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, et al.,

Respondents.

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

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QUESTION PRESENTED

Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, to obtain relief from a final judgment, a moving party must show a significant change in factual conditions or law that renders continued enforcement of that judgment inequitable. The U.S. Court of Appeals for the Seventh Circuit believed that the moving parties (Tribes) had provided sufficient evidence to establish that a significant change in conditions had occurred. Out of deference to the district court, however, rather than holding so outright, it shifted the burden of production to the non-moving party (Wisconsin) to provide additional evidence if it sought to continue to contest the motion on remand.

Does Rule 60(b)(5) permit shifting the burden of production onto the non-moving party in these unique factual circumstances, where the moving party had already submitted sufficient evidence to establish the existence of changed conditions?

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OPINIONS BELOW

The Petition identifies three of the opinions below, Pet. at 1, and provides a copy of each in its appendix. Pet. App. 1a-13a; 14a-42a; 43a-111a. The Petition fails to include the district court's original final judgment in this matter, *see Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991), as well as its 2012 order denying preliminary injunctive relief to the Respondent Tribes. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 74-cv-313-bbc (Dec. 17, 2012) (D.Ct. Dkt. #269).

PROVISIONS INVOLVED

The Petition lists Rule 60(b)(5) of the Federal Rules of Civil Procedure as the only constitutional provision, treaty, statute, ordinance, or regulation involved in this case. Pet. at 2; Sup. Ct. R. 14(1)(f). The Tribes' action, however, rests on treaties with the United States that guarantee their right to hunt on certain off-reservation lands within the states of Michigan, Wisconsin, and Minnesota.

More specifically, Article 5 of the 1837 Treaty with the Chippewa provides that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [*sic*] to the Indians, during the pleasure of the President of the United States." 7 Stat. 536. Similarly, Article 2 of the 1842

Treaty with the Chippewa states that "[t]he Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States." 7 Stat. 591. Also implicated in this case is Art. VI, clause 2 of the Constitution of the United States, which declares that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

I. The Original Treaty Rights Litigation

The Petition fails to discuss what this case is actually about: Ojibwe treaty rights in the ceded territory within Wisconsin. By omitting the history of the case and applicable treaty rights law, the Petition conceals the complex and fact-bound nature of the proceedings below. Because it is impossible to understand the Seventh Circuit's decision without familiarity with this history, a brief description follows.

A. Recognition of Ojibwe Treaty Rights

In 1837 and 1842, the Ojibwe entered into two treaties ceding their land in Wisconsin, Michigan and Minnesota to the United States. Treaty with the Chippewa, 1837, 7 Stat. 536 ("1837 Treaty"); Treaty

with the Chippewa, 1842, 7 Stat. 591 ("1842 Treaty"). Before consenting to these treaties, the Ojibwe demanded the continued right to hunt, fish, and gather on those lands. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176-77 (1999). The United States agreed, and these usufructuary rights were explicitly retained in the treaties. 1837 Treaty, art. 5; 1842 Treaty, art. 2. Not long afterwards, the United States contemplated removing the bands westward, but in 1854, the federal government changed course and a new treaty designated permanent reservations in Wisconsin, Michigan and Minnesota for many of the Ojibwe bands. Treaty with the Chippewa, 1854, 10 Stat. 1109 ("1854 Treaty"). The Respondents in this case are the six federally recognized Ojibwe bands in Wisconsin who were signatories to the 1837, 1842, and 1854 treaties.

Despite specific treaty language guaranteeing their usufructuary rights, tribal members were frequently prosecuted by Wisconsin officials for exercising those rights in the ceded territory. In 1974, the Respondent Tribes filed suit in the U.S. District Court for the Western District of Wisconsin, seeking a declaratory judgment recognizing their treaty rights. *United States v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978). The district court held that the Tribes' usufructuary rights under the 1837 and 1842 treaties had been impliedly abrogated by the 1854 Treaty. *Id.* at 1361. The Seventh Circuit reversed. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983) ("*LCO I*"). Utilizing

the canons of Indian treaty construction, the Seventh Circuit held that the Tribes' right to hunt, fish, and gather remained in full force and effect. *Id.* at 365.[1]

B. The Extent of Permissible State Regulation

The Seventh Circuit remanded the case to the district court to determine how the exercise of usufructuary rights would be regulated. *LCO I*, 700 F.2d at 365. The litigation was then bifurcated into two phases: a declaratory phase and a regulatory phase. Pet. App. B at 18a.

In the "declaratory phase" of the litigation, the district court set out to determine the scope of the tribes' usufructuary rights. Pet. App. B at 18a. The court determined that the tribes retained the right to harvest several species, including white-tailed deer, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1428, 1435 (W.D. Wis. 1987) ("*LCO III*"), that the Ojibwe were not confined to the use of hunting and fishing methods that their ancestors relied upon, *id.* at 1435, and that they were entitled to harvest enough resources to "insure them a modest living." *Id.* The court found that the Tribes "enjoy greater rights to hunt, fish, and

[1] More than fifteen years later, this Court issued a similar decision in a case involving off-reservation hunting and fishing rights within the Minnesota ceded territory under the same 1837 treaty. *Mille Lacs Band*, 526 U.S. at 200.

gather in the ceded territory than do non-Indians." *Id.* at 1429.

In the subsequent "regulatory phase" of the litigation, the court considered whether the state had authority to regulate the exercise of treaty rights, and if so, to what extent. Pet. App. B at 18a. As a general rule, tribes regulate the exercise of their treaty rights free from state interference. *See Antoine v. Washington*, 420 U.S. 194, 206 (1974) ("[State] legislation must be construed to exempt the Indians' preserved rights from like state regulation."); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) (holding that state licensing law did not apply to tribal fisherman). However, this Court has articulated a narrow exception where state regulation is necessary for the conservation of a species (i.e., where extinction would occur without such regulation). *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 (1979) ("[T]reaty fishermen are immune from all regulation save that required for conservation."). *See also Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 49 (1973) (rejecting Washington's attempt to prohibit tribal members from net fishing of steelhead trout, but noting that "[w]e do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species").

The district court added another exception not previously recognized in this Court's jurisprudence. It held that the state may also regulate the exercise of treaty rights where necessary to prevent "a substantial

detriment to the public safety." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F. Supp. 1233, 1237 (W.D. Wis. 1987) ("*LCO IV*") (quoting *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin,* 760 F.2d 177, 183 (7th Cir. 1985)). The court determined that this newly articulated public safety exception must be subject to the same high standard as the conservation exception. *Id.* at 1239. Thus, "[t]he state may regulate the tribes' off-reservation treaty rights where the regulations are reasonable and necessary to prevent or ameliorate a substantial risk to the public health or safety, and do not discriminate against the Indians." *Id.* The regulation is necessary if it meets a three-part test. *Id.* First, the state must show "that a substantial detriment or hazard to public health or safety exists or is imminent." *Id.* Second, the state must show that the *specific* regulation at hand is necessary to ameliorate the detriment or hazard. *Id.* Third, the state must show that the application of that regulation *to the tribes* is necessary to protect public safety. *Id.* Even if this three-part test is met – and the regulation is reasonable – "the state must show that its regulation is the least restrictive alternative available to accomplish its health and safety purposes." *Id.* The court emphasized that "State regulations that burden treaty-reserved rights must be closely drawn to ensure the minimum possible infringement upon the tribes' treaty rights." *Id.*

The effect of these decisions – that state regulation of tribal treaty rights is only permitted in extremely narrow circumstances – is not that

usufructuary rights are unregulated. Instead, the tribes themselves regulate the exercise of the treaty right, both on and off reservation. As a result, "effective tribal self-regulation of a particular resource or activity precludes state regulation of that resource or activity as to the tribes." *Id.* at 1241.

In 1984, the Tribes formed an agency charged with regulating their usufructuary rights: the Great Lakes Indian Fish and Wildlife Commission ("GLIFWC"). *See Reich v. GLIFWC*, 4 F.3d 490, 492 (7th Cir. 1993). They also formed the Voigt Intertribal Task Force to direct GLIFWC's activities and propose tribal regulations for each species. D.Ct. Dkt. #363 (Tr. 1-A-33). Prior to the regulatory phase of this litigation, GLIFWC, the Voigt Intertribal Task Force and the Tribes developed proposed regulations and compiled them into a Model Off-Reservation Conservation Code ("Model Code"). *Id.*

C. The Dispute over Night Hunting

The Model Code was developed through negotiation with the State of Wisconsin. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400, 1401 (W.D. Wis. 1990) ("*LCO VII*"). Only the issues that the parties could not agree upon were brought to the district court. *Id.* One such issue was the practice of shining and shooting deer at night. *Id.* at 1402. The Ojibwe have hunted deer at night by torch light since before treaty times, *see* D.Ct. Dkt. #297 at 29-30, and they continue to practice

nighttime deer hunting on their reservations today. *See, e.g.*, D.Ct. Dkt. #364 at 2-A-52 to -53; D.Ct. Dkt. #366 at 4-A-108. The purpose of such night hunting is its efficiency – the shining of the light freezes the deer in place. *LCO VII*, 740 F. Supp. at 1408. Efficiency is important to the Ojibwe because, unlike the typical non-Indian hunter, they hunt for subsistence and not for sport. D.Ct. Dkt. #297 at 37.

Both parties agreed that conservation of deer was not at issue, *LCO VII*, 740 F. Supp. at 1408, but they did dispute whether Wisconsin could prohibit nighttime shooting of deer for safety reasons. *See id.* at 1423. Importantly, the issue was not whether the Tribes had a right to shine deer in the ceded territory. Rather, it was whether despite that right, the State could completely prohibit the activity in accordance with the narrow public safety exception articulated in *LCO IV*. *See LCO VII*, 740 F. Supp. at 1423.

A trial was held in 1989. The Tribes' proposed regulatory scheme would have permitted persons to shine and shoot deer on foot from September 1st through December 31st each year. *LCO VII*, 740 F. Supp. at 1408. But there was a dearth of evidence on the relative safety of night shining at the time, as the practice was virtually unknown in the ceded territory of Wisconsin, Pet. App. at 37a, and indeed

the United States.[2] Tribes' 7th Cir. App.[3] at 323-24. Although Wisconsin permitted night hunting of smaller species (e.g., fox, coyote, raccoon), the court distinguished night hunting of deer on the grounds that deer hunters use higher caliber bullets that travel farther. *LCO VII*, 740 F. Supp. at 1408. The court also noted that the smaller species were usually shot while treed, making it more likely that the bullet would fall to the ground harmlessly. *Id.* Though the Tribes speculated that certain safety measures could lessen the risk of nighttime deer hunting, there was no data available on the effectiveness of those practices. *See id.* at 1423. With no field-tested alternatives available to ensure public safety, the court decided that the ban on night shining fit the *LCO IV* exception. *See id.* Thus, the State could enforce a ban on night hunting "except insofar as plaintiffs incorporate the same prohibition into their own tribal codes." *Id.* A complete ban on night hunting was subsequently adopted into the Tribes' Model Code. Pet. App. at 20a.

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[2] While nighttime deer hunting existed on the Respondent Tribes' reservations in 1989, the parties agreed that this activity was not directly analogous because of differences between the reservations and the ceded territory in terms of geography and population. *See* D.Ct. Dkt. #366 at 4-A-114.

[3] For the purposes of this Opposition Brief, most exhibits that were admitted into evidence during the five-day evidentiary hearing before the district court are cited in this brief by referring to their location in the appendix the Tribes filed in the Seventh Circuit, because this is the only electronically available (through PACER) copy of such documents.

II. The Increase in Night Hunting

Beginning in the late 1990s, Wisconsin found itself unable to keep its exploding deer population in check. Tribes' 7th Cir. App. at 508; D.Ct. Dkt. #368 at 1-P-53 to -56. At the same time, hunter safety education (which was in its infancy in the 1980s), had not only become widespread, but it dramatically reduced the number of hunting accidents within the State. Tribes' 7th Cir. App. at 555-56; D.Ct. Dkt. #366 at 4-A-282. These two changes set the stage for what became a dramatic increase in nighttime hunting of deer within the State.

A. The Chronic Wasting Disease Program

In 2001, CWD was discovered in the Wisconsin deer population. D.Ct. Dkt. #329 at ¶ 76 (Stipulated Facts). CWD is not dangerous to humans, but it is highly contagious and deadly for deer. *Id.* at ¶ 77. Thus, in 2002 the Wisconsin Department of Natural Resources (DNR) embarked on a CWD shooting program to contain the outbreak. *Id.* at ¶¶ 80-81. Nearly all of the shooting was conducted at night, as this is the most efficient way to harvest deer. *Id.* at ¶ 79.

Over the years, the CWD program grew and over 300 individuals participated in the shooting. Pet. App. at 29a. Though most of the shooters were DNR employees, they were not required to have any specific qualifications or experience. *See, e.g.*, Pet. App. at 7a (quoting from trial exhibit 77, a DNR memorandum written by State expert witness Timothy Lawhern);

D.Ct. Dkt. #369 at 2-P-78 to -81 (testimony of DNR employee with a leadership role in the CWD nighttime shooting program, admitting that she had only shot a rifle at summer camp as a child and during her hunter safety training course, and that she had never killed a deer prior to her participation in the program). Thousands of deer were shot at night through the CWD program. *See* Pet. App. at 29a (finding that 987 deer were killed in 2007 alone). Despite this, not one safety incident was recorded throughout the course of the five-year program. Pet. App. 29a; D.Ct. Dkt. #329 at ¶ 120.

As part of the CWD program, the DNR developed and field tested techniques to ensure public safety was protected while nighttime hunting occurred. D.Ct. Dkt. #329 at ¶¶ 93-94 (discussing marksmanship tests); *Id.* at ¶¶ 109-14 (discussing shooting plans that were sometimes used). The DNR's safety techniques were internal policy only, not a matter of enforceable law. *See id.* at ¶ 86. Nevertheless, these techniques were incorporated into the night shooting program later proposed by the Tribes as part of their Rule 60(b)(5) motion. Pet. App. at 32a. *See also* D.Ct. Dkt. #363 at 1-A-68.

B. Night Shooting of Nuisance Deer

At the same time that the DNR was attempting to isolate and eradicate pockets of CWD, the focus of its management practices in general shifted from maintaining the deer herd to reducing local hot spots. D.Ct. Dkt. #300 at 19-20; D.Ct. Dkt. #368 at 1-P-57 to

-59. Efforts to control nuisance deer took advantage of the efficiency of night shooting. In 2005, the DNR amended its regulations on deer nuisance permits to allow night shooting. D.Ct. Dkt. #365 at 3-A-90 to -94 & 3-A-102 to -103. While these permits can be obtained by municipalities, private contractors conduct most of the nighttime hunting. Pet. App. at 30a; D.Ct. Dkt. #365 at 3-A-97 to -100. Even though private contractors are utilized, the Wisconsin DNR has not promulgated regulations or written policy guidelines describing safety measures for night shooting under these permits. *See* D.Ct. Dkt. #365 (Tr. 3-A-87 to -90); D.Ct. Dkt. #370 (Tr. 3-P-5 to -10) (discussing the varying criteria in permits).

In 2007, there was a dramatic expansion in night hunting under nuisance permits. Pet. App. at 30a (noting that up to a dozen permits have been issued each year from 2007-2013); D.Ct. Dkt. #365 (Tr. 3-A-90). Typically, 25 to 200 deer can be shot per permit, but some permits allow for an unlimited number of deer to be shot at night. D.Ct. Dkt. #365 at 3-A-109 to -112. As a result, 2,000 or more nuisance deer are shot at night in any given year in Wisconsin. *See* D.Ct. Dkt. #365 at 3-A-109 to -111. There is no evidence that any hunting accidents occurred as a result of this shooting.

C. The Nighttime Wolf Hunt

In 2012, the gray wolf was removed from the federal Endangered Species List. Almost immediately, the Wisconsin Legislature authorized a public wolf

hunt, which included the ability to hunt wolves at night. D.Ct. Dkt. #329 at ¶ 136. *See also* Tribes' 7th Cir. App. at 509, 511 (2011 Wisconsin Act 169, the "Wolf Act"). Wolves are substantially larger than the unprotected species such as fox or coyote. *See* D.Ct. Dkt. #329 at ¶ 150. As a result, most wolf hunters use the same high caliber weapons they use to hunt deer. *Id.* at ¶ 159.

After passage of the Wolf Act, the DNR issued emergency regulations to enable citizens to hunt wolves in the upcoming season. The regulations were issued in August 2012 and the wolf hunt commenced not long thereafter. D.Ct. Dkt. #329 at ¶¶ 143-44, 149. The State made 1,160 wolf licenses available, and hunters harvested 117 wolves. *Id.* at ¶¶ 143-44, 147-49. At least three of these wolves were shot at night. D.Ct. Dkt. #370 at 3-P-159. The State reached its wolf harvest quota so fast that it had to close the season two months early. *Id.* at ¶ 149. Notably, there were no hunter safety incidents during the course of the wolf hunt. *Id.* at ¶ 160.

III. The Tribes' Rule 60(b)(5) Motion and Proceedings in the District Court

In light of these significant changes, the Tribes adopted new nighttime deer hunting regulations. Those regulations are unquestionably more stringent than State policies governing nighttime shooting under the CWD program, as well as the regulations governing the 2012 nighttime wolf hunt. Under the

Tribes' proposal, a night hunter must take a twelve-hour advanced hunter safety course,[4] pass a stringent marksmanship test at night,[5] pick – in advance – a specific location for shooting that has an adequate backstop to stop any bullet from traveling more than 125 yards,[6] and draw up and file a detailed shooting plan with GLIFWC and local law enforcement.[7] Unless the hunter plans to shoot downward from an elevated position and within 50 feet of a backstop, a GLIFWC warden or tribal conservation officer must visit the proposed area and pre-approve the shooting plan. D.Ct. Dkt. #329 at ¶¶ 175-76; Revised Regulations § 6.20(5); D.Ct. Dkt. #364 at 2-A-84. Furthermore, the hunter *must* use a light to "freeze" the deer in place, making it a stationary target. D.Ct. Dkt. #329 at ¶ 179; Revised Regulations § 6.20(3)(a); D.Ct. Dkt. #363 at 1-A-72. The State has never utilized such a strict, detailed plan, yet it has deemed night hunting to be safe in a variety of circumstances.

The Tribes filed their initial motion for preliminary relief in November 2012, followed by an amended Rule 60(b)(5) motion on March 1, 2013. D.Ct. Dkt.

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[4] D.Ct. Dkt. #329 at ¶ 171; Revised Regulations § 6.20(7); D.Ct. Dkt. #363 at 1-A-81.

[5] D.Ct. Dkt. #329 at ¶ 171; Revised Regulations § 6.20(7)(a); D.Ct. Dkt. #363 at 1-A-80 to -81.

[6] D.Ct. Dkt. #329 at ¶ 173; Revised Regulations §§ 601(1), 6.20(3)(b), (5)(a)-(d); D.Ct. Dkt. #363 at 1-A-74, 2-A-81 to -84.

[7] D.Ct. Dkt. #329 at Stipulated Facts ¶ 173; Revised Regulations § 6.20(2), (5)(a), (8); D.Ct. Dkt. #363 at 1-A-84 to -85.

#193 & 276. This Court has established a two-part test for Rule 60(b)(5) motions. First, the court must find a significant change in factual or legal circumstances. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992). Second, the court must find that the proposed modification to the original judgment or decree is "suitably tailored" to the change in circumstances. *Id.* The Tribes argued that there had been a significant factual change since 1989 that rendered the original judgment inequitable: nighttime hunting of deer and other large animals is now prevalent and the hunting safety records of such programs prove that this activity is safe. D.Ct. Dkt. #277 at 5. Thus, a complete ban was no longer "the least restrictive alternative available to accomplish [the State's] public health or safety interest." *Id.* at 4 (quoting *LCO IV*, 668 F. Supp. at 1239). The Tribes then argued that their revised regulations on night hunting were suitably tailored to these changed circumstances because they incorporated safety measures used by Wisconsin and other jurisdictions. D.Ct. Dkt. #277 at 16.

The district court held a hearing from July 22 to 26, 2013. The Tribes produced extensive evidence on the history and safety record of the CWD program, the wolf hunt, and night shooting of nuisance deer in Wisconsin. The Tribes also attempted to introduce evidence of night shooting practices in other jurisdictions. Although there was brief testimony on night hunting in other jurisdictions – particularly in Minnesota, Michigan, Washington, and Oregon, D.Ct. Dkt.

#363 at 1-A-39 to -47, -52 to -57 – the district court excluded any further evidence on the matter claiming it was irrelevant. D.Ct. Dkt. #364 at 2-A-65. The court also declined to consider the testimony when it issued its final opinion. Pet. App. at 41a.

The district court issued its decision in December 2013. It determined that "relatively little night hunting took place before 1989." Pet. App. at 37a. The court further found that "with the explosion in the deer population in the late 1990s and the emergence of chronic wasting disease, the number of deer killed at night increased significantly" and that there was a "dramatic expansion in night hunting during the years from 2007-09." *Id.* at 39a. The court also noted the impeccable safety record of Wisconsin's wolf hunt. *Id.* at 31a.

Despite these favorable findings, the court denied the Tribes' Rule 60(b)(5) motion claiming that changed circumstances did not exist. The dissonance between the favorable factual findings and unfavorable holding seemed to lie in a belief that changed circumstances could only be established by a change in law, not a change in facts. Even though "new hunting led to a vast increase in the number of deer killed," the court determined these facts were irrelevant because they were "not to any expansion in the scope of the DNR's authorized powers" and most of the CWD shooting had been conducted by DNR employees. *Id.* at 40a. The court also believed that a higher burden should be imposed on the Tribes because they had failed to appeal from the final

judgment in 1991, and because they were asking that only one part of that final judgment be reopened, *id.* at 34a, even though considering such factors was directly contrary to this Court's decision in *Horne v. Flores*, 557 U.S. 443, 453 (2009). The district court did not reach the issue of whether the Tribes' revised regulations were suitably tailored to changed circumstances.

IV. The Seventh Circuit's Decision

The Tribes appealed, arguing, among other things, that the district court applied the incorrect legal standard for Rule 60(b)(5) motions, and the court erroneously excluded evidence of night hunting in other jurisdictions. Seventh Cir. Dkt. #21 at 33-35. Significantly, the district court's factual findings were undisputed. *Id.* at 33. Rather, the Tribes argued that – given the court's factual findings – application of the correct legal standard would compel a finding of changed circumstances. *Id.*

The Seventh Circuit agreed with the Tribes. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 769 F.3d 543 (7th Cir. 2014) (hereinafter cited to Pet. App. 1a-13a). Judge Posner, writing for the unanimous court, held that "[g]reater experience with deer hunting suggests that a total ban is no longer (if it ever was) necessary to ensure public safety." Pet. App. at 11a. The court went on to note that "as the record stands the evidence presented by the tribes that night hunting for deer in the ceded territory is unlikely to create a serious

safety problem provides a compelling reason for vacating the 1991 judgment that prohibited Indians from hunting deer at night in that territory." *Id.* at 12a-13a. But the court noted that evidence of the safety record of night hunting in other states could be useful to consider if that evidence came from other states that were similar to Wisconsin in terms of geography and population. *Id.* at 12a. As a result, the Seventh Circuit "le[ft] it to the district court to decide whether to invite the parties to submit such comparative evidence." *Id.* Because the Seventh Circuit already believed that the Tribes had satisfied their burden, however, it held that if such evidence was required, "[t]he burden of production should be placed on the state."

On remand, both the State and the Tribes agreed to forgo the evidentiary hearing proposed by the Seventh Circuit's decision. D.Ct. Dkt. #398 & 399. In anticipation of the State's petition for certiorari, upon the joint request of the parties, the district court stayed proceedings. D.Ct. Dkt. #400. In its order the court confirmed that "[n]either side intends to introduce any new evidence" on remand. *Id.* Instead, the district court encouraged the parties to continue to work together in an attempt to develop an agreed upon set of regulations that would protect the public safety. *Id.* Short of that, the district court indicated that it would review the record and determine under what conditions, if any, Tribal members should be permitted to hunt deer at night.

REASONS FOR DENYING THE PETITION

I. THE SEVENTH CIRCUIT'S RULING DOES NOT CONFLICT WITH ANY RULING OF THIS COURT NOR DOES IT CREATE A CIRCUIT SPLIT

The State's only argument on petition for certiorari is that "the Seventh Circuit shifted the burden to the non-moving party (Wisconsin) to justify [the] underlying judgment." Pet. at i. This characterization of the Seventh Circuit's opinion is incorrect. The court applied the factual findings of the district court to the correct Rule 60(b)(5) legal standard, and concluded that changed circumstances existed to support the Tribes' motion. Out of an abundance of caution, the Seventh Circuit noted that on remand, the district court could allow the State to proffer additional evidence to refute this finding of changed circumstances. If it chose to do so, the burden of *production* – not *persuasion* – would rest on the State for such additional evidence.

The Seventh Circuit's unanimous decision was based on the unique factual circumstances presented in this case. It does not pose an issue of national importance, it does not create a circuit split in authority, and it is not at odds with any precedent from this Court. Consequently, there is no reason to grant review over this interlocutory appeal.

A. The State Was Not Required to Justify the Underlying Judgment

Wisconsin alleges that the Seventh Circuit's decision conflicts with the decisions of this Court because it improperly shifts the burden of justifying the underlying judgment to the State. But a closer examination demonstrates that the State simply disagrees with the Seventh Circuit's application of the traditional Rule 60(b)(5) standard, which is insufficient grounds for granting certiorari.

The State argues that the basis of the district court's original decision remains true today: night-time hunting is not safe because a hunter cannot see what is beyond her target and could injure others if the bullet misses that target or travels through the deer. Pet. at 16. The State then claims that the changed circumstances offered by the Tribes "were not about the fundamentals of night hunting," and therefore, the Seventh Circuit's decision was in error. *Id.* at 16-17. This is the same merits argument that the State made before the district court and the Seventh Circuit.

This Court's precedent, however, establishes that a party is entitled to relief from a final litigated judgment under Rule 60(b)(5) if the movant can establish new facts or laws that, if they were before the district court in the original litigation, would have produced a decision in favor of the moving party. *Horne v. Flores*, 557 U.S. 433, 454 (2009). During the original proceedings in this matter, in order for the

State to be authorized to regulate Tribal-member hunters, it was required to show not only that nighttime hunting was fundamentally unsafe, but also that (1) the State's regulation was necessary to protect the public safety (e.g., that the proposed Tribal regulation would not protect the public), and (2) that regulation was the least restrictive means available to protect the public. *LCO IV*, 668 F. Supp. at 1239. The Tribes argued in these Rule 60(b)(5) proceedings that Wisconsin's CWD and nuisance deer shooting programs, since they resulted in the shooting of thousands of deer at night without a single hunting accident, were changed circumstances that demonstrated a complete ban on nighttime deer hunting was no longer necessary to protect the public safety. The Tribe also argued that their newly crafted regulations, which were modeled after the State's policies for CWD nighttime deer shooting, and the State's regulations for nighttime wolf hunting, were sufficient to protect the public safety.

The Seventh Circuit agreed. It relied on the uncontroverted evidence presented by the Tribes with respect to the State's own nighttime hunting programs. Beginning in 2002, State employees, many of whom had little prior training in firearms or hunting safety, shot thousands of deer at night without a single hunting accident. Pet. App. at 6a-7a. Applying this Court's Rule 60(b)(5) standard, the Seventh Circuit concluded:

> Based on almost no experience with night deer hunting in the 1980s, the district court at the beginning of the next decade upheld on safety grounds Wisconsin's ban on off-reservation night deer hunting by Indians. Greater experience with deer hunting suggests that a total ban is no longer (if it ever was) necessary to ensure public safety. And as noted in *Reich v. Great Lakes Indian Fish & Wildlife Commission, supra*, 4 F.3d at 501, it is only safety . . . that can justify a state's forbidding a normal Indian activity, authorized to the tribes on land ceded by them to the United States.

Pet. App. at 11a.

The State did not lose on appeal because the Seventh Circuit repudiated the district court's original decision that nighttime hunting was fundamentally unsafe. Indeed, the Tribes have consistently admitted that all hunting, whether day or night, is inherently unsafe if it is not properly regulated. *E.g.*, Seventh Cir. Dkt. #21 at 41 n.20. Instead, the Seventh Circuit vacated the district court's decision because the Tribes had established, by introducing evidence on the safety record of the State's own nighttime hunting programs, that this activity could occur while still maintaining public safety if specific regulations were adopted.

This Court has established the test for Rule 60(b)(5) motions in several recent cases. *E.g.*, *Horne*, 557 U.S. 433; *Frew v. Hawkins*, 504 U.S. 431 (2004);

Agostini v. Felton, 521 U.S. 203 (1997); *Rufo*, 502 U.S. 367. The Seventh Circuit's unanimous decision in this matter does not conflict with any of these cases; it simply applies the established standard to the facts at hand. As such, certiorari is not warranted.

B. On Remand, the Seventh Circuit Shifted the Burden of Production, Not the Burden of Persuasion, Regarding One Narrow Set of Evidence

The Petition repeatedly claims that the Seventh Circuit's decision shifts the burden of proving changed circumstances from the moving party to the non-moving party. *E.g.*, Pet. at 11. It notes that this Court has placed a "presumption against reopening an earlier judgment" and this has been "enforced by keeping the burden of proof where it belongs (on the movant)." Pet. at 10. By supposedly shifting the burden of proof, the Petition claims that the Seventh Circuit's decision directly conflicts with U.S. Supreme Court precedent.

There is a fatal flaw in this argument: the Seventh Circuit never shifted the burden of proof. The court believed that the Tribes had established the existence of changed circumstances. Pet. App. at 12a ("as the record stands the evidence presented by the tribes that night hunting for deer in the ceded territory is unlikely to create a serious safety problem provides a compelling reason for vacating the 1991 judgment that prohibited Indians from hunting deer

at night"). Rather than compelling the district court to reopen the final judgment, however, it noted that the court could, on remand, permit the introduction of evidence of the safety of nighttime deer hunting in other jurisdictions (evidence improperly excluded by the district court below). If it did so, however, the Seventh Circuit indicated that the burden of *production* should be shifted to the State to produce this evidence. Pet. App. at 12a ("We'll leave it to the district court to decide whether to invite the parties to submit such comparative evidence. The burden of production should be placed on the state" if it chooses to do so). This made sense, because the Tribes had already met their burden.

The Petition mentions the Seventh Circuit's burden shifting on nearly every page. Yet only once – when quoting the Seventh Circuit directly – does it acknowledge that only the burden of production was being shifted. Pet. at 9. Interestingly, on remand but prior to the filing of the Petition for Writ of Certiorari, both the State and the Tribes notified the district court that they would not be submitting any new evidence, and instead would rely on briefing and the original record. D.Ct. Dkt. #398 (noting that "the State does not request another evidentiary hearing or to submit additional testimony. The State understands that the Tribes are of the same view."). The district court issued an order noting that "[n]either side intends to introduce any new evidence on the matter." Order, D.Ct. Dkt. #400. The State's reliance

on this portion of the Seventh Circuit's decision is thus a red herring.

C. The Application of Rule 60(b)(5) to a Unique Set of Factual Circumstances Does Not Warrant a Grant of Certiorari Since There Is No Circuit Split

Even if a burden-shifting issue were present, the limited resources of this Court should not be devoted to this case, which involves unique factual circumstances that are unlikely to be replicated in the future. There is no controversy between jurisdictions for this Court to resolve. There is no split between the lower courts regarding the burden of production or persuasion. The State cites a few cases from other circuits, possibly insinuating that there is some sort of conflict with the Seventh Circuit. Pet. at 12. But none of the citations are on point. Instead, they refer to vague policy statements about the general need for finality of judgments, which no one disputes.

For example, the State cites *Reid v. Angelone*, 369 F.3d 363, 370 (4th Cir. 2004) for the proposition that "the limits on Rule 60(b) review are designed to protect the finality of judgments." The issue in *Reid* was whether an order on a Rule 60(b) motion is the final order in a habeas corpus proceeding. *Id.* at 367.

Another citation by the State is from a proceeding regarding a Rule 60(b)(6) motion, which is subject to a higher standard than Rule 60(b)(5). *See* Pet. at 12 (citing *Blue Diamond Coal Co. v. Trs. of UMWA*

Combined Benefit Fund, 249 F.3d 519, 524 (6th Cir. 2001)). Similarly, the discussion in *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147 (1st Cir. 1980) revolved around a Rule 60(b)(6) motion. *Id.* at 156. In *Scola*, the court denied relief when the movant had failed to timely file a Rule 60(b)(1) motion to correct a clerical error in a judgment and sought Rule 60(b)(6) as a fallback. *Id.* at 154 ("[T]hat relief, if defendant had been entitled to it, would have been available upon a timely motion under Rule 60(b)(1) and, for that reason, it is unavailable upon a belated motion under Rule 60(b)(6) except, perhaps, in extraordinary circumstances, not present in this case."). The quotation in *Scola* cited by the State originated in *Mayberry v. Maroney*, 558 F.2d 1159 (3d Cir. 1977), which reversed a grant of Rule 60(b)(5) relief where the district judge had originally granted the motion without a hearing and on remand had only heard the testimony of one witness for one party. *Id.* at 1163.

In *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606 (6th Cir. 2011), the court declined to reopen a judgment based on changed circumstances of population growth that were not only anticipated at the time of the original judgment but "stems mostly from [the plaintiff church's own] growth – something entirely within its own power." *Id.* at 618. And in *Cook v. Birmingham News*, 618 F.2d 1149 (5th Cir. 1980), the Fifth Circuit decided that Rule 60(b)(5) cannot be used where a judgment has no prospective impact. *Id.* at 1153.

None of these cases discuss the burden of production in Rule 60(b)(5) cases. Their vague dicta regarding the need for finality of judgments does not create a controversy worthy of this Court's attention. It is clear that the State is fundamentally dissatisfied with the result of the appeal and is seeking a way out of the remand. But that is not sufficient reason to harness this Court's resources. In reality, the Seventh Circuit applied this Court's precedent to a unique, complicated set of facts. The matter requires applying Rule 60(b)(5) to a treaty rights case, something that has never happened before and is unlikely to happen again. The evolution of the *LCO* line of cases and the incorporation of the Model Code into the final judgment creates a unique set of circumstances that is unlikely to be found in other treaty rights cases or in other Rule 60(b) cases.

II. THE SEVENTH CIRCUIT DID NOT REVIEW THE DISTRICT COURT'S FINDINGS OF FACT *DE NOVO*

Both the Petitioner and the *Amici* Wisconsin County Forests Association ("WCFA") claim that the Seventh Circuit engaged in improper fact-finding on appeal by setting aside the district court's findings after conducting a *de novo* review, rather than the review mandated by Fed. R. Civ. P. 52(a). Pet. at 20-22; WCFA Br. at 7-13. It did not do so. The Seventh Circuit applied this Court's jurisprudence to the factual findings of the district court and concluded that the district court had abused its discretion in

denying the Tribes' motion outright. Pet. App. at 6a-8a (describing changed circumstances as increase in night hunting). *See also Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."). None of the district court's factual findings were overturned. Facts that the Seventh Circuit mentioned that were not contained in the district court's decision were either irrelevant to its ultimate decision or supported by the record and uncontroverted.

First, the State and WCFA claim the court's statement that "[t]he night hunter doesn't shoot until the deer is a brightly lit stationary object" is unsupported. *See* Pet. for Cert. at 8 (quoting Pet. App. at 8a); WCFA Br. at 12. In fact, the statement is supported by both the district court's original decision in *LCO VII* and expert reports filed in support of the Tribes' Rule 60(b)(5) case. *LCO VII*, 740 F. Supp. at 1408 ("Shining deer is an effective means of locating and killing them. Deer are nocturnal, their eyes reflect artificial light, and they tend to freeze in place when a light is focused directly onto their eyes."); D.Ct. Dkt. #300 at 17-18 (stating that revised regulations will require members to shine, "mak[ing] it more likely that the deer will provide a stationary target due to the effects of the light, which causes the deer to momentarily freeze"); D.Ct. Dkt. #297 at 30 (describing Ojibwe practice of "freezing" deer with a torch light in the mid-nineteenth century). This fact

was never questioned by the State, and was actually conceded by its own expert witness.[8]

The State also claims that the Seventh Circuit "asserted without attribution" that the Tribes looked to nighttime hunting practices in Michigan and Minnesota when developing their own regulations, and that therefore, "Minnesota's and Michigan's experiences with night hunting of deer by Indians might have a bearing on our case." Pet. at 9 (quoting Pet. App. at 12a). Similarly, the Petition claims that "the Seventh Circuit discussed hunting practices in Minnesota and Michigan" and "[w]ithout support, the

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[8] Timothy Lawhern, the State's hunting safety expert, testified as follows on cross-examination:

> Q. If you shine a light at a deer, the light causes the deer to freeze at night; correct?
>
> A. Yes, Ma'am.
>
> Q. And that makes shooting the deer easier; right?
>
> A. Yes, Ma'am.
>
> Q. Because the deer stays still, it's frozen, and then you have an opportunity to aim and shoot.
>
> A. So much so that my experience is that while I had never done it prior to CWD shooting, I had witnessed it. But under the CWD Program, I actually had the opportunity to do that and I was literally able to freeze a deer with a light and walk right up to it and shoot it within feet.

D.Ct. Dkt. #271 at 6-7.

court posited that night hunting of deer occurs in both of those states." Pet. at 20.[9]

As an initial matter, this issue arose because the district court improperly excluded testimony and exhibits regarding nighttime hunting practices outside of Wisconsin. The Seventh Circuit was simply refuting the district court's logic that this information should have been excluded on relevancy grounds. Regardless, the parties stipulated that tribal members are able to hunt at night in the ceded territory of Minnesota and Michigan. D.Ct. Dkt. #329 at ¶¶ 130, 132. Additionally, testimony before the district court established that the Tribes looked to regulations governing tribal night hunting in these states as a starting point for developing their own Revised Regulations. D.Ct. Dkt. #363 at 1-A-37 to -47. And one of the Tribe's own expert witnesses testified that he personally shot deer at night in the ceded territory in Michigan. D.Ct. Dkt. #364 at 2-A-52 to 2-A-53. None of this testimony was refuted.

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[9] WCFA is apparently confused by the fact that tribal treaty rights are often not codified in state statutes or regulations. *See* WCFA Br. at 13. This is often the case because, as discussed *supra*, state hunting and fishing regulations do not apply to tribal members exercising usufructuary rights. *Antoine*, 420 U.S. at 206. Instead, the tribes themselves regulate these rights. Thus, a member of the Keweenaw Bay Indian Community ("KBIC") is subject to section 10.101(12) of the KBIC code, *see* D.Ct. Dkt. #329 at ¶ 132, a member of the Mille Lacs Band of Ojibwe is subject to that Band's code, *see id.* ¶ 130, and members of Washington tribes are subject to their tribes' respective codes. D.Ct. Dkt. #363 at 1-A-55 to -57. State law cannot trump a federal treaty right.

Finally, the State and WCFA make much of the Seventh Circuit's acknowledgement that the Tribes are impoverished and would benefit from more opportunities to harvest deer meat as guaranteed by treaty. *See* Pet. at 17 (citing Pet. App. at 2a-3a); WCFA Br. at 12. Yet, the State acknowledges that these facts were recited at the beginning of the opinion and were "irrelevant" to the Seventh Circuit's decision. *Id.* Because granting a Rule 60(b)(5) motion always requires some inquiry into equitable factors, these facts – which *were* presented to the district court, D.Ct. Dkt. #205 & 237 – may become relevant on remand. It is difficult to see why this Court would grant certiorari, however, to "correct" facts that were both irrelevant to the holding below, and undisputed.[10]

Curiously, while the State argues that this Court should grant certiorari to correct the Seventh Circuit's factual mistakes, its *amici* WCFA attempts to place its own non-record evidence before this Court.[11]

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[10] WCFA also took issue with the Seventh Circuit's statement that "the more deer that Indians kill, the fewer deer-related accidents to humans there will be." WCFA Br. at 13 (quoting Pet. App. at 9a). But the District Court itself found that the DNR and law enforcement have increased nighttime shooting to reduce accidents on roads and airports. Pet. App. at 17a. And once again, this evidence was presented to the district court below. D.Ct. Dkt. #301.

[11] *Amici* Association of Fish and Wildlife Agencies ("AFWA") also offers its own facts which appear nowhere in the district court's record and contradict evidence that was actually admitted. For example, AFWA claims that the Seventh Circuit was

(Continued on following page)

In its brief, it describes recreational activities in northern Wisconsin, WCFA Br. at 15-18, claims that numbers of recreational users have increased, *id.* at 24, cites hunting incidents that occurred in other states, *id.* at 21-22, and discusses coniferous tree cover during the winter. *Id.* at 21. None of these facts are part of the district court's findings or the record on appeal. In fact, in nearly every case the Tribes presented contrary evidence to the district court. *See* D.Ct. Dkt. #298 (Expert Report of James Thannum); D.Ct. Dkt. #365 at 3-A-8 to 3-A-76 (testimony of James Thannum). It is certainly not the role of this Court to evaluate evidence not presented to the lower courts. Such minutia wastes this Court's time.

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wrong in concluding that, at most, only a small number of persons would be authorized to shoot deer at night under the Tribes' Revised Regulations. AFWA Br. at 9. AFWA claims that the 57,000 Indians living in Wisconsin could do so. *Id.* AFWA's logic is flawed. The bulk of those Indians are not members of the Respondent Tribes and thus do not possess the federal treaty rights that are the basis of this lawsuit. The Respondent Tribes have consistently had fewer than 2,200 Tribal-member deer hunters, and only a subset of those hunters who were are able to pass the stringent marksmanship test required by the Revised Regulations could ever participate in nighttime deer hunting even if the district court ultimately grants the Tribe's Rule 60(b)(5) motion.

III. THESE PROCEEDINGS ARE STILL INTERLOCUTORY, AND THIS CASE IS NOT THE PROPER VEHICLE TO ADDRESS THE ARGUMENTS MADE BY *AMICI* AFWA

The State's Petition notes "[i]t is true that this petition is interlocutory." Pet. at 15. Thus, the district court must still decide whether the Tribes' Revised Regulations are "suitably tailored" to the change in circumstances. Consequently, while the State and its *amici* make numerous misstatements about the content and safety of the Tribes' proposed Revised Regulations, *see, e.g.*, WCFA Br. at 22-23, those misstatements are not germane. On remand, the district court may require additional safety precautions to be incorporated within those regulations before granting the Tribes' motion, or it may deny the Tribes any relief. The State has not offered any compelling reasons for why its Petition should be granted now, at this preliminary stage.

Amici AFWA devote their brief to two arguments. First, they argue that the State possesses authority to manage fish and wildlife resources within their borders, and that the Seventh Circuit's opinion "harms states' legal authority to conserve fish and wildlife." Second, they argue that "if a state fish and wildlife agency determines that a particular hunting practice is unsafe and prohibits it, the agency's reasonable regulation should stand." AFWA Br. at 2-3. This case does not present this Court with the opportunity to address either of these arguments.

With respect to the first argument, nighttime deer hunting by members of the Respondent Tribes does not raise any conservation concerns. There are fewer than 2,200 Tribal-member deer hunters, and those hunters currently harvest less than 2,000 deer annually. On the other hand, there are more than 1.7 million deer in Wisconsin, and hundreds of thousands of deer are harvested each year by non-Indians. It is for this very reason that the parties stipulated that nighttime deer hunting did not implicate any conservation concerns.

Finally, the district court decided the scope of state regulatory jurisdiction over tribal treaty rights in its 1987 decision in *LCO IV*. That decision does not permit the state to regulate tribal member harvest anytime the regulation is "reasonable." *LCO IV*, 668 F. Supp. at 1239. *LCO IV* was incorporated into the final judgment in 1991, it was never appealed by Wisconsin, and the State has not filed a Rule 60(b)(5) motion seeking to amend that portion of the judgment. Thus, it would not be properly before this Court even if the Petition were granted.

CONCLUSION

For the above reasons, this Court should deny certiorari.

Respectfully submitted,

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