

FILED  
06-01-2026  
CLERK OF WISCONSIN  
SUPREME COURT

No. 2026AP1168

---

*In the Supreme Court of Wisconsin*

ELIZABETH BOTHFELD, JO ELLEN BURKE, MARY COLLINS,  
CHARLENE GAEBLER-UHING, KATHLEEN GILMORE, PAUL  
HAYES, SALLY HUCK, THOMAS KLOOSTERBOER, ELIZABETH  
LUDEMAN, GREGORY ST. ONGE AND LINDA WEAVER,

PLAINTIFFS-APPELLANTS,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN,  
ANN S. JACOBS, DON M. MILLIS, ROBERT F. SPINDELL, JR.,  
CARRIE RIEPL, MARK L. THOMPSON AND MEAGAN WOLFE,

DEFENDANTS-RESPONDENTS,

GLENN GROTHMAN, BRYAN STEIL, TOM TIFFANY, SCOTT  
FITZGERALD, DERRICK VAN ORDEN, TONY WIED, GREGORY  
HUTCHESON, PATRICK KELLER, PATRICK MCCALVY, MIKE  
MOELLER, WISCONSIN STATE LEGISLATURE, BILLIE  
JOHNSON, CHRIS GOEBEL, AARON GUENTHER, CHARLES  
HANNA, TIM HIGGINS, LOU KOWIESKI, CHRIS MULLER, ERIC  
O'KEEFE, CRAIG ROSAND, RUTH STRECK AND RONALD ZAHN,

INTERVENORS-DEFENDANTS-RESPONDENTS.

---

On Appeal from a three-judge panel at the Dane County  
Circuit Court pursuant to Wis. Stat. § 751.035,  
The Honorable Judges, Julie Genovese, Mark Sanders,  
and Emily Lonergan, Presiding,  
Dane County Case No. 2025-CV-2432

---

**MOTION TO DISMISS THE APPEAL**

---

WISCONSIN INSTITUTE FOR  
LAW & LIBERTY, INC.

RICHARD M. ESENBERG  
LUKE N. BERG  
LUCAS T. VEBBER  
NATHALIE E. BURMEISTER

---

**No. 2026AP1168**

1241 N. Franklin Place  
Milwaukee, WI 53202  
Phone: (414) 727-9455

*Attorneys for Intervenor-  
Defendants-Respondents Billie  
Johnson, et al.*

Pursuant to Wis. Stat. § 809.14, the Intervenor-Defendants-Respondents Billie Johnson, Chris Goebel, Aaron Guenther, Charles Hanna, Tim Higgins, Lou Kowieski, Chris Muller, Eric O'Keefe, Craig Rosand, Ruth Streck and Ronald Zahn (hereinafter the “Johnson Intervenor”), by their undersigned attorneys, hereby move to dismiss this action for lack of jurisdiction. The grounds for this motion are more fully set forth below.

### **BACKGROUND**

This case was brought pursuant to Wis. Stat. §§ 751.035 and 801.50(4m). It is an action to challenge the apportionment of Wisconsin’s congressional districts. The complaint was filed in Dane County Circuit Court, and pursuant to Wis. Stat. § 751.035(1), this Court appointed a panel consisting of three circuit court judges and assigned Dane County Circuit Court as the venue for all hearings and filings.

On March 31, 2026, the three judge panel in this case issued a decision wherein it denied Plaintiffs-Appellants’ motion for judgment on the pleadings and granted Respondents’ motions to dismiss, dismissing this action in its entirety. Dkt. 158. On May 15, 2026, Plaintiffs-Appellants filed a notice of appeal. Dkt. 159.

But the statute providing for appeal of three judge panel decisions in cases like this does not allow for an appeal of right. Instead, the

statute provides that this court “may” hear such an appeal. Wis. Stat. § 751.035(3). To invoke this Court’s jurisdiction, Plaintiffs needed to file a Petition for Review, not a notice of appeal.

In a related appeal, which also came from a three judge panel appointed to hear a similar congressional redistricting action, this Court issued an Order declining to decide whether the appeal was discretionary or of right. *See Order, Wisconsin Business Leaders for Democracy, et al. v. Wisconsin Elections Commission, et al.*, Appeal No. 2026AP1008 (May 29, 2026). The facts here are much different, however. Due to the timing of the filing of the notice of appeal in this matter, the time to seek traditional discretionary review from this Court has passed. While the notice of appeal was filed within the statutory notice of appeal deadline, that would only apply to an appeal of right, not to this discretionary appeal.

Therefore, the Johnson Intervenors move to dismiss this improper attempt to invoke this Court’s jurisdiction.

## ARGUMENT

### **I. The plain language of the appellate venue statute provides that this a discretionary appeal, not an appeal of right.**

Pursuant to Wis. Stat. § 751.035(3), “An appeal from any order or decision issued by the panel assigned pursuant to sub. (1) *may* be heard

by the supreme court and may not be heard by a court of appeals for any district.” (Emphasis added).

Plaintiffs-Appellants filed a notice of appeal, purporting to obtain an appeal as a matter of right. But subsection 3 of Wis. Stat. § 751.035—under which Plaintiffs-Appellants filed this case—does not allow for an appeal of right to this Court. Instead, the plain language of that subsection provides that the Court “may” hear the appeal, and the Court of Appeals “may not” hear it—but there is no requirement that this Court hear the appeal at all.

## **II. The legislative history confirms this is a discretionary appeal.**

This Court has “repeatedly emphasized that [to] ... ‘resort to legislative history is not appropriate in the absence of a finding of ambiguity.’” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Seider v. O’Connell*, 2000 WI 76, ¶ 50, 236 Wis. 2d 211, 612 N.W.2d 659). “Thus, as a general matter, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation.” *Id.*

Here, the meaning of Wis. Stat. § 751.035(3) is plain, and allows only for a discretionary appeal. This understanding is also confirmed by the legislative history.<sup>1</sup> That history is fully summarized below:

Wisconsin Stat. § 751.035—the three-judge panel statute—was created via 2011 Wisconsin Act 39. That Act began as 2011 Senate Bill 150, and as originally introduced, would have created Wis. Stat. § 751.035(3) to allow for an appeal of right to this Court. Indeed, as introduced, it *originally* read:

(3) An appeal from any order or decision issued by the panel assigned pursuant to sub. (1) **shall** be heard by the supreme court and may not be heard by a court of appeals for any district.

2011 Senate Bill 150, § 28 (emphasis added).<sup>2</sup> Confirming the original draft required this Court to take action, a drafter's note from the Legislative Reference Bureau<sup>3</sup> stated:

Please be aware that this draft requires the supreme court to take certain actions. This may be in violation of the

---

<sup>1</sup> Alternatively, if this Court determines the statute is ambiguous, the legislative history herein resolves any ambiguity, so either way, a review of the legislative history is wholly appropriate here.

<sup>2</sup> See 2011 Senate Bill 150 (July 11, 2011), available at: <https://docs.legis.wisconsin.gov/2011/related/proposals/sb150.pdf>

<sup>3</sup> See “Drafters note from the Legislative Reference Bureau” (July 1, 2011), available at:

[https://docs.legis.wisconsin.gov/2011/related/drafting\\_files/wisconsin\\_acts/2011\\_act\\_039\\_sb\\_150/02\\_sb\\_150/11\\_2296\\_1dn.pdf](https://docs.legis.wisconsin.gov/2011/related/drafting_files/wisconsin_acts/2011_act_039_sb_150/02_sb_150/11_2296_1dn.pdf)

separation of powers doctrine, and may be rejected by the supreme court on those grounds.

Subsequently, the Legislature introduced a simple amendment to the bill which changed the word “shall” to “may.” 2011 Senate Bill 150, Senate Amendment 5.<sup>4</sup> This amendment made clear that the Supreme Court was not required to take any action, and that the appeal itself was discretionary.<sup>5</sup>

On July 19, 2011, this amendment was adopted by the Senate, and on the same day, the Senate passed the as-amended bill.<sup>6</sup> After approval in the Assembly, this language was signed into law as 2011 Wisconsin Act 39 on July 25, 2011 (published August 8, 2011).<sup>7</sup>

This history confirms the plain meaning of the statute: any appeal of a three-judge panel decision (such as the decision being appealed by the Plaintiffs-Appellants here) goes to the Supreme Court, which “may” exercise its jurisdiction and hear the appeal, but is not required to do so.

---

<sup>4</sup> See Senate Amendment 5, to 2011 Senate Bill 150, available at:

[https://docs.legis.wisconsin.gov/2011/related/amendments/sb150/sa5\\_sb150.pdf](https://docs.legis.wisconsin.gov/2011/related/amendments/sb150/sa5_sb150.pdf)

<sup>5</sup> See Wis. Leg. Council Amendment Memo to 2011 Senate Bill 150 at 7 (noting the effect of the amendment), available at:

<https://docs.legis.wisconsin.gov/2011/related/lcamendmemo/sb150.pdf>

<sup>6</sup> *Id.*; see also history of 2011 Senate Bill 150, available at <https://docs.legis.wisconsin.gov/2011/proposals/sb150>

<sup>7</sup> See history of 2011 Senate Bill 150, available at <https://docs.legis.wisconsin.gov/2011/proposals/sb150>; 2011 Wisconsin Act 39, available at: <https://docs.legis.wisconsin.gov/2011/related/acts/39.pdf>

**III. The appropriate remedy here is for the appeal to be dismissed outright.**

This Court has held that where only a discretionary appeal is allowed, and a party purports to seek an appeal of right, the remedy is to dismiss the appeal altogether. *See Wick. v. Mueller*, 105 Wis. 2d 191, 313 N.W.2d 799 (1982). As with the Plaintiffs in *Wick*, Plaintiffs-Appellants' notice of appeal would have been timely *if* an appeal of right was allowed. But such an appeal is plainly not provided for in the statute governing these types of cases, as just explained.

This judicial principle was also applied in *Brownsell v. Klawitter*, 99 Wis.2d 407, 299 N.W.2d 292 (1980). In that case, the court dismissed an appeal because the judgment from which the party appealed was nonfinal due to an unresolved counterclaim, and therefore not appealable as of right under Wis. Stat. § 808.03(1). Because the ten-day statutory window for seeking permissive discretionary review had expired and the appellant had not requested leave to appeal a nonfinal order, the court declined to exercise discretionary jurisdiction and dismissed the appeal.

The Plaintiffs-Appellants should have filed a Petition for Review under Wis. Stat. § 809.62, which is the statutory method for seeking this Court's review as a matter of discretion; the deadline to file a Petition for

Review is within 30 days of the decision for which the filing party is seeking review. Wis. Stat. § 808.10(1). The Plaintiffs-Appellants did not meet that deadline.

Here, the statutes allow this Court, and *only* this Court, to hear any appeal, but it does not *require* this Court to hear the appeal—it is purely discretionary. Accordingly, this appeal should be dismissed because Plaintiffs-Appellants sought review only as a matter of right, and review of right is not provided for under the statute.

### CONCLUSION

For the reasons explained above, this Court should grant this motion and dismiss this appeal.

Dated: June 1, 2026.

Respectfully submitted,  
WISCONSIN INSTITUTE FOR  
LAW & LIBERTY, INC.

*Electronically signed by*  
*Lucas T. Vebber*

---

Richard M. Esenberg (#1005622)  
Luke N. Berg (#1095644)  
Lucas T. Vebber (#1067543)  
Nathalie E. Burmeister. (#1126820)

1241 N. Franklin Place  
Milwaukee, WI 53202  
Telephone: (414) 727-9455

rick@will-law.org  
luke@will-law.org

lucas@will-law.org  
nathalie@will-law.org

*Attorneys for Intervenor-  
Defendants-Respondents Billie  
Johnson, et al.*