evidence before the lower court. Circuit courts are generally not charged with the task of finding facts – for good reasons. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969) (explaining that reviewing courts must

[5] The Petitioner's brief primarily touches on the former – the erroneous application of Rule 60(b)(5) burden of production.

recognize their function is not to decide factual issues de novo); *Bose Corp. v. Consumer Union of United States, Inc.*, 466 U.S. 485, 514 n.31 (1984) (This Court determined that de novo review occurs when a "reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff"). Rule 52(a) of the Federal Rules of Civil Procedure was adopted to fortify this important principle. Rule 52(a) states that in all actions tried without a jury, or with an advisory jury, an appellate court shall not set aside the trial court's findings of fact, whether based on oral or documentary evidence, unless those findings are clearly erroneous.[6] According to the advisory committee's notes, allowing appellate fact-finding undermines the legitimacy of lower courts, increases appeals by encouraging appellants to retry the facts of cases at the appellate level, and needlessly reallocates judicial authority.[7]

While a district court's decision on a Rule 60(b)(5) motion is reviewed for abuse of discretion, *Agostini v. Felton*, 521 U.S. 203, 215 (1997), a district court's findings of facts must be accepted unless clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). A finding is clearly erroneous when the

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[6] "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6).

[7] Fed. R. Civ. P. 52 advisory committee notes.

reviewing court, after reviewing the entire evidence, is left with a definite and firm conviction that a mistake was made. *Id*. at 573. It is a highly deferential standard of review. *Id*. at 574.

This Court has given clear directions on the important considerations reviewing courts must remain conscious of when applying this standard to the findings of a district court sitting without a jury. The reviewing court must "constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp.*, 395 U.S. at 123. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals must abstain from reversing the lower court's decision even though it may have weighed the evidence differently if it had been sitting as the trier of fact. *See United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). As a matter of law, even "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

Due deference must be given to the original finder of fact. The trial judge is in a superior position to make determinations of credibility. *See Bose Corp.*, 466 U.S. at 500. The trial judge's role is to determine facts, and "with experience in fulfilling that role comes expertise." *Anderson*, 470 U.S. at 574. This Court is fundamentally against the duplication of the trial judge's efforts by the court of appeals because such duplication "would very likely contribute only negligibly to the accuracy of fact determination at a

huge cost in diversion of judicial resources." *Id.* at 575. Deference to the trier of facts is the rule, not the exception.

This Court made this point clear in *Dennison Mfg. Co. v. Panduit Corp.* when it remanded the case back to the Federal Circuit and reprimanded the panel for engaging in impressible fact-finding. 475 U.S. 809 (1986). In holding various patents invalid, the Federal Circuit ignored Rule 52(a) and seemingly substituted its view of factual issues for that of the District Court. *Id.* This Court granted certiorari, reversed, and remanded the decision with instructions. *Id*. This Court noted that the Federal Circuit failed to mention Rule 52(a), "did not explicitly apply the clearly-erroneous standard" to the district court's findings, and failed to provide an explanation. *Id.* at 811.

In fact, last month, this Court reiterated this "clear command" against appellate fact-finding. *See Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831 (2015) (Decided January 20, 2015). In *Teva Pharmaceuticals,* the petitioner owned the relevant patent to a drug and the respondent attempted to market generic versions of the same drug. *Id*. at 335. The petitioner brought a patent infringement suit, and the respondent defended its position by asserting that the patent was invalid. *Id.* Central to the underlying suit was whether the requisite "molecular weight" to ensure the validity of the patent was satisfied. *Id.* at 836. After taking evidence from experts, the district court concluded that the

petitioners met the "molecular weight" requirement, and thus, held the patent valid. *Id.* But on appeal, the Federal Circuit reversed and held the patent invalid. *Id.* In reaching its decision, the Federal Circuit reviewed the underlying facts de novo.

This Court granted certiorari, reversed and remanded the Federal Circuit's decision. According to this Court:

> Federal Rule of Civil Procedure 52(a)(6) states that a court of appeals "must not . . . set aside" a district court's "[f]indings of fact" unless they are "clearly erroneous." In our view, this rule and the standard it sets forth must apply when a court of appeals reviews a district court's resolution of subsidiary factual matters made in the course of its construction of a patent claim. We have made clear that the Rule sets forth a "clear command." "It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." Accordingly, the Rule applies to both subsidiary and ultimate facts. And we have said that, when reviewing the findings of a " 'district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' " (internal citations omitted).

Id. at 837. Further, this Court added that the Federal Circuit breached its standard of review because it

overruled the district court's findings without a finding that they were clearly erroneous. *Id*. at 843.

Similarly, here, the Seventh Circuit lost track of the clearly erroneous rule and exceeded its scope of review. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. State of Wisconsin*, 769 F.3d 543 (7th Cir. 2014). It undertook an unnecessary fact-finding quest at odds with traditional notions of appellate review. The opinion below is fraught with emptiness. As did the appellate courts in *Teva Pharmaceuticals* and *Dennison Mfg.*, the Seventh Circuit failed to explain its departure from the record. The court did not state that the district court's findings were erroneous or whether or why it found the district court's findings unassailable. Nevertheless, it concluded that hunting deer at night appears relatively safe.

At almost every turn in its decision, the Seventh Circuit took it upon itself to improperly fact-find. The court began with a discussion of the health benefits of lean deer meat and other purported public policy rationale *sua sponte* as support for its decision. *Id.* at 544. At a point, the Seventh Circuit purported to rely on the plaintiff's "proposed findings of facts," rather that upon any actual evidence in the case. *Id*. It then adopted these appellate "findings" without giving any deference to the trial court's evaluations. For example, the court found that night hunters do not shoot until "the deer is a brightly lit stationary object – a perfect target." *Id.* at 547. It went on to state that "[h]unting deer during the day is likely to be more

dangerous because there are more people about and the hunter will often be shooting at a moving animal." *Id*. Without citation to the record, the court concluded "that the more deer that Indians kill, the fewer deer-related accidents to humans there will be." *Id*. at 547-48. Though the actual trial record and reality reflect otherwise, the court stated that Michigan and Minnesota had allowed night hunting for a decade. *Id*. at 549. Although clearly a major support for its ultimate conclusion that nighttime hunting is safe, the court provides no citation for this proposition. In making these bold assertions, the Seventh Circuit neither cited its source nor provided a justification for its new findings of facts.

Allowing the Seventh Circuit to conduct its own fact-finding, as it did here, gravely undermines the district court's legitimacy. It will certainly lead to an increase in the number of appeals if litigants believe that they can achieve a de novo review of factual findings at the appellate level. Not to mention, it needlessly reallocates judicial authority. The decision below is a dangerous venture into unwarranted judicial hyperactivity that should be checked. Like the *Dennison Mfg.* case, this case would benefit from a grant of certiorari, a swift reversal, and remand to correct the lower court's errors.

II. The Decision Below Ignores the Reality That Nighttime Deer Hunting Is Fundamentally Unsafe.

After decades of litigation, one conclusion remains unscathed – night deer hunting is fundamentally unsafe. The Tribes' night deer hunting proposal violates the basic precept of hunting that one must be able to see what lies beyond his target, and gives rise to unacceptably dangerous user conflicts. The Tribes' proposed night hunts would require no advance notice to adjoining landowners, local law enforcement or forest recreational users.[8] Thus, the proposed nighttime hunts give rise to conflicts between hunters, private landowners and other forest users. The district court's record, both at the original deer trial and during the Rule 60(b) stage, shows conflicts arising between these groups. The district court concluded that these user conflicts, when combined with the inability of night deer hunters to see beyond their targets, constituted a specific safety hazard that justified Wisconsin's ban on night deer hunting. Instead, the Seventh Circuit ignored the district court's findings without explanation and substituted its own false reading of the record to conclude that

[8] Dkt. 278-2 (Docket citations refer to the current electronic docket entries from the district court's record).

the State did not meet its supposed burden to demonstrate that night deer hunting was unsafe.[9]

A. State and County Forest Lands Are a World Class Destination for Outdoor Recreation That Is Incompatible With Nighttime Deer Hunting.

The Tribes have proposed a night deer hunting season running from November 1 through the first Monday in January. This is the time of year when state and county forests often have the most activity after dark. Potential for a night shooting accident is greatest during this two month time frame than at any other time of the year. November is prime deer breeding season (aka "the Rut") and a great many hunters are active. Dispersed camping[10] in the county forests is most popular at this time of the year and extends into the traditional 9-day gun hunt which runs from the Saturday prior to Thanksgiving to the Sunday after. Conservation wardens routinely work nights and drive these roads on public lands.

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[9] As stated in the Petitioners' Brief, the court of appeals erred by placing the burden on the State in response to the tribes' Rule 60(b) motion.

[10] Many people enjoy the solitude of a primitive camping experience away from developed campgrounds and other campers. Dispersed camping is the term used for camping anywhere in the forest outside of a designated campground.

Ignoring the district court's factual record and realities on the ground, the Seventh Circuit proceeded with a number of false factual assumptions. One of which was its unfounded assertion that because the proposed night hunting would be taking place "in the thinly populated (by human beings) northern part of Wisconsin," it presents scant safety concerns. 769 F.3d at 547. Although northern Wisconsin is less populated than an urban area like Chicago, relative population density is not indicative of a particular activity's safety. Instead, as human populations grow, especially within urban centers, public lands like those in Wisconsin are called upon to meet the ever-expanding and sometimes conflicting demands. Here, the forests of the ceded territory host a great deal of activity. Much of which conflicts with the nighttime hunting of deer.

Wisconsin's northern forests serve as world class destination for winter outdoor recreation, including hiking, cross country skiing, snowshoeing, dog sledding, skijoring, bird-watching, fishing, trapping and, of course, winter ATV riding and snowmobiling.[11] In fact, Wisconsin boasts 5,555 miles of state-funded ATV trails, of which 1,559 miles are open for summer

[11] Wisconsin Department of Natural Resources, *Wisconsin's Northern State Forest Assessments: Recreational Supply and Demand* (March 2001), http://dnr.wi.gov/topic/forestmanagement/documents/pub/FR-137a.pdf.

usage while 3,996 miles are available in the winter.[12] Of course, Wisconsin is also the premiere destination in the United States for snowmobiling with over 25,000 miles of groomed trails.[13] The City of Eagle River, Wisconsin – in the ceded territory – is known as the "Snowmobiling Capital of World."[14] Much of this activity takes place during nighttime hours when the winter sun sets before 5:00 p.m.[15] Candlelight skiing and snowshoeing are common on county and state forest lands[16] and winter hiking and camping is increasing in popularity on state forest lands.[17] The

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[12] Wisconsin Department of Tourism, *Economic & Demographic Profile of Wisconsin's ATV Users* (March 2004), http://www.newridersatvclub.com/en/download/documents/2003-watva-eco-sum.pdf.

[13] TravelWisconsin.com, *Snowmobiling: A Winter Fun Invention*, http://www.travelwisconsin.com/things-to-do/outdoor-fun/winter-activities/snowmobiling.

[14] TravelWisconsin.com, *Wisconsin Offers Wide Variety of Outdoor Recreation* (2011), http://www.travelwisconsin.com/uploads/medialibrary/d3/d3a15cb3-3d26-4bfb-a28d-1dd9bd920db8-overview-outdoor-recreation.pdf.

[15] Snowmobiling is encouraged but speed limits are reduced to 55 mph for visibility concerns. *See* Wisconsin Department of Natural Resources, *Wisconsin Snowmobile Laws*, http://dnr.wi.gov/topic/Snowmobile/documents/snowmobile_regs.pdf.

[16] Chelsey Lewis, Milwaukee Journal Sentinel, *Guide to candlelight ski, snowshoe and hike events in Wisconsin* (updated January 7, 2015), *available at* http://www.wisconsintrails.com/outdoors/guide-to-candlelight-ski-snowshoe-and-hike-events-in-wisconsin-b99411106z1-287210551.html.

[17] Wisconsin Department of Natural Resources, *Winter Camping*, http://dnr.wi.gov/topic/parks/camping/winter.html; TravelWisconsin.com, *Wisconsin Winter Camping: A Snowy Delight* (updated

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North Country Trail cuts through the two counties where tribal hunters currently harvest 80% of their deer.[18] Also, the heavily travelled Ice Age Trail bisects the southern half of the ceded territory. State and local enforcement officers are tasked to patrol these and other state and county forest lands during the night. Commercial logging operations frequently work into the night hours in order to timely complete a project.[19] All of these users conduct nighttime activities on the forests within the ceded territory where the Tribes propose to conduct night hunting of deer with high caliber weapons. The State presented an abundance of evidence of these user conflicts to the district court which led the court to find that the hunters, despite their best efforts, simply cannot perceive "whether a campsite or home is nearby or whether there are people in the area."[20] The Seventh Circuit panel ignored or disregarded these findings without finding them clearly erroneous.

December 11, 2014), http://www.travelwisconsin.com/article/things-to-do/article/wisconsin-winter-camping-a-snowy-delight.

[18] Dkt. 366, p. 243.

[19] Dkt. 369, p. 50.

[20] 740 F. Supp. at 1427.

B. Nighttime Deer Hunting Presents Safety Concerns That Cannot Be Adequately Remedied to Ensure the Safety of the Public and Law Enforcement.

Every hunter must be able to identify his or her target and what lies beyond it before firing. This is not only a fundamental principle of hunting safety,[21] as described and established by evidence in the record of the case,[22] it is common sense. At night, seeing beyond one's target becomes significantly more difficult. One's visual abilities (including the ability to recognize objects) are drastically reduced as luminance decreases and the contrast between an object and its background is reduced.[23] As the trial testimony established, "[e]ven if the hunter hits the targeted deer, "[the bullet may] go right through that deer and continue on for hundreds, if not thousands of yards and until its energy is expended."[24]

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[21] International Hunter Safety Association, *Basic Safety Rules*, http://homestudy.ihea.com/firearmsafety/01actt.htm; National Rifle Association, *NRA Gun Safety Rules*, http://training.nra.org/nra-gun-safety-rules.aspx; National Shooting Sports Foundation, *Firearms Safety – 10 Rules of Safe Gun Handling*, http://www.nssf.org/safety/basics/.

[22] *See* note 4, supra.

[23] Lauren Linz Mastro, M.S., *Deer-vehicle Collision Prevention Techniques and Factors Influencing a Motorist's Ability to Detect Deer at Night*, Utah State University (2007).

[24] R. 1133 at 44-45 (Testimony of Homer Moe, August 8, 1989) (Record citations refer to the district court's original manual docket entries from the 1989 Deer Trial).

In addition, visibility for deer hunters is only marginally better in winter than during the summer months. During this time of year the leaves have mostly fallen off the broadleaf trees of the forest causing the deer population to look for coniferous cover.[25] Unlike the deciduous trees of the forest, coniferous forest needles remain on the trees during the winter and provide thick cover for deer.[26] This dense winter cover further restricts the visibility for hunters and impedes their ability to detect a passing cross-country skier, solitary camper or approaching snowmobiler.[27]

Night hunters risk misidentifying unwitting hikers at night.[28] In 2012 two hunters accidentally

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[25] During the winter deer congregate "in coniferous vegetation that provides thermal cover and woody browse." 740 F. Supp. at 1403.

[26] According to one U.S. Army study of forest visibility of soldiers, visibility in deciduous forests only improves by 40% from summer to winter while no appreciable difference was noted for coniferous stands. Robert L. Anstey, U.S. Army Natick Laboratories, Earth Sciences Division, *Special Report: Visibility Measurements in Forested Areas* (November 1964), *available at* http://www.dtic.mil/dtic/tr/fulltext/u2/648230.pdf.

[27] As the trial record indicates, it is common to have snow on the ground in the ceded territory, and people engaged in cross country skiing, snowshoeing, hunting and snowmobiling, during the proposed tribal night hunting season. [See, e.g., Dkt. 339 at 15; Dkt. 340 at 25; Dkt. 346 at 29; and Dkt. 364 at 10].

[28] T. DeLene Beeland, Scientific American, *Night-Hunting Coyotes in N.C. Risky for Red Wolves* (March 27, 2012), *available at* http://blogs.scientificamerican.com/guest-blog/2012/03/27/night-hunting-coyotes-in-n-c-risky-for-red-wolves/ ("One concerned citizen

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shot and killed a Forest Service agent while night hunting in the Oconee National Forest in Georgia.[29] They apparently mistook the glint of the agent's optics and killed him.[30] Recently, a Florida deer hunter accidentally shot a hiker who he mistook for an animal at 5:30 p.m.[31] Last year a Massachusetts hunter shot a runner when he mistook him for deer in an incident occurring around 5:00 p.m.[32] Because of this type of visibility concern the district court rightly found "that if the hunter missed, the bullet or arrow would travel into the background area where it might damage persons or property that the hunter cannot see." 740 F. Supp. at 1408. These are manifested

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and hunter said he hoped other hunters would recognize that the glint of his eyes, six feet off the ground, were not those of a coyote; but he worried that an inexperienced hunter might mistake his six-year old, whose eyes are lower to the ground").

[29] TheChattanoogan.com, *Georgia Hunter Admits To Killing Forest Service Officer* (November 18, 2011), http://www.chattanoogan.com/2011/11/18/213837/Georgia-Hunter-Admits-To-Killing-Forest.aspx; Forest Service Press Office, Release No. 12-05, *Georgia Man Sentenced To Five Years In Death of U.S. Forest Service Officer* (March 23, 2012), *available at* http://www.fs.usda.gov/detail/conf/news-events/?cid=STELPRDB5360383.

[30] *Id*.

[31] The Commercial Appeal, *Crime Report: Deer hunter charged with reckless endangerment* (November 25, 2008), http://www.commercialappeal.com/news/crime-report-suspect-rises-wheelchair-flees-beer.

[32] Alison Wade, Runner's World, *Mistaken for a Deer, Runner Shot by Hunter* (December 10, 2014), http://www.runnersworld.com/general-interest/mistaken-for-a-deer-runner-shot-by-hunter.

dangers that have not been found to be clearly erroneous and directly contradict the Seventh Circuit's overreaching factual findings.[33]

Further, it is remarkable how the Seventh Circuit concluded that "the proposed Wisconsin regulations are far more stringent than those other states [Michigan and Minnesota]," 769 F.3d at 549, where the Tribes' proposed regulation is devoid of any mechanisms that address the safety of the general public and law enforcement. The proposed regulation provides absolutely no notice requirements to neighboring property owners,[34] law enforcement agencies or any members of the public.[35] According to the record, the Tribes' witnesses argued that they did not want to provide prior notice of night hunting activities or to require clothing that might identify tribal members hunting at night in order to prevent tribal hunters from being harassed.[36] Further compounding the lack of notice is the fact that nothing in the text of the proposed regulation absolutely prohibits tribal hunters from shooting near roads, schools, churches, private residences, campgrounds or trails. The regulation's

[33] The Seventh Circuit's consideration of the Tribes' on-reservation safety record, 769 F.3d at 546, is a flawed comparison because these multiple public access conflicts do not exist on the reservation land.

[34] Hunting on private property is allowed in Wisconsin if the lands are enrolled in the Managed Forest Land program. Wis. Stat. § 77.80 *et seq*.

[35] Dkt. 369 at 53.

[36] Dkt. 369 at 56; Dkt. 363 at 130.

undefined "adequate backstop" requirement for shooting near these sensitive areas offers little comfort to the *amici* and those they represent. The *amici*'s safety concerns are especially heightened in light of the fact that hunters as young as 10-years old are authorized to hunt at night. The Seventh Circuit's conclusion that there existed "scant reason"[37] to support the State's safety concerns within the record appears dubious.

Instead, the Seventh Circuit panel appears to have justified its decision based upon a gross misunderstanding of the legality and prevalence of nighttime deer hunting in Minnesota and Michigan. 769 F.3d at 549 ("[B]oth states . . . have allowed night hunting for at least a decade . . . although the proposed Wisconsin regulations are far more stringent."). This statement is simply untrue. For example, the Minnesota-based, Mille Lac Band's regulation[38] requires that hunters use tree stands at least 10 feet off the ground within 17 yards of a bait pile, and they required advance notification of appropriate state and federal officials as well as nearby landowners. 11 Mille Lacs Band Stat. Ann. § 5059(c)-(d). Likely as a result of the stringent notice requirements, there is no evidence that any tribal members in the State of Minnesota have *ever* applied for a night hunting permit. By comparison, Michigan prohibits night

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[37] 769 F.3d at 547.

[38] Dkt. 271.

hunting of deer without exception. M.C.L. § 324.40113. To the extent that the Keweenaw Band Indian Community Code § 10.561 and § 10.567[39] permits the off-reservation hunting of deer at night, it does so in contradiction of state law. Again, however, there is no admissible evidence that any Michigan tribal members have actually exercised such a right. The lack of nighttime hunting in Minnesota and Michigan stands at odds with the facts accepted by the Seventh Circuit.

The result is that the Seventh Circuit erroneously transformed itself into a second level trial court that substituted its own erroneous findings for those of the district court – finding changed circumstances where none existed and no threat to public safety when the evidentiary record and common sense showed the opposite. Despite the passage of time there have been no extraordinary changes that justify setting aside the district court's findings on the safety of night hunting. The night still brings with it visibility concerns while numbers of recreational forest users have only increased. The Tribes can only point to the State's temporary, emergency response to chronic wasting disease, a handful of permits allowing for municipalities to cull nuisance deer and three wolves that were taken at night in 2012 during the short-lived wolf hunt. These isolated instances do not constitute exceptional circumstances required in

[39] Dkt. 278-5, pp. 65-66.

order to re-open a judgment pursuant to Fed. R. Civ. P. 60(b) and they do not demonstrate that widespread nighttime deer hunting is safe in Wisconsin.

The Tribes' night hunting proposal poses great dangers to other forest users that cannot be ignored. Nighttime hunting on these public lands puts adjoining landowners, forest recreational users and law enforcement at risk. This case merits review by the Court. The ability of the *amici* to control and manage their lands and ensure the safety of forest users has been jeopardized.

CONCLUSION

The *amici* recognize that this Court does not sit to correct ordinary errors of a lower appellate court. But there are bizarre cases[40] in which the lower

[40] *See Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986) (per curiam) ("grant[ing] the petition for certiorari, vacat[ing] the judgment, and remand[ing] the case to the Court of Appeals for further consideration in light of Rule 52(a)"); *Anderson v. City of Bessemer City*, 470 U.S. 564, 566 (1985) (certiorari granted and judgment reversed where "Court of Appeals misapprehended and misapplied the clearly erroneous standard"); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc*., 456 U.S. 844, 858 (1982) (certiorari granted and judgment reversed where the "Court of Appeals erred in setting aside findings of fact that were not clearly erroneous"); *Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 108 (1969) (granting certiorari to determine "whether the Court of Appeals properly discharged its appellate function under Rule 52(a) of the Federal Rules of Civil Procedure").

court's errors are obvious, its effects significant, and the errors stem from a miscarriage of its duties as a federal appellate court, that this Court should exercise its supervisory powers.[41] *This is such a case.* The Seventh Circuit departed from the clearly erroneous rule and inserted itself as a second-level trial court in violation of Fed. R. Civ. P. 52(a), and Fed. R. Civ. P. 60(b). More significantly, however, the Seventh Circuit's erroneous fact-finding jeopardizes the safety of forest visitors and law enforcement officials by declaring safe, night deer hunting within the ceded territory. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[41] This Court's Rules state that it will consider granting a writ where a United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).