



Dear {{FirstName or 'Friend'}},

The Thanksgiving season presents an important opportunity to celebrate and amplify Native American histories. In today's issue, we examine the role state courts play in protecting indigenous peoples' rights. While tribal courts play an important role for tribal communities, state supreme courts have a significant impact on a range of rights for indigenous communities.

So far in 2023, state supreme courts **have delivered** at least 19 decisions affecting Native American and tribal law. The Indian Child Welfare Act (ICWA) **mandates** procedures and guidelines in custody proceedings for Native American children, though these procedures can be circumvented due to the "**existing Indian family**" exception that enables states to claim jurisdiction over children who do not reside with a Native American family. In ***State ex rel. the Delaware Tribe of Indians v. The Honorable Stacy Nowicki-Eldridge***, the West Virginia Supreme Court **recognized** the negative consequences of the use of this exception to avoid ICWA proceedings and protections, and determined the matter was best decided by a tribal court.

Cases affecting water rights and land sovereignty have massive implications for tribes' ability to maintain their cultural practices, many of which are closely connected to their environment and surrounding natural resources. The Minnesota Supreme Court issued a decision in ***In re Contested Case Hearing Requests & Issuance of National Pollutant Discharge Elimination System / State Disposal System Permit for the Proposed NorthMet Project*** that **prevented** the construction of a mining and processing plant due to the failure of state agencies to accurately evaluate the environmental impacts on the Fond du Lac Band's water quality standards. But in Hawai'i, the supreme court **greenlit** the destruction of land sacred to Native Hawaiians with its ruling in ***In re Kanahale***; and **determined** that Native Hawaiians born after a certain date are not eligible to receive a payout from a settlement reached between the state and beneficiaries of a trust permitted to lease homestead land held for Native Hawaiians as part of a pledge under the federal government's Hawai'ian Homes Commission Act, in ***Rivera v. Cataldo***.

These are just a sample of the decisions released this year affecting indigenous communities across the country. According to the [Brennan Center](#), only three states currently have a Native American justice on their state supreme court. They are Minnesota Supreme Court Justice [Anne McKeig](#) of the White Earth Band of Ojibwe; Oklahoma Supreme Court Justice [Dustin Rowe](#) of the Chickasaw Nation, and Washington Supreme Court Justice [Raquel Montoya-Lewis](#) of the Laguna Pueblo. As these decisions have far-reaching consequences, it's critical that the judges on our state courts understand the nuances of tribal law and sovereignty.



Ethics Update

Wisconsin impeachment efforts

As we previously reported in our September State of Justice issue, Republican lawmakers in the Wisconsin Assembly [threatened](#) to impeach Wisconsin Supreme Court Justice Janet Protasiewicz if she did not recuse herself from a lawsuit asking the court to throw out allegedly gerrymandered district apportionment maps. Assembly Speaker Robin Vos asked three conservative former Wisconsin Supreme Court justices to study the issue and provide him with feedback on whether impeachment was an appropriate response. When asked, he [refused](#) to name the former justices he'd tapped.

Watchdog group [American Oversight](#) subsequently filed a [lawsuit](#) against Speaker Vos alleging that asking the three former justices to review the matter violated the state's open meetings law. The [first](#) of the former justices to reveal their involvement was David Prosser, who advised Vos in an email that Justice Protasiewicz had not committed any criminal or corrupt conduct and cautioned that threatening impeachment to affect the outcome of a single case would be viewed as partisan political maneuvering by voters. A [second](#) conservative former Wisconsin Supreme Court justice, Jon Wilcox, confirmed that he was also asked to study the matter, and agreed with Prosser's assertion that none of Justice Protasiewicz's statements or actions would justify impeaching her. A court filing revealed that the third former justice is Patience Roggensack, whose retirement earlier this year created the vacancy on the court that was ultimately filled by Justice Protasiewicz. American Oversight asked the judge hearing the case to compel former Justice Roggensack to testify to her findings and to release all documents in the matter. Roggensack successfully

convinced the judge that she should not have to testify, but was **ordered** to release all documents related to her involvement by December 13.

Despite receiving advice against the move from at least two of the three former justices, Speaker Vos has **refused** to take the threat of impeaching Justice Protasiewicz off the table, saying members of the Assembly will decide next steps based on how she ultimately rules in the redistricting case. Justice Protasiewicz **rejected** all calls to recuse herself, and the court is currently hearing the case.

North Carolina investigation

In another ethics investigation the AFJ Action team has been closely monitoring, North Carolina Supreme Court Justice Anita Earls, the court's only Black justice, continues to battle an investigation by the North Carolina Judicial Standards Commission into comments she made in an **interview** about the lack of diversity on the state's highest court and among those who argue before it. The commission **opened** an investigation into Justice Earls' comments, alleging that they potentially undermined public confidence in the integrity and impartiality of the court in violation of the state's Code of Judicial Conduct. In response, Justice Earls **filed** a lawsuit in federal court alleging the investigation is a violation of her First Amendment right to free speech, and an effort to silence criticism from a Black woman of the white male-dominated court.

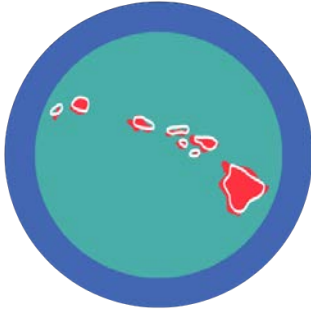
Last week, the judge overseeing Justice Earls' lawsuit **denied** a motion filed by the justice seeking a preliminary injunction that would have halted the commission's investigation while her lawsuit was heard, **allowing** the investigation to move forward. Justice Earls' lawsuit will proceed, and she has **indicated** she will appeal the denial on her preliminary injunction motion



Four candidates running for Arkansas Supreme Court Chief Justice

Four **candidates**, three of whom are current sitting justices, are vying for the position of Chief Justice of the Arkansas Supreme Court. They are Justices Karen Baker, Barbara Womack Webb, Rhonda Wood, and former State Rep. Jay Martin.

Justices Womack Webb and Wood are Republicans, while Justice Baker and former Rep. Martin are Democrats. If Justice Wood, Justice Womack Webb, or Justice Baker are elected, they will become the first female chief justice in the state's history. The seat is being vacated by the retirement of current Chief Justice Dan Kemp, whose term will expire on December 31, 2024. The election will be held on March 5, 2024, and incumbent associate justices Shawn Womack and Courtney Hudson will also be running for another term on the state's highest court.



Hawai'i Supreme Court nominees confirmed

The Hawai'i State Senate has **confirmed** the appointments of two new associate justices to the Hawai'i Supreme Court. The five-member court had two vacancies since the spring of 2023, when associate justices Paula Nakayama and Michael Wilson retired shortly before reaching the mandatory retirement age of 70.

The two new associate justices are Lisa Ginoza and Vladimir Devens. Justice Ginoza was previously a judge and later Chief Judge of the Hawai'i Intermediate Court of Appeals, and had worked as a Deputy Hawai'i Attorney General and in private practice before becoming a judge. Justice Devens previously worked in private practice specializing in land use and labor relations, including representing the State of Hawai'i Organization of Police Officers and the Hawai'i State Teachers Association, and had also previously served as an officer with the Honolulu Police Department, where he continues to serve as a volunteer reserve officer. Justices Ginoza and Devens will each serve a ten-year term, after which the state's Judicial Selection Commission will consider retaining them for additional ten-year terms.



South Carolina legislators consider changes to the state's judicial selection process

The South Carolina legislature recently held **hearings** on proposed changes to the state's system for choosing judges. South Carolina and Virginia are the only two states where the legislature alone is tasked with the selection of judges.

Critics seeking the changes argue that a conflict of interest is inherent in the current system because one third of the legislature are attorneys, allowing legislators to choose the judges they may later appear before. Proponents further argue that under the current system, legislators may receive preferential treatment from judges, undermining public confidence in judicial integrity. Opponents of the changes assert there is little evidence to support the claims of preferential treatment and conflicts of interest made by those advocating for changes. Justices of the South Carolina Supreme Court testified both in favor of and opposing the proposed changes during the hearings.



Tennessee Supreme Court justice will retire in 2024

Tennessee Supreme Court Justice Roger Page has **announced** that he will retire in August 2024. His retirement will give Gov. Bill Lee his third opportunity to appoint a justice to the state's highest court, after which Lee appointees will comprise a majority of the five-member court. The person selected to fill the vacancy created by Justice Page's retirement will require approval by the state legislature, and will be required to face a retention election in 2032.



Access to Justice 

Indiana

[*State of Indiana v. \\$2,435 in U.S. Currency and Kizer*](#)

The Indiana Supreme Court unanimously ruled that the state's historical record of statutes and judicial decisions established a common law right to trial by jury for defendants in cases of civil forfeiture, a process that allows law enforcement officials to seize property and assets of people suspected of criminal activity. The decision will require prosecutors, who previously partnered with law enforcement to determine the appropriateness of civil forfeiture actions, to convince a jury that the state is entitled to seize a person's assets.

Kansas

[*State v. Kerrigan*](#)

The Kansas Supreme Court ruled in a 5-2 decision that state law does not require law enforcement officers to honor requests for a lawyer made by motorists prior to the administration of roadside evidentiary breath tests for suspected driving under the influence of alcohol. The state's highest court overruled lower court opinions holding that drivers have the right to request an attorney before submitting to the test, determining that state law requires motorists to submit to the evidentiary breath test before invoking their right to request and consult with an attorney.

New Jersey

[*State v. Olenowski*](#)

The New Jersey Supreme Court ruled in a 5-2 decision that the testimony of drug recognition experts, officers trained in recognizing symptoms of drug use who are often dispatched to the scene when a driver is pulled over for suspicion of driving under the influence of drugs or alcohol, is not sufficient to convict someone accused of driving under the influence. The decision limits the degree to which prosecutors may rely on the testimony of such officers, and requires officers to use toxicology reports or blood tests to determine if drugs are in someone's system whenever possible.

Washington

In re Personal Restraint of Knight

The Washington Supreme Court issued a divided opinion in which four justices concurred, four justices dissented, and one justice concurred in part and dissented in part, that vacated a murder conviction in a high-profile homicide case. The decision will allow one of the defendants to be resentenced for her role in the homicide after the state's highest court determined there was insufficient evidence to support her conviction in the way it was presented to the jury.

Environmental Protections

Hawaii

City and County of Honolulu, et. al v. Sunoco LP, et. al

In a groundbreaking decision, the Hawai'i Supreme Court has denied a motion to dismiss a lawsuit brought by the City and County of Honolulu against numerous fossil fuel companies, which alleges that the companies have understood the threat of climate change and their products' contribution to it for decades, and have subsequently engaged in a series of deceptive marketing practices to hide this reality from the public. The suit alleges that these practices have caused the city and the county to suffer substantial harm from the destruction of natural resources and a loss of tax revenue and funding that must be directed toward current and future mitigation efforts. The decision allows the suit against the companies to proceed, potentially opening the door for the city and county to hold the companies financially liable for the effects of climate change if they are found liable for their deceptive practices.

Indigenous Rights

Florida

West Flagler Associates, Ltd. et al. v. Ron DeSantis et al.

The Florida Supreme Court rejected a request by two casino companies to halt an online sports betting app recently launched by the Seminole Tribe as part of a gambling compact between the tribe and the state, while a broader legal battle is heard by lower courts. The companies had contended that the sports betting aspect of the compact violates the state constitution and asked the state's highest court to block the tribe from launching the app while lower courts determine whether it is constitutional.

Reproductive Rights

Missouri

State of Missouri ex rel. Basinger v. Ashcroft

The Missouri Supreme Court denied the Missouri Secretary of State's efforts to appeal rulings against language he wrote summarizing initiative petitions seeking to enshrine the right to abortion in the state's constitution, in which he asserted that the initiatives would allow for "dangerous, unregulated, and unrestricted abortions" and would "nullify long-standing Missouri law protecting the right to life." The state's highest court agreed with lower courts that the summaries contained impermissible politically partisan language.

Oklahoma

Oklahoma Call For Reproductive Justice V. Drummond

The Oklahoma Supreme Court delivered a 5-4 opinion affirming that the state constitution guarantees the right to an abortion when necessary to preserve the life of the mother, blocking a series of bills addressing who can administer abortions in the state and where they can be administered while lower courts hear challenges to the laws. While the injunction is in place, abortions may be performed when the life of the mother is in jeopardy, although the procedure remains illegal in the state in virtually all other instances.

Tenant Rights

Montana

Westview v. Lockhart and Greener Montana v. Cunningham

In a 6-2 decision, the Montana Supreme Court has ruled that mobile home landlords, whose tenants sign leases to rent the land their homes are situated on, cannot terminate their tenants' leases without cause. Landlords were previously only required to provide their tenants with 30 days' notice to vacate a lot, but must now provide an affirmative reason to initiate the termination of a lease.



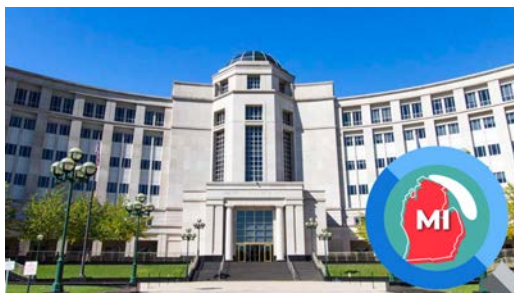
[*Is the California Supreme Court Going to Throw Employers a Bone on PAGA?*](#)

The California Supreme Court just heard oral arguments in a case determining if lower trial courts can strike Private Attorneys General Act (PAGA) claims based on “manageability.” In California, PAGA is a law that enables aggrieved workers to file civil lawsuits against their employees on behalf of themselves, other employees, or based on other labor code violations.



[*Illinois Supreme Court Questions Legality of Staffing Agencies' No-Poach Agreements*](#)

The Illinois Supreme Court heard oral arguments in a case brought by Illinois Attorney General Kwame Raoul challenging staffing agencies' hiring and employment agreements. Raoul claimed the companies colluded to create no-poaching agreements for a common client, trapping low-wage workers in low-paying jobs.



[*Oral Arguments Held Before Michigan Supreme Court in Voter Intimidation Case, People v. Burkman and Wohl*](#)

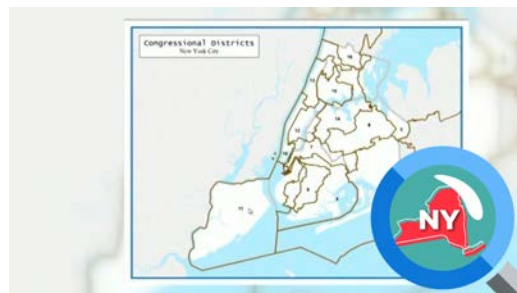
[*Florida abortion rights supporters push Supreme Court to allow proposed amendment on 2024 ballot*](#)

Supporters of a ballot measure attempting to enshrine the right to an abortion up to viability in the Florida constitution. Many advocates filed briefs supporting the amendment before the Florida Supreme Court including a group of Florida doctors, former Republican lawmakers, the American College of Obstetricians and Gynecologists, and constitutional law professors. Some progressive advocates fear the outcome of the case, especially considering the fact that Governor DeSantis has appointed 5 out of the 9 justices on the court.



[*Maine's highest court weighs law to remove time limits of child sexual abuse lawsuits*](#)

Attorneys for the Roman Catholic Diocese of Portland are challenging the constitutionality of a law removing the time limit to bring cases of child sexual abuse forward. As a result of the law passing in 2021, dozens of people have come forward and sued the Diocese for abuse.



[*New York Court of Appeals hears arguments on redrawing House map*](#)

New York's highest court heard arguments in a case challenging the federal House of

The Michigan Supreme Court heard oral arguments in a case challenging charges that the state attorney general filed against two people accused of voter intimidation against Black Michigan residents in the 2020 election. The two men, Burkman and Wohl, are accused of sending robocalls to Black Detroit residents deterring them from using vote-by-mail.

Representatives maps and will decide if the maps should be redrawn. The suit, originally filed by Republicans, is challenging the Democratic- drawn and approved maps from 2022. However, the maps were heavily criticized by good government groups and Republicans claiming they give Democrats an unfair advantage. Especially ahead of next year's election, the court's decision could have national political implications as Republicans gained 4 seats under maps created before this most recent proposal.



[Ohio Supreme Court to weigh abortion amendment's effect on 'heartbeat' case](#)

Chief Justice Sharon Kennedy invited comments from the attorney general and other plaintiffs on how the recent passage of Issue 1, a voter-approved constitutional amendment enshrining abortion in the state constitution, will affect the state's current abortion ban.



[A lawsuit challenging state legislative district maps is heading to the Wisconsin Supreme Court](#)

Democratic voters are asking the supreme court to review the state's conservative-drawn legislative maps. If the court agrees with the voters and orders new maps, all 132 state lawmakers will have to run for re-election next year since they will be under new legislative districts.

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