IRG COURT WATCH

October Recap

Seven October arguments, Act 10's return, a new Court of Appeals judge, and the November calendar

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Court Watch Newsletter

WISCONSIN SUPREME COURT · THE OCTOBER SITTING

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Back to the Words: What October Told Us About the Wisconsin Supreme Court

Over three days in October, the Wisconsin Supreme Court heard seven arguments. The last two were held before a public audience at the Heyde Center in Chippewa Falls. The subjects had little in common: a hospital tower's tax bill, a village's ban on short-term rentals, a federal tax claim against a foreclosure surplus, a reckless-homicide jury instruction, an attorney discipline matter, a conservation warden's roadside investigation, and a snowmobile trail through a state park. Yet the bench kept coming back to the same two questions. What did the Legislature actually write? And how much have the courts added on top of it?

Questions from the bench do not predict votes, and nothing here forecasts how any case will come out. Oral argument does show how a court reasons, though, and October showed a court willing to look hard at its own doctrine.

The first example came on October 6 in *Children's Hospital of Wisconsin v. City of Wauwatosa*. On the January 2020 assessment date, the hospital's North Tower was about 14 percent complete, and Wauwatosa sent a $122,870 tax bill. The lower courts argued over the "readying rule," a doctrine that exempts property being prepared for an exempt use. Courts created that rule; the Legislature did not. Justice Taylor opened the argument by moving away from it. She pointed to the statute's own words, which exempt property "used exclusively for the purposes of" a hospital. The City answered with text of its own: since 1997, state law has required that tax exemptions be "strictly construed in every instance." Either way the Court rules, the dispute now turns on the statute.

Two days later, *Wildwood Estate v. Village of Summit* brought the Court a case under Wisconsin's 2017 right-to-rent statute. Summit banned rentals of six days or fewer and set fines of up to $10,000 a day. The lower courts struck the ordinance down as zoning adopted without zoning procedures. Much of the hour went to the Court's own six-factor test for identifying a zoning ordinance. Justice Hagedorn asked both sides what the test is meant to measure: whether an ordinance could be zoning, must be zoning, or is so much like zoning that it cannot be called anything else. Justices Protasiewicz and Taylor asked how a villagewide rule that creates no districts could be zoning at all. When a court asks what its own test is for, it may be ready to revise that test.

The Chippewa Falls arguments turned the same scrutiny on agency power. In *State v. Phelan*, a DNR warden stopped a driver for suspected littering. Before sheriff's deputies arrived, he ran field sobriety tests and a preliminary breath test on his own. The statute lets a certified warden arrest for a crime committed in his presence, but it bars wardens from investigating violations of state law outside narrow exceptions. The court of appeals suppressed the evidence from the warden's solo investigation, though not the deputies' blood test, even though the statute says nothing about suppression. At argument, justices noted that the State's key limiting word, "formal," does not appear anywhere in the statute. Other justices pressed the defense for any text showing the Legislature meant to give criminal defendants an exclusionary remedy. Textualism cuts both ways in *Phelan*, and the bench appeared to recognize that.

Friends of Blue Mound State Park v. DNR may matter most for anyone who cares about agency accountability. Wisconsin law gives a party injured by an agency action the right to a contested case hearing. That is a trial-like proceeding with a neutral examiner, discovery, and cross-examination. An exception covers hearings that other law expressly leaves to the agency's discretion. DNR relied on that exception to deny a hearing to a group opposing a snowmobile trail in the park's master plan. Its theory was that discretion over public listening sessions was enough to defeat the right to adjudication. Several justices warned that this reading could let the exception swallow the right. Others questioned the Friends on the statute's wording and on older precedent. Chief Justice Karofsky asked what, exactly, the disputed facts were material to. The underlying question reaches every state agency that holds public hearings. Can an agency, through its own discretion, place whole programs beyond the reach of a right the Legislature granted?

COMMENTARY BACK TO THE WORDS, CONTINUED

So what direction is this Court taking? The seven-member bench includes a justice in her third month. Across October, its members spoke the same language: statutory text, the limits of judge-made rules, and the gap between what the Legislature enacted and what later doctrine added. That is welcome. When courts hold themselves to the enacted text, agencies have less room to expand their own authority. Citizens can read the law and know where they stand.

A shared vocabulary does not guarantee consistent results, however. In *Blue Mound*, the narrower reading of a single word favors DNR. The Friends need the broader, contextual reading of the whole section, along with a clear-statement rule that agencies must say plainly when they are removing a statutory right. In *Children's Hospital*, a statute-first approach may help the hospital on the meaning of "used" and hurt it on "strictly construed." Questioning from the text is the easy part. The real test comes when the text leads to an outcome a justice would not choose.

Decisions in these cases are expected by mid-2027. When they arrive, the measure of this Court will be whether it followed the words wherever they led. Who won will matter less. Court Watch will be reading each opinion with that standard in mind.

REVIEW GRANTED ORDER OF NOVEMBER 11, 2026 · NO. 2024AP2429

Act 10 returns to the Wisconsin Supreme Court

On November 11, the Court granted the unions' petition for review in *Abbotsford Education Association v. WERC*, the challenge to 2011 Wisconsin Act 10. Justice Ziegler dissented from the grant. Justice Hagedorn, who was Governor Walker's chief legal counsel when Act 10 passed, did not participate.

The unions challenge where Act 10 drew its public safety line. Act 10 left bargaining rights largely intact for seven occupations, including municipal police and firefighters, deputy sheriffs, State Patrol officers, and state motor vehicle inspectors. It placed Capitol and UW police, correctional officers, conservation wardens, and state firefighters in the general group. The unions say that line violates the state constitution's equal protection guarantee. Dane County Circuit Judge Jacob Frost agreed. In December 2024 he struck numerous provisions of Act 10 and 2015 Act 55, then stayed his judgment pending appeal, so Act 10 has remained in effect throughout the case.

On July 29, a District II panel reversed, 2–1, in an unpublished per curiam opinion and directed dismissal. The majority relied on *Madison Teachers v. Walker* (2014) and the Seventh Circuit's *WEAC v. Walker* (2013), which rejected a nearly identical claim under the federal Constitution. Because this Court has treated the state and federal equal protection guarantees as coextensive, the majority concluded the result must be the same. It also cited IRG's 2020 Act 10 paper. Judge Grogan concurred, writing that "a law's constitutionality does not ebb and flow with a court's composition." Presiding Judge Neubauer dissented. Applying the five-factor test from *Metropolitan Associates v. City of Milwaukee* (2011), she found no substantial distinction between the included and excluded occupations and concluded that "rational-basis review is not a rubber stamp." The unions quoted that line in their petition.

The case turns on method. The Court must decide which rational-basis framework governs a claim under the state equal protection guarantee, and how much weight to give its own 2014 decision and a federal ruling on the same classification.

The unions' brief is due December 11. The State, the Legislature, and intervenor Kristi Koschkee then have 20 days to respond, and the unions have 10 days to reply. No argument date has been set.

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The arguments

OCTOBER 6 A JURY NOTE · A HOSPITAL TOWER

CRIMINAL

ARGUED OCT 6

Court of Appeals
Columbia County
2025 WI App 53 · new trial

State v. Osornio

Can a Jury Note Prove Prejudice?

On October 6, the Wisconsin Supreme Court heard argument in *State v. Osornio*, a Columbia County case asking how far an appellate court may go in reconstructing what a jury would have done. Samuel Osornio was convicted of first-degree reckless homicide for delivering the heroin that killed his buyer. He was also charged separately with the delivery itself, and every element of that charge is an element of the homicide charge. His trial lawyers did not request the lesser-included-offense instruction until the jury had been deliberating for nearly seven hours.

The court of appeals ordered a new trial. Its reasoning rested largely on a single jury note sent at 3:45 p.m., saying the jury had reached a conclusion on the delivery count but could not agree on the homicide count. The State argues the jury was always free to convict on delivery alone, and that every instruction it received was legally correct. It also points out that the jury deliberated four more hours before unanimously convicting on both counts. Osornio's counsel argued that the note was unambiguous and that the jury had been given conflicting instructions.

Several justices questioned whether trial counsel's performance was deficient at all, even though the State's petition did not raise that issue. The real question is one of method: whether *Strickland* prejudice can rest on an inference about what happened inside the jury room. A decision is expected by mid-2027.

WHAT'S NEXT

Reversal would reinstate the homicide conviction. The court of appeals did not reach Osornio's alternative plain-error and interest-of-justice theories; Chief Justice Karofsky asked what the Court should do with them, and the State urged the Court to dispose of them rather than remand. Watch for scope discipline: whether the Court confines itself to prejudice as the petition framed it, or reaches deficient performance despite the State's choice not to contest it. Any opinion may also prompt revisions to Wis JI–Criminal 112 where both offenses are charged.

For an in-depth discussion, read the oral argument primer **here**.

PROPERTY TAX

ARGUED OCT 6

Court of Appeals
Divided panel

Children's Hospital v. Wauwatosa

Can a Building Under Construction Be "Used" as a Hospital?

On October 6, the Wisconsin Supreme Court considered whether a nonprofit hospital owes property tax on an addition still being built. On January 1, 2020, the tax assessment date, Children's Hospital's North Tower was about 14 percent complete. Wauwatosa sent a $122,870 tax bill. A divided court of appeals held that the "readying rule," which exempts property being readied for an exempt use, covers only a building that is "fully constructed and in the final stages of being readied to be used for exempt purpose."

Justice Taylor opened by pointing to a simpler route than the judge-made rule: the statute's own words, property "used exclusively for the purposes of" a hospital. Justice Crawford tested the City's bright-line rule with a lightning-damaged hospital wing under repair, and the City conceded that wing would stay exempt. Justices Hagedorn and Dallet asked why the City had not taxed earlier construction on the same campus. The City pressed a strong textual point of its own: since 1997, state law has required exemptions to be "strictly construed in every instance."

The ruling will reach any tax-exempt property under construction, including churches and schools. A decision is expected by mid-2027.

WHAT'S NEXT

Hospital counsel noted that twelve subsections of § 70.11 use the same "used exclusively" language, covering schools, churches, cemeteries, and other exempt property. A ruling for the City would make every exempt owner pay tax on construction in progress and sue to recover it. A ruling for the hospital would shift that burden to local taxpayers and require assessors to weigh evidence of future use. Watch the mandate: an outright reversal with judgment for the hospital, as it requests, or a remand for fact-finding, as the dissent below proposed.

For an in-depth discussion, read the oral argument primer **here**.

OCTOBER 8 A FORECLOSURE SURPLUS · SHORT-TERM RENTALS

TAX PRIORITY

ARGUED OCT 8

Court of Appeals
Waukesha County

Bank of America v. Estate of Nelson

Who Gets Paid First?

On October 8, the Wisconsin Supreme Court heard a dispute between two tax collectors over $54,421.96. That is the surplus left after a sheriff's sale of a house owned by the late Richard Nelson, who died owing the IRS about $175,000 and the Wisconsin Department of Revenue about $116,000. A federal statute dating to 1797 puts the United States first when "the estate of a deceased debtor, in the custody of the executor or administrator," can't pay its debts. The court of appeals treated the Waukesha County clerk of courts as a functional administrator and gave the money to the federal government.

The Department of Revenue argues that the custody clause means what it says. A surplus pulled out of the estate by an involuntary foreclosure sale is not in an administrator's custody, so ordinary lien priority should control. The United States argues that its priority attaches to the claim, not to whoever happens to hold the money. Asked which reading it preferred, it chose the broadest one.

Much of the hour concerned how a state court should treat U.S. Supreme Court precedent from 1832 and 1926 that reads the statute liberally, now that the modern Court has rejected that approach. Justice Protasiewicz warned that ruling for the State risked swift reversal. A decision is expected by mid-2027.

WHAT'S NEXT

A ruling for the Department of Revenue would let first-in-time lien priority govern foreclosure surpluses from insolvent estates, and would invite a petition for certiorari by the United States. A ruling for the United States could rest on the court of appeals' narrower, functional-control rationale or on the broader claim-based reading. Which one the Court chooses will determine how much of the custody clause survives in Wisconsin courts.

For an in-depth discussion, read the oral argument primer here.

ZONING

ARGUED OCT 8

Court of Appeals
2025 WI App 47 · affirmed

Wildwood Estate v. Village of Summit

Zoning or Police Power?

On October 8, the Wisconsin Supreme Court took up the state's 2017 "right to rent" law, Wis. Stat. § 66.1014. The Village of Summit banned vacation rentals of six days or fewer, with fines of up to $10,000 a day, using its ordinary legislative process. Wildwood Estate had been renting its home for short stays and sued. Both lower courts held the ordinance was zoning in substance and void for skipping zoning's notice-and-hearing requirements. They also found a federal due process violation and awarded about $55,000 in attorney fees and costs.

The Village argues the Legislature placed § 66.1014 outside the zoning chapters and left municipalities free to regulate sub-seven-day rentals through their general police power. Wildwood argues that short stays were a permitted use under existing zoning, so banning them everywhere was a zoning amendment by another name.

Much of the bench's questioning was about the Court's own six-factor test for spotting a zoning ordinance. Justice Hagedorn asked whether the question is whether an ordinance could be zoning, must be zoning, or is "quintessentially" zoning. Justices Protasiewicz and Taylor pressed Wildwood on how a villagewide rule with no districts can be zoning at all. Several justices doubted that skipped zoning procedures amount to a constitutional violation. A decision is expected by mid-2027.

WHAT'S NEXT

The court of appeals has already cited *Wildwood* in a July 2026 decision striking down a Door County village's bedroom cap as preempted by § 66.1014. A reversal could clarify that municipalities may regulate sub-seven-day rentals through their general police power, while leaving § 66.1014's seven-day floor intact, and could unwind the § 1983 judgment and fee award. Watch for whether the Court reframes *Zwiefelhofer* around a single defined question, such as whether the ordinance is "quintessentially" zoning.

For an in-depth discussion, read the oral argument primer here.

OCTOBER 13 CHIPPEWA FALLS · TWO DNR CASES

CRIMINAL

ARGUED OCT 13

2024AP777-CR

Court of Appeals
2025 WI App 57 · reversed

State v. Phelan

Arrest, but Don't Investigate?

A DNR warden who stopped John Phelan for suspected littering ran field sobriety tests and a preliminary breath test, and questioned Phelan, all before sheriff's deputies arrived. Wisconsin law lets a certified warden arrest anyone who commits a crime in the warden's presence. The same subsection bars wardens from conducting investigations for violations of state law, outside three exceptions. The court of appeals held that the warden crossed that line, suppressed the evidence from his solo investigation, and vacated Phelan's convictions. Evidence the deputies gathered, including the blood test, was properly admitted. *State v. Phelan*, 2025 WI App 57.

The State asks the Supreme Court to reverse on three grounds:

1. An arrest power carries the tasks needed to exercise it.
2. Suppression is not a remedy for violating a statute that creates no rights for criminal defendants.
3. Any error was harmless.

From the bench, justices pressed both sides on where arresting ends and investigating begins. They also asked whether the State forfeited its remedy and harmless-error arguments by not developing them in the court of appeals. Some justices floated a narrower route: assume a violation and hold suppression unavailable. The ruling could reshape when Wisconsin courts may suppress evidence for statutory, rather than constitutional, violations.

WHAT'S NEXT

Watch three things: whether the Court defines the line between arresting and investigating or deliberately avoids it; whether it narrows *Popenhagen*'s discretionary remedy for statutory violations, a holding that would reach any statute allocating authority among officers; and whether it confirms that harmless-error review is a duty courts must perform unprompted. The practical stakes are greatest in rural counties, where wardens are often the nearest officers on the road.

For an in-depth discussion, read the oral argument primer **here**.

ADMINISTRATIVE

ARGUED OCT 13

2024AP577

Court of Appeals
2025 WI App 63 · affirmed

Friends of Blue Mound State Park v. DNR

Can Agency Discretion Erase a Right to a Hearing?

Wisconsin law gives people injured by an agency action a right to a contested case hearing. That is a trial-like proceeding with a neutral examiner, discovery, cross-examination, and findings of fact. An exception covers "actions where hearings at the discretion of the agency are expressly authorized by law."

The DNR used that exception to deny a hearing to a friends group opposing a snowmobile trail in Blue Mound State Park's 2021 master plan. The court of appeals agreed. It held that the department's discretion over public participation, including whether to hold public hearings, was enough. *Friends of Blue Mound State Park v. DNR*, 2025 WI App 63.

The Friends argue that "hearings" in the exception means contested case hearings. On their reading, an agency must clearly say so, through rules the Legislature can review, before it removes the right.

From the bench, justices pressed both sides. Some questioned the Friends on the statute's text and on older precedent. Others warned DNR that its reading could let any public listening session cancel an injured party's right to adjudication. Several justices also asked whether the Friends' complaint is really a policy disagreement.

The decision will reach every agency that holds public hearings.

WHAT'S NEXT

Watch whether the Court reaches subsection (3) or resolves the case on the subsection (1) factors, an approach at least one justice floated that would leave the court of appeals' broad reading in place. Watch, too, how it treats *Waste Management*: following it, confining it, or withdrawing its language. Two related petitions, including *Sauk Prairie Conservation Alliance v. DNR*, are being held pending this decision.

For an in-depth discussion, read the oral argument primer **here**.

Looking ahead: the November arguments

SEVEN CASES · SUPREME COURT HEARING ROOM, STATE CAPITOL

NOVEMBER 5

ESTATES
9:00 A.M.
2024AP117
Waukesha County
District II
reversed

Santner v. Matson

ISSUE Whether delivery of an unwitnessed will to an individual's intended donee constitutes delivery to establish a gift causa mortis.

Scott Santner died of COVID-19 in hospital isolation in 2021 after signing a will no one could witness. The court of appeals held that nothing was delivered to the beneficiaries. They say delivery to Matson was symbolic delivery to all four; Santner's brother says he died intestate.

NOVEMBER 10 TUESDAY

CRIMINAL
9:00 A.M.
2023AP2192-CR
Sheboygan County
District II
reversed

State v. Rejholec

ISSUES (1) Whether a defendant's allocution before sentencing is admissible at a later trial after he withdraws his plea. (2) Whether introducing it violates due process.

Rejholec's plea was withdrawn after his Miranda waiver was held invalid. He argues the allocution is barred by Wis. Stat. § 904.10 and due process. The State says the case is moot because he died while review was pending, and that § 904.10 covers only statements made before a plea deal is final.

UNEMPLOYMENT
10:30 A.M.
2024AP1013
Waukesha County
District II
affirmed

Abby Windows v. LIRC

ISSUES Whether to revisit *Kalal* and adopt a holistic approach to statutory interpretation; alternatively, whether the court of appeals erred in treating the Unemployment Act's policy declaration as only a rule of construction and finding "consumer products" unambiguous.

A door-to-door commission salesman sought unemployment benefits. An exclusion covers sellers of "consumer products." LIRC and DWD say the court of appeals should have weighed the Act's purpose statement; Abby Windows says *Kalal* was applied correctly.

NOVEMBER 17 TUESDAY

INSURANCE
9:00 A.M.
2024AP1098
Walworth County
District II
reversed

Somerset Condominium Association v. RC Somerset

ISSUE When a liability policy excludes claims arising from facts "related" to an earlier reported wrongful act, and the insured acts over several years to prevent development of two parcels, are the later acts "related" so that the exclusion applies?

Erie says the exclusion bars D&O coverage for counterclaims over the condominium's 2022 purchase of units. The court of appeals found the acts unrelated. Somerset says a shared goal is not the same wrongful act.

CONSTITUTIONAL
10:30 A.M.
2024AP1175
Waukesha County
District III
affirmed

Minority Business Association of Wisconsin v. DATCP

ISSUE Whether a party subject to an administrative-search regime has a justiciable claim under the Uniform Declaratory Judgments Act when, before receiving a search demand, it claims the regime lacks meaningful precompliance review.

MBAW challenges the civil investigative demand statute, Wis. Stat. § 93.15. The court of appeals held the claim not justiciable. DATCP says the statute has never affected MBAW.

NOVEMBER 19 THURSDAY

CRIMINAL
9:00 A.M.
2024AP2291-CR
Brown County
District III
reversed

State v. Ricketts

ISSUE Must qualifying convictions stem from separate temporal incidents for the domestic abuse repeater enhancer to apply?

Ricketts' two prior convictions came from one incident. He says the text is plain; the State says it is ambiguous. The State cites *Wittrock* and *Hopkins*, which read similar repeater language to reach convictions entered together.

NOVEMBER 19 THURSDAY, CONTINUED

MENTAL HEALTH

10:30 A.M.

2024AP2177-CR

Dane County
District IV
reversed

State v. Wilhite

ISSUES Whether a facial constitutional challenge can ever be forfeited; whether noncompliance with § 971.17(7m)(a) deprived the court of appeals of competency; whether Wilhite met the UDJA notice requirements; and whether he proved § 971.17(3)(e) facially unconstitutional.

Wilhite's conditional release as an NGI acquittee was revoked for a rules violation, and he raised his constitutional claim for the first time on appeal. The State says the claim was forfeited; Wilhite says a facial challenge cannot be forfeited.

COURT OF APPEALS DISTRICT III · APPOINTED NOVEMBER 2

New on the Court of Appeals: Judge Emily Lonergan

On November 2, Governor Tony Evers appointed Outagamie County Circuit Judge Emily Lonergan to the Wisconsin Court of Appeals, District III. She fills the vacancy created by Presiding Judge Lisa Stark's retirement and will complete a term ending July 31, 2029. District III is chambered in Wausau and hears appeals from 35 counties across northern Wisconsin, from Superior and Eau Claire to Green Bay.

Governor Evers first appointed Judge Lonergan to the circuit bench in 2019, and voters elected her to a full term in 2020 and re-elected her, unopposed, in April 2026. She previously practiced criminal defense and personal injury law in Milwaukee and Appleton. Her 2019 application described the proper role of a judge as applying "the existing law to the facts that are unique to each case." On her appointment, she said she plans "to make decisions based upon the rule of law, in order to ensure that everyone is treated with fairness."

In March, Judge Lonergan sat on the three-judge panel that dismissed *Bothfeld v. Wisconsin Elections Commission*, a challenge alleging that Wisconsin's congressional map is a partisan gerrymander favoring Republicans. The panel ruled against the plaintiffs, concluding that it lacked authority to supersede the Wisconsin Supreme Court. A National Republican Congressional Committee spokesman called the dismissal "a significant win for Republicans." The Supreme Court accepted the plaintiffs' appeal on June 11 and heard argument on September 16. A decision is pending.

Her application lists membership in the Wisconsin Association for Justice and the Wisconsin Association of Criminal Defense Lawyers, along with service on the Wisconsin Election Protection Legal Coordinating Committee from 2014 to 2017. It also lists six endorsements from the prior six years: Ed Fallone, JoAnne Kloppenburg, Rebecca Dallet, and Lisa Neubauer for the Supreme Court, and Paul Rifelj and Jean Kies for Milwaukee County Circuit Court. When the Supreme Court named her to the map panel, the conservative site Wisconsin Right Now reported that she had contributed to Governor Evers, the State Senate Democratic Committee, and the Assembly Democratic Campaign Committee. The site gave no amounts or dates.

Judge Lonergan has served on the Outagamie County bench since 2019, where she has also overseen the county's Drug and Alcohol Treatment Court. She has served as associate dean of the Judicial College, is a member of the Wisconsin Judicial Council, and sits on the Wisconsin Civil Jury Instruction Committee. An Appleton native, she is a graduate of Marquette University and Marquette University Law School.

District III is the court that reviews Outagamie County appeals. Since 2019, it has issued at least 11 decisions reviewing Judge Lonergan's rulings. It affirmed nine, including three appeals in which appointed counsel found no issue of arguable merit. It reversed two. In *Outagamie County v. X.Z.B.* (2021), the court held that the county had not proved dangerousness for a mental-health commitment extension. In *Outagamie County DHS v. S.B.* (2025), it held that a circuit court may lift a visitation injunction before a termination-of-parental-rights case ends. None of the 11 decisions was published. That is typical, because most Court of Appeals decisions are unpublished and are not precedent under Wis. Stat. § (Rule) 809.23(3); those issued since July 1, 2009 may be cited only for persuasive value. In 2024, District III reversed 18% of the cases it decided by opinion.

Governor Evers is accepting applications for her Branch 2 seat through 5 p.m. on November 16, 2026. The new judge will serve a term ending July 31, 2028.

Court Watch will follow her work on the District III bench.



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