

Court Watch Newsletter

WISCONSIN SUPREME COURT · THE SEPTEMBER SITTING



Eight arguments heard, and a new front opens in Dane County

The Court heard eight arguments between September 8 and September 23: a contract dispute, a reverse-waiver challenge, an unpromulgated-rule case, a question of party status in a children's code petition, two appeals asking the justices to discard the congressional map they adopted in 2022, a no-social-media condition of supervision, and an insurance exclusion triggered by a raze order. Most turned on method rather than facts. Away from the docket, Planned Parenthood of Wisconsin filed the case that may define the next two terms. For detailed primers on each argument, [click here](#).

NEW FILING DANE COUNTY CIRCUIT COURT · SEPTEMBER 10

Six Statutes, Not Two

Planned Parenthood of Wisconsin (PPWI) has asked a Wisconsin court to hold, for the first time, that the state constitution protects a right to abortion. The public framing is two restrictions: the physician-only rule and the 24-hour delay. The pleading in *Planned Parenthood of Wisconsin v. Ozanne* reaches six statutory provisions and one administrative rule, and asks for eight separate declarations of unconstitutionality. It leaves the mandatory ultrasound requirement, the parental-consent regime, and the twenty-week limit itself alone—a litigation judgment rather than a concession.

Every count arises under Article I, Section 1. Two belong to patients—liberty and equal protection. Two belong to providers, and those are the ones with consequences past abortion. Count 2 asks the court to declare a constitutional right of clinicians to practice to the full extent of their education, training, and skill; Wisconsin's occupational licensing structure is built on the opposite premise.

THE "PHYSICIAN-ONLY RESTRICTION"—FIVE PROVISIONS

§ 940.15(5)	Makes it a Class I felony for a non-physician to perform an abortion.
§ 253.105(2)(a), (3)	Requires that the same physician who performs the pre-abortion physical examination also prescribe and provide the medication.
§ 253.10(3)(b), (c)1., (c)2.	To the extent they assume a physician performs the abortion and that only a physician may assess voluntariness and deliver the mandated disclosures.
§ 253.107(2)	Only insofar as it requires a <i>physician</i> to determine probable postfertilization age. The twenty-week limit itself is not challenged.
§ Med 11.03	The Medical Examining Board rule restricting abortion to licensed physicians.

THE OBSTACLE IN THE PATH

Wisconsin courts have long read Article I, Section 1 as substantially equivalent to its federal counterpart, and abortion was criminal in the Wisconsin Territory when the constitution was ratified in 1848.

The case turns on the standard of review. Declare a fundamental right and the provisions fall; apply ordinary rational basis and they survive. Watch whether the Legislature intervenes—the named defendants are a district attorney who has declined to prosecute providers and two boards appointed under a Democratic administration.

Read detailed explainer of the PPWI complaint [here](#).

THE "24-HOUR DELAY"

§§ 253.10(3)(c), 253.105(2)

To the extent they require a patient to wait twenty-four hours after the physical examination, the disclosures, and consent before obtaining care.

THE CASE TURNS ON THE STANDARD OF REVIEW

Strict	The challenged provisions fall, and the remaining abortion statutes—ultrasound, parental consent, the twenty-week limit—become vulnerable on the next pass.
Intermediate	The physician-only provisions are in serious jeopardy; the 24-hour delay becomes a closer question.
Rational basis	The statutes survive.

WHAT'S IN THIS ISSUE—AT A GLANCE

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COMMENTARY

BY DANIEL SUHR, IRG COURT WATCH SENIOR LEGAL FELLOW

Why is Hannah Dugan still licensed to practice law?

I'm just as confounded as Justice Annette Ziegler that the Wisconsin Supreme Court has declined to provisionally suspend the law license of former judge Hannah Dugan in light of her criminal conviction for obstructing an ICE operation.

Under Wisconsin precedent, a state court judge under felony indictment is suspended from office. *In re Raineri* (1981). In this case, to its credit, the Wisconsin Supreme Court unanimously—proactively—promptly suspended Judge Dugan after her indictment. She subsequently resigned her judicial seat and is now an attorney. As an attorney, she still retains a law license subject to the Wisconsin Supreme Court's disciplinary jurisdiction. She's also a convicted felon after a jury of her peers found that she violated federal law after a fair trial before Judge Lynn Adelman.

Confoundingly, the Court has declined to temporarily suspend her license while the disciplinary process grinds through its paces. The Wisconsin Rules grant the Wisconsin Supreme Court discretion on this point—"the supreme court *may* summarily suspend the attorney's license to practice law pending final disposition." The ABA Model Rules are less flexible: "The court *shall* place a lawyer on interim suspension immediately upon proof that the lawyer has been found guilty of a serious crime regardless of the pendency of any appeal." (emphasis added).

The ABA Model Rules' commentary advises, "Interim suspension is necessary both to protect members of the public and to maintain public confidence in the legal profession. The interim suspension . . . serves to protect the profession and the administration of justice from the specter created where an individual found guilty of a 'serious crime' continues to serve as an officer of the court in good standing." The ABA Commentary continues, "Continued practice by a lawyer found guilty of a 'serious crime' undermines the public confidence in the profession and the administration of justice. . . . Immediate suspension of a lawyer so found guilty, regardless of the pendency of any appeal, is essential to preserve public confidence."

A felony is automatically a serious crime under the Wisconsin Rule. And the ABA Rules note the particular importance of addressing convictions for "interference with the administration of justice," which is surely the nature of Judge Dugan's offense (interference with an active ICE law enforcement operation).

The Court's failure to suspend Judge Dugan's license in light of her conviction of a felony poses exactly the risk that the Commentary warns against: it undermines public confidence in the judiciary and creates the impression of favoritism for those who break the law in a politically popular cause.

The arguments

CONTRACTS

ARGUED SEPT 8

2023AP2428

Court of Appeals, District II
Sheboygan County
Judge George A. Limbeck
2025 WI App 46 · affirmed

Buddy's Plant Plus Corp. v. Viking Masek Global Packaging Technologies, LLC

The term opened with a commercial dispute, and with Justice Chris Taylor's first argument on the Court. Viking Masek agreed to build a custom stick-pack machine for \$259,450, never delivered a working one, and was found in breach after a bench trial. The contract limited its maximum liability to the amount paid and made the warranty the buyer's sole remedy. Buddy's wants lost profits, arguing the cap failed of its essential purpose, was unconscionable, and sat under a heading labeled "Warranty."

The question. Was the limitation-of-liability provision placed within the warranty clause unconscionable, and did it fail of its essential purpose? And did Buddy's prove its consequential damages to a reasonable degree of certainty?

WHAT'S NEXT

The Court can affirm on the contract's language, clarify or disavow the sentence in *Phillips Petroleum* suggesting that a damages limit "inappropriately masked" under a warranty heading may be disregarded for that reason alone, or reverse and remand for a determination of consequential damages. Viking did not appeal the breach finding and has paid what Buddy's paid, so the money at stake is the claimed lost profits.

For an in-depth discussion, read the oral argument primer [here](#).

JUVENILE**ARGUED SEPT 8****2024AP2585-CR**

Court of Appeals, District I
Milwaukee County
Judge Jane Carroll
2026 WI App 17 · reversed

State v. Noah Q. Mann-Tate

A boy charged as an adult with first-degree intentional homicide for killing his mother when he was ten. Wisconsin law places that charge in adult court from the start and lets the child seek transfer to juvenile court by proving three statutory criteria. The Court of Appeals held the transfer statute facially unconstitutional under the Fourteenth Amendment because it does not require judges to weigh the "attributes of youth" described in federal sentencing cases, and directed courts to consider six youth-related factors on remand.

The question. Is § 970.032(2) facially unconstitutional for not requiring consideration of the "attributes of youth," or does *Kleser* already allow it? And did the circuit court misuse its discretion?

Bryan Stevenson of the Equal Justice Initiative argued for the child; the State asked the Court to reverse the constitutional holding in full, arguing that no court anywhere has adopted that reasoning and that *State v. Kleser* already lets youth-related evidence inform each criterion. Several justices asked how a ten-year-old could ever prove what treatment he would need at eighteen; Justice Hagedorn defended the circuit court's ruling under deferential review.

WHAT'S NEXT

Several justices showed interest in deciding the case on how the circuit court applied the statute rather than on its face. That course would send the matter back for a new reverse-waiver hearing with instructions. If the Court affirms instead, every reverse-waiver hearing in the state acquires a six-factor script drawn from federal dicta rather than from the Legislature.

For an in-depth discussion, read the oral argument primer [here](#).

GUARDIANSHIP**ARGUED SEPT 15****2024AP472**

Court of Appeals, District IV
Waupaca County
Judge Troy L. Nielsen
2025 WI App 32 · reversed
Six justices participating

S. G. v. Wisconsin Department of Children and Families

Ten days before her eighteenth birthday, a legal orphan in the state's guardianship petitioned for one more year of foster care and services so she could finish high school. Waupaca County corporation counsel appeared and moved to dismiss. A contested petition requires a fact-finding hearing, none could be held in time, and the case was dismissed when she turned eighteen.

The question. Does Wis. Stat. § 48.09(5), which says the public's interests "shall be represented" by corporation counsel "in any matter arising under" the children's code, make corporation counsel a party to a petition it did not file?

WHAT'S NEXT

The bench made its sympathy plain and then spent the hour on the text, with one justice saying he was trying hard not to let bad facts make bad law. Several floated a middle course: corporation counsel may be heard on the public's behalf without being a party for every purpose. Justice Taylor, who wrote the opinion below, did not sit, so a 3–3 division would leave it in place.

For an in-depth discussion, read the oral argument primer [here](#).

RULEMAKING**ARGUED SEPT 15****2024AP673**

Court of Appeals, District IV
Dane County
Judge Frank D. Remington
2025 WI App 39 · reversed
in part

Sierra Club v. Wisconsin Department of Natural Resources

Since 2008 a DNR protocol has supplied the background air-pollution values used in permit modeling statewide, sorting locations by population and assigning numbers drawn from selected monitors. It states that the listed values "are the values to be used." The Court of Appeals held that the protocol satisfies all five elements of a rule, invalidated it as unpromulgated, and ordered DNR to reopen the air permit for seven gas-fired engines at the Weston Generating Station near Wausau.

The question. Does DNR's internal memo on background pollutant concentrations have the "force of law," so that it needed to go through notice-and-comment rulemaking?

DNR contests only the "force of law" element: background concentration is a fact, it argues, not a legal standard, and applicants may displace the protocol with their own monitoring data. Sierra Club answered that DNR treated the memo as dispositive, linking to it in the permit analysis and refusing a request for site-specific monitoring. The alignments are unusual—an environmental group pressing the case for legislative control of agency policy, with the Legislature as amicus taking a similar view of what counts as a rule.

WHAT'S NEXT

Affirm, and DNR must either promulgate a background methodology by rule or make case-specific determinations, with other internal protocols facing the same challenge. Reverse, and the Court's account of "force of law" governs unpromulgated-rule challenges across state government.

For an in-depth discussion, read the oral argument primer [here](#).

SEPTEMBER 16 TWO APPEALS · THE CONGRESSIONAL MAP

The Court is asked to undo its own map

Both appeals come from Dane County three-judge panels that dismissed before trial—the *Bothfeld* panel in March, holding that circuit judges cannot supersede a decision of the Supreme Court, and the *WBLD* panel in April, holding the claim non-justiciable until this Court says otherwise. Both concern the plan the Court adopted in 2022 under a least-change criterion it has since stepped away from. The plaintiffs are aiming at the 2028 elections; the 2026 midterms will proceed under the current map.

2026AP1168 · REDISTRICTING

Bothfeld v. Wisconsin Elections Commission

Two routes. The lead theory needs no trial: because *Clark* overruled any part of the *Johnson* decisions that “mandates a least change approach,” the map rests on a repudiated method and must fall as a matter of law. The fallback asks the Court to recognize a claim for extreme partisan gerrymandering under Article I, §§ 1, 3, 4, and 22. Counsel recommended Pennsylvania’s test while telling the justices they could choose another, including the framework from Justice Kagan’s *Rucho* dissent.

Justice Hagedorn, who wrote *Johnson II*, rejected the premise that the Court absorbed the 2011 Legislature’s motives: “We said what our intent was in that opinion.” The Chief Justice, who wrote *Clark*, said she did not know how she could have been clearer that least change was overruled.

For an in-depth discussion, read the oral argument primer [here](#).

2026AP1008 · REDISTRICTING

Wisconsin Business Leaders for Democracy v. Wisconsin Elections Commission

WBLD, a business group represented by Law Forward and Harvard Law School’s Election Law Clinic, alleges that the seats are so safe that no incumbent has lost and no seat has changed parties in more than a decade. The panel dismissed on April 28, calling the claims “functionally equivalent to partisan gerrymandering claims” and holding that “[u]ntil the Supreme Court says otherwise, Plaintiffs’ claims are non-justiciable.”

Harvard professor Nicholas Stephanopoulos argued the claim is distinct because it does not care which party wins: partisan gerrymandering is one party benefiting at another’s expense; anti-competitive gerrymandering is officeholders of any party benefiting at voters’ expense.

For an in-depth discussion, read the oral argument primer [here](#).

WHAT'S NEXT

The Court has several exits. It could affirm on procedural grounds—the panels’ lack of authority, or laches—without reaching the merits. It could hold that *Clark* already dooms the map and run a remedial process itself. Or it could recognize a claim, announce a test, and remand for fact-finding, likely coordinated across the two cases; counsel for the Republican members of Congress said they would not oppose consolidation if both claims survive, and the WBLD plaintiffs want a remand by January 4, 2027, a trial in April 2027, and final maps by March 15, 2028—a pace the defenders say they never agreed to. Justices Protasiewicz and Crawford denied motions to recuse on September 3. Whatever the Court does, the rules it announces will govern the redistricting that follows the 2030 census.

NOW LIVE

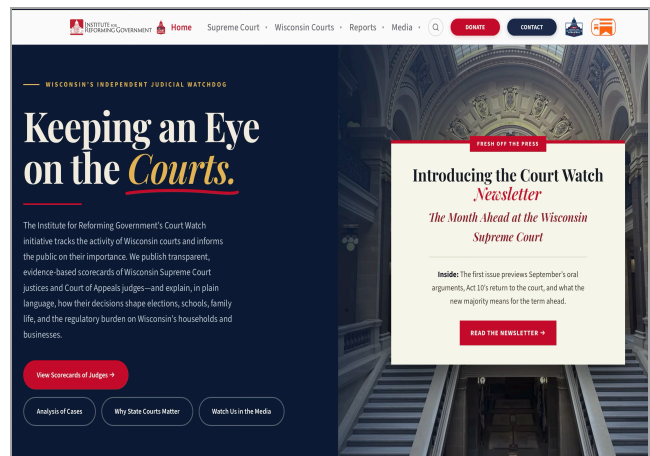
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Questions or comments?

Email kz@reforminggovernment.org



SEPTEMBER 23

SPEECH ON SUPERVISION · A RAZE ORDER

SPEECH

ARGUED SEPT 23

2024AP581-CR

Court of Appeals, District II
Kenosha County
Judge Anthony G.
Milisauskas
2025 WI App 74 · affirmed

State v. Jonathan James Petersen

In 2022 Petersen walked into a Kenosha County gas station where a woman who had refused his advances worked, carrying a knife and a replica rifle, and threatened to kill her. Before that he had found her social media accounts and posted harmful things about her, opening new accounts each time she blocked him, until she deleted her own. He pleaded guilty to stalking, false imprisonment, and making terrorist threats, and the circuit court imposed a "no social media" condition of extended supervision. The Court of Appeals affirmed under *State v. Rowan*, which allows a condition that burdens a constitutional right if it is not overly broad and is reasonably related to rehabilitation.

The question. "[W]hether—and to what extent—a circuit court at sentencing can regulate a defendant's First Amendment activity as a condition of extended supervision."

Petersen asked for intermediate scrutiny, reading *State v. King* to carry it over from *Packingham v. North Carolina*; the State relied on *Turner v. Safley* and *Griffin v. Wisconsin* and pressed forfeiture and ripeness, since trial counsel had called the conditions appropriate. The bench spent much of the hour on a problem neither side solved: no Wisconsin statute defines "social media." Several questions separated using a platform to reach the victim from simply holding an account, and a justice who had served as a circuit judge asked whether the supervising agent should hold that discretion instead.

WHAT'S NEXT

Adopt intermediate scrutiny, and every speech-related supervision condition in Wisconsin becomes litigable. Hold that *Rowan* is the whole test, and discretionary conditions are largely insulated. The narrower course is an instruction that sentencing courts name the platforms or conduct covered, which would change practice without a constitutional holding.

For an in-depth discussion, read the oral argument primer [here](#).

INSURANCE

ARGUED SEPT 23

2023AP1717

Court of Appeals, District III
Eau Claire County
Judge Emily M. Long
Unpublished · affirmed

Distinguished Multiplying Buildings (D.M.B.), LLC v. Germantown Mutual Insurance Company

A February 2020 fire damaged part of an occupied Eau Claire apartment building; four months later the city ordered it razed. Germantown Mutual paid a little over \$300,000 for fire, smoke, and water damage and refused the rest of a roughly \$1 million rebuild, citing an exclusion for loss caused "directly or indirectly" by an ordinance requiring tear-down, "regardless of any other cause or event that contributes concurrently or in any sequence." D.M.B. relies on *Gambrell* and *Gimbels*, 1970s decisions treating a raze order as recognition that the fire's loss was complete. The Court of Appeals held the exclusion unambiguous and confined those cases to the valued policy law, which since 1979 reaches only owner-occupied dwellings.

The question. Does the ordinance-or-law exclusion bar coverage for a constructive total loss when the municipality ordered the building razed following a significant fire?

WHAT'S NEXT

The argument points toward holding the anti-concurrent-cause clause dispositive, leaving commercial owners to carry the raze-order risk unless they buy a law-and-ordinance endorsement. Watch whether the Court declares *Gambrell* and *Gimbels* statutory decisions, and for a separate writing on the result the bench found uncomfortable: the owner whose fire department saves part of the building recovers less.

For an in-depth discussion, read the oral argument primer [here](#).

WHAT WE HEARD

The September sitting was a term's worth of method questions in eight arguments: whether the words two businesses signed still bind them, whether a constitutional requirement can be read out of federal dicta, whether a memo that estimates facts can carry the force of law, whether a mandatory "shall" survives an incomplete set of companion statutes, whether a general clause about the consent of the governed can supply an enforceable limit the constitutional text never states, whether a sentencing court may ban a medium of speech rather than the conduct that abused it, and whether an anti-concurrent-cause clause means what it says. In most of them, the justices were asked to supply a rule that neither the Legislature nor the parties had written. How they answer will say more about the term than any single outcome.