Supreme Court of Wisconsin

No. 2024AP164
Appeal from Dane County Circuit Court, No. 2023CV1900,
The Honorable Ann Peacock, Presiding

PRIORITIES USA;
WISCONSIN ALLIANCE FOR RETIRED AMERICANS;
AND WILLIAM FRANKS, JR.,
PLAINTIFFS-APPELLANTS-PETITIONERS,

v.

THE WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-APPELLEE-RESPONDENT,

THE WISCONSIN STATE LEGISLATURE,
INTERVENOR-DEFENDANT-APPELLEE-RESPONDENT.

PLAINTIFFS-APPELLANTS-PETITIONERS' BRIEF

Diane M. Welsh,
State Bar No. 1030940
PINES BACH LLP
122 W. Washington Ave.,
Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

David R. Fox*
Justin Baxenberg*
Richard A. Medina*
Omeed Alerasool*
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
Telephone: (202) 986-4490
Facsimile: (202) 986-4498
dfox@elias.law
jbaxenberg@elias.law
rmedina@elias.law
oalerasool@elias.law

* Admitted *pro hac vice*
pursuant to SCR 10.03(4)(b)

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional & Statutory Provisions

Other Authorities

INTRODUCTION

Two years ago in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519 (2022), a fractured majority of this Court rewrote the decades-old law that governs the return of absentee ballots to impose restrictions that appear nowhere in the statute's plain text and that contradict the statute's evident purpose. The statute requires only that the ballot "shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. But *Teigen* appended a new limitation: that the elector deliver the ballot directly to the municipal clerk *in her office*, even if the municipal clerk has agreed to accept delivery via a secure drop box somewhere else.

This interpretation was wrong when *Teigen* was decided and it is wrong now. Nothing in Section 6.87 or any other provision of Wisconsin law governs *where* a municipal clerk may accept absentee ballots, so nothing prevents municipal clerks from agreeing to accept ballots at locations other than their own offices, including via secure ballot drop boxes placed elsewhere. The statute is simply silent on that issue. And while Section 6.84 renders the relevant statutes mandatory, rather than directory, it does not license the Court's imposition of a requirement found nowhere in the statutory text simply because that requirement would make absentee voting harder.

The consequences of the Court's erroneous ruling in *Teigen* are severe. Drop boxes are a safe and efficient means by which voters can return their absentee ballots to municipal clerks. They were used in Wisconsin without incident during the 2020 elections and earned praise from leaders of both major parties and from the U.S. Supreme Court. They became controversial only later, when

those determined to cast doubt on election results that did not favor their preferred candidates and causes made them a political punching bag. But that partisan controversy did not change the content of Wisconsin law. This Court erred in bowing to that controversy in *Teigen*, and it should correct its mistake now.

STATEMENT OF ISSUES PRESENTED

Pursuant to the Court's March 12, 2024, Order, the issue before the Court on bypass is:

> Whether to overrule the Court's holding in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks.

The circuit court did not analyze the text of Section 6.87, instead holding that "[e]ven if [it] agree[d] that *Teigen* was incorrectly decided, [it] must follow the *Teigen* precedent and [] leave any revisiting of that decision to the Wisconsin Supreme Court." App. 15, R. 100 at 11.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court has set oral argument for May 13, 2024. The Court's opinion should be published because it will address the continuing validity of *Teigen*, 2022 WI 64, which was itself published.

STATEMENT OF THE CASE

In 2020, the Wisconsin Elections Commission (WEC) promulgated guidance encouraging municipal clerks to use ballot drop boxes to make it easier for voters to return their absentee

ballots. A drop box, according to that guidance, is "a secure, locked structure operated by local election officials." *Teigen*, 2022 WI 64, ¶ 1. The guidance explained that "[v]oters may deposit their ballot in a drop box at any time after they receive it in the mail up to the time of the last ballot collection [on] Election Day. Ballot drop boxes can be staffed or unstaffed, temporary or permanent." *Id.*

Drop boxes quickly became one of the most popular methods for returning absentee ballots. In 2020, thousands of voters used hundreds of drop boxes located in a variety of official municipal locations throughout Wisconsin without incident. R. 2 ¶ 37. As Justice Kavanaugh remarked, the ability of voters to "place their absentee ballots in a secure absentee ballot drop box" made "[r]eturning an absentee ballot in Wisconsin . . . easy." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 36 (2020) (Kavanaugh, J., concurring).

But in 2022, over a vigorous three-justice dissent, this Court invalidated WEC's guidance authorizing drop boxes, concluding that it violated Wisconsin Statutes Section 6.87(4)(b)1. *Teigen*, 2022 WI 64, ¶ 72 (Grassl Bradley, J., plurality opinion); *id.* at ¶ 204 (Hagedorn, J., concurring). The relevant part of Section 6.87(4)(b)1 provides that absentee ballots "shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Although the statute does not specify any particular location at which the ballot must be delivered, *Teigen* held that it required ballots to be returned to the municipal clerk "at her office." 2022 WI 64, ¶ 62.

The 2022 general election was therefore conducted without drop boxes, and the voters of Wisconsin suffered as a result. Over 1,600 absentee ballots arrived at the clerk's office after election day in 2022 and thus were not accepted—in contrast, only 689 ballots

arrived at the clerk's office after election day in 2020, despite nearly three times as many Wisconsin voters casting absentee ballots. R. 2 ¶¶ 35–50.

Anticipating another high-turnout presidential election in 2024, Petitioners Priorities USA, the Wisconsin Alliance for Retired Americans, and William Franks, Jr., filed this lawsuit on July 20, 2023, in the Dane County Circuit Court to challenge unnecessary and burdensome restrictions on Wisconsin absentee voters, including the requirement imposed by this Court in *Teigen* that absentee ballots be returned only by mail or directly in-person to a clerk, and not to a secure drop box. *See generally* R. 2. Priorities USA is a nonprofit vote-centric organization that seeks to build a permanent infrastructure of civic engagement, including through educating, mobilizing, and turning out voters. R. 2 ¶ 7. The elimination of drop boxes as a permissible means of returning ballots frustrates that mission by making absentee voting more difficult. R. 2 ¶ 8. The Wisconsin Alliance for Retired Americans is a nonprofit social welfare organization that serves and represents thousands of retired Wisconsinites. R. 2 ¶¶ 9–10. Many of its members rely on absentee voting, including especially its older members and those with disabilities, and without drop boxes that process is more difficult than it needs to be. R. 2 ¶ 10–11. And Mr. Franks is a board member of the Alliance who believes that voters should not face unnecessary obstacles to voting. Together, they brought suit against WEC, the agency responsible for promulgating guidance implementing the challenged restrictions. The Wisconsin State Legislature subsequently intervened as a defendant under Section 803.09(2m). Both defendants filed separate motions to dismiss.

On January 24, 2024, the circuit court issued its Decision and Order on Motions to Dismiss. App. 5–16, R. 100. As relevant to the issue before the Court, the circuit court explained that "[e]ven if [it] agree[d] that *Teigen* was incorrectly decided, [it] must follow the *Teigen* precedent and . . . leave any revisiting of that decision to the Wisconsin Supreme Court." App. 15, R. 100 at 11.

Petitioners timely appealed, R. 104, and petitioned the Court to bypass the Court of Appeals. This Court granted the petition on March 12, 2024, on the issue of whether *Teigen* correctly interpreted Section 6.87 or instead should be overruled.

ARGUMENT

Section 6.87(4)(b)1 requires only that completed absentee ballots "be mailed by the elector, or delivered in person, to the municipal clerk"—it does not restrict *where* municipal clerks may agree to accept delivery of such ballots, including via secure drop boxes. This Court's decision to the contrary in *Teigen* was unsound in principle and is unworkable in practice. It should be overturned because the majority read limitations into the statute that are not there, thereby exceeding the proper role of the judiciary.

In analyzing whether to overrule past precedent, the Court "engage[s] in two levels of analysis," first assessing whether its prior conclusions "were incorrect as a matter of law" and then "decid[ing] whether th[o]se errors require the court to overrule its recent precedent and deviate from the doctrine of stare decisis." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 28, 264 Wis. 2d 60, 665 N.W.2d 257. Because the Court's holding in *Teigen* was fundamentally flawed from its inception and has unnecessarily limited election officials' ability to offer voters a safe and convenient method of returning their absentee ballots, this

Court should overrule its prior decision and properly interpret the statute.

I. Section 6.87(4)(b)1 allows the use of drop boxes.

"Statutory interpretation begins with the language of the statute." *Est. of Miller v. Storey*, 2017 WI 99, ¶ 35, 378 Wis. 2d 358, 903 N.W.2d 759 (cleaned up) (quoting *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110, and citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56–58 (2012)). In relevant part, Section 6.87 provides:

> The [absentee ballot] envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.

Wis. Stat. § 6.87(4)(b)1. That language requires that the ballot be returned to the municipal clerk who issued it, and it allows for return either by mail or by "deliver[y] in person." But that is all it regulates. It simply does not address *where* the ballot may be returned to the municipal clerk, nor the precise mechanics or equipment that the clerk may use to accept it.

"[I]t is a seminal canon of textual interpretation that [courts] do not insert words into statutes or constitutional text." *State v. Schultz*, 2020 WI 24, ¶ 49, 390 Wis. 2d 570, 939 N.W.2d 519. The Court therefore "will not read into [a] statute a limitation the plain language does not evidence." *County of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 33, 315 Wis. 2d 293, 759 N.W.2d 571. *Teigen* violated this fundamental precept by reading into Section 6.87(4)(b)1 limiting language that appears nowhere in its text.

A. Returning an absentee ballot to an authorized drop box is a means of delivering the ballot "to the municipal clerk."

Section 6.87(4)(b)1 requires only that an absentee ballot be either mailed by the elector or delivered in person "to the municipal clerk." The statutory language ends there. The interpretive question presented by this case is therefore straightforward: Can delivery to a drop box constitute delivery "to the municipal clerk?" The answer is "Absolutely." *Teigen*, 2022 WI 64, ¶ 225 (Walsh Bradley, J., dissenting). As the dissenting justices in *Teigen* explained: "A drop box is set up by the municipal clerk, maintained by the municipal clerk, and emptied by the municipal clerk. This is true even if the drop box is located somewhere other than within the municipal clerk's office." *Id.* A drop box is "simply another way to deliver a ballot 'to the municipal clerk.'" *Id.* The analysis should begin and end with this straightforward application of the plain meaning of the text as written.

Rather than follow the plain text of the statute, the *Teigen* Court took up the legislative pen and inserted its own additional language, concluding that "'to the municipal clerk' means mailing or delivering the absentee ballot to the municipal clerk *at her office*." *Teigen*, 2022 WI 64, ¶ 62 (emphasis added). But if the legislature wished to require the return of an absentee ballot to the municipal clerk "at her office," it would have included that language in the statute.

The legislature included that very language in other statutes throughout Wisconsin's election code. A voter who has moved from Wisconsin can vote absentee after filling out a form that "shall be returned *to the municipal clerk's office*." Wis. Stat. § 6.18 (emphasis added). Mail registration forms "must be delivered *to*

the office of the municipal clerk." *Id.* § 6.28 (emphasis added). A late registrant may obtain a certificate allowing them to vote, which if they vote absentee must be "mailed with the absentee ballot *to the office of the municipal clerk*." *Id.* § 6.29 (emphasis added). A voter whose registration is at risk of suspension due to list maintenance "may continue [their] registration by signing the statement [certifying residence] and returning it *to the office of the municipal clerk*." *Id.* § 6.50 (emphasis added). *See also Teigen*, 2022 WI 64, ¶ 220 & n.9 (Walsh Bradley, J., dissenting) (listing additional examples).

"If a word or words are used in one subsection but are not used in another subsection, we must conclude that the legislature specifically intended a different meaning." *Responsible Use of Rural and Agr. Land v. Pub. Serv. Comm'n of Wis.*, 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888. The Court therefore "must conclude" that the legislature's decision not to specify in Section 6.87(4)(b)1 that absentee ballots be returned to the clerk's *office* reflects a legislative choice not to impose such a requirement. The legislature instead left municipal clerks free to decide where and how they would accept delivery of returned absentee ballots.

That does not mean, as the *Teigen* majority feared, that voters may seek out their municipal clerk at her personal residence or the grocery store. 2022 WI 64, ¶¶ 61–62. Nothing in Section 6.87(4)(b)1 requires municipal clerks to accept returned absentee ballots anywhere and everywhere. The statute therefore leaves municipal clerks free to decide for themselves where and when such ballots may be delivered. Indeed, some leeway to set reasonable conditions on when and where delivery may be accomplished is needed even under *Teigen*'s approach, unless the

Court meant to require clerks to accept in-person delivery at their offices at all hours of the day and night.

In misconstruing the statute to require delivery to the clerk's office specifically, *Teigen* misread the provision's use of the word "to." 2022 WI 64, ¶ 55. *Teigen* reasoned that depositing an absentee ballot into a secure drop box constituted delivery *to* the drop box, for purposes of Section 6.87, rather than "delivery to the municipal clerk." *Id.* (quotation omitted). And *Teigen* explained that "[a]n inanimate object, such as a ballot drop box, cannot be the municipal clerk." *Id.*

Taken literally, this cramped reading of the word "to" would impose truly absurd limitations on how absentee ballots are returned to be counted—well beyond the prohibition of drop boxes. For example, it would require electors to carefully ensure that they hand their ballots directly to their municipal clerk or her staff,[1] lest the ballot be deemed improperly delivered "to" a receptacle or piece of furniture in the clerk's office instead of "to" the clerk. The *Teigen* majority obviously did not believe this, because it affirmed a circuit court judgment that upheld the use of staffed drop boxes in clerk's offices, despite the evident risk that ballots would improperly be delivered "to" such drop boxes by voters depositing them directly in the box. *Id.* ¶ 3. But once one accepts that placement in an in-office drop box designated by the clerk constitutes delivery *to* the clerk, the majority's entire "to"-based rationale crumbles, because the same reasoning applies equally to other approved drop boxes, wherever they may be located.

[1] As *Teigen* noted, "municipal clerk" is defined in the election statutes to include "authorized representatives." Wis. Stat. § 5.02.

Teigen's approach is also irreconcilable with ordinary English usage. It is commonplace that one may deliver an item "to" someone by leaving it in a location the recipient has specified, and not only by handing it to the recipient directly. Mail is delivered to hundreds of millions of Americans every day when postal workers leave it in the recipients' designated mailboxes. And as far back as 1872, this Court held that a "delivery" of logs to a buyer occurred when they were left "at the designated place" in the parties' contract. *Morrow v. Campbell*, 30 Wis. 90, 93 (1872). Placement of a ballot in a secure drop box that is designated by a municipal clerk as a means of ballot return, and that is accessible only to the municipal clerk and her authorized representatives, is therefore a perfectly ordinary means of delivering that ballot "to" the municipal clerk.

Thus, nothing in Section 6.87(4)(b)1's plain text precludes municipal clerks from accepting delivery of absentee ballots at designated drop boxes. *Teigen*'s contrary ruling added a new requirement to the statute that is not there.

B. Other provisions of the Wisconsin Statutes do not prohibit drop boxes.

In trying to justify its atextual reading of Section 6.87(4)(b)1, *Teigen* also relied on three other statutory provisions: Section 6.84, Section 6.855, and Section 5.81(3). None supports *Teigen*'s prohibition of drop boxes.

1. Section 6.84

Instead of starting with the governing statute, Section 6.87(4)(b)1, *Teigen* started its analysis with Section 6.84's statement of legislative policy. But that statement is simply irrelevant to the question before the Court. As the Wisconsin

Legislature itself argued in its briefing below, Section 6.84 "is, by its own terms, merely a statement of '[l]egislative policy,'" as distinct from the "affirmative provisions of the election law that actually regulate election processes." R. 60 at 25–26.

Section 6.84(1) expresses the enacting legislature's view that "voting by absentee ballot must be carefully regulated." Wis. Stat. § 6.84(1). And Section 6.84(2) provides that certain specified absentee voting regulations, including Section 6.87(4), must "be construed as mandatory," rather than directory, and that ballots "cast in contravention of" those procedures cannot be counted. Wis. Stat. § 6.84(2). Section 6.84 thus seeks to justify the legislature's absentee voting regulations, and it addresses the consequences of a violation of Section 6.87(4), among other provisions. But Section 6.84 says nothing about the substance of what Section 6.87(4), or any other provision, requires. The fact that the legislature thought absentee voting should "be carefully regulated" might explain why the legislature enacted the laws that it did, but it does nothing to clarify what those laws say, much less license courts to invent *new* regulations that the legislature nowhere imposed.

Inventing a new regulation is exactly what *Teigen* did when it read into Section 6.87(4)(b)1 a prohibition on the use of drop boxes that appears nowhere in the statute's plain text. Deciding that the legislature must have intended to prohibit drop boxes in Section 6.87 because of a statement regarding fraud or abuse is a policy determination, not an exercise in statutory interpretation. And as Justice Hagedorn explained in *Teigen*, concerns about "making absentee voting more convenient and secure . . . are policy concerns, and where the law does not speak, they are the business of the other branches, not the judicial branch." *Teigen*, 2022 WI 64, ¶ 145 (Hagedorn, J., concurring); *see also* Scalia & Garner, *supra*,

at 93–95 ("The search for what the legislature 'would have wanted' is invariably either a deception or a delusion."). If the legislature concluded—against all evidence—that fraud or abuse would abound unless the law required absentee ballots to be delivered to the municipal clerk's office, it easily could have specified as much. It did not, and *Teigen* should not have taken it upon itself to rewrite the statute in response to an unfounded concern that drop boxes are insufficiently secure.

2. Section 6.855

Teigen also looked to Section 6.855, which governs alternate absentee ballot sites. But as *Teigen* acknowledged, "[b]allot drop boxes are not alternate absentee ballot sites under Wis. Stat. § 6.855 because a voter can only return the voter's absentee ballot to a drop box, while an alternate site must also allow voters to request and vote absentee at the site." *Teigen*, 2022 WI 64, ¶ 57; *cf. Trump v. Biden*, 2020 WI 91, ¶¶ 53–57, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring) (concluding that site where absentee ballots were collected by "sworn city election inspectors" but where "[b]allots were not requested or distributed" did not constitute alternate site under Section 6.855). Section 6.855's restrictions on alternate absentee ballot sites therefore say nothing about whether and where drop boxes may be placed.

That Section 6.855 governs the designation of sites where voters may request and vote absentee on site, but not drop boxes where absentee ballots may be returned, makes sense. Unlike Section 6.87(4)(b)1's provision governing the return of absentee ballots, the statutes that govern voters' request for and receipt of absentee ballots expressly limit where those requests and receipts may occur. Section 6.86(1)(a) provides that voters may request an absentee ballot "by mail" or "[i]n person *at the office of the*

municipal clerk or at an alternate site under s. 6.855, if applicable," among other methods—precisely the sort of location restriction that is missing from Section 6.87(4)(b)1. Wis. Stat. § 6.86(1)(a)1–2 (emphasis added). And Section 6.87(3)(a) similarly specifies that "[i]f the ballot is delivered to the elector *at the clerk's office, or an alternate site under s. 6.855*, the ballot shall be voted at the office or alternate site and may not be removed by the elector therefrom." Wis. Stat. § 6.87(3)(a) (emphasis added).

Thus, Wisconsin law specifically restricts where *voters* may receive their absentee ballots in person, and Wisconsin law further requires that voters who receive their absentee ballots in person vote and return them on the spot. It is this in-person absentee voting process that Section 6.855 principally regulates, and liberalizes, by authorizing alternate absentee voting sites: places other than the clerk's office where electors "may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election." Wis. Stat. § 6.855(1).

Where the legislature sought to restrict activities to alternate absentee ballot sites, however, it did so expressly, by cross-referencing Section 6.855. *See* Wis. Stat. § 6.86(1)(a) (in-person absentee ballot request); *id.* § 6.87(3)(a) (in-person absentee ballot receipt and voting); *id.* § 6.88(1) (processing and pre-election storage of completed absentee ballots). There is no such cross-reference in Section 6.87(4)(b)1, confirming that Section 6.855 "simply does not apply to drop boxes and tells us nothing about whether their use is permissible." *Teigen*, 2022 WI 64, ¶ 226 (Walsh Bradley, J., dissenting).

3. Section 5.81(3)

Finally, *Teigen* cited Section 5.81(3), which states that for municipalities using electronic voting systems, "absentee ballots may consist of ballots utilized with the system or paper ballots and envelopes voted in person in the office of the municipal clerk or voted by mail." Wis. Stat. § 5.81(3). *Teigen* reasoned that this statute set forth two categories of absentee ballots: those "cast 'in person in the office of the municipal clerk'" and those "voted by mail," and did not allow for a third category of ballots "cast via a drop box." *Teigen*, 2022 WI 64, ¶ 60.

Teigen's reading of Section 5.81(3), however, runs headlong into the plain text of Section 6.87(3)(a) and Section 6.87(4)(b)1. In particular, Section 6.87(3)(a) provides for in-person absentee ballots that are literally "voted at the office or alternate site" and never "removed . . . therefrom," while Section 6.87(4)(b)1 provides for ballots that are mailed to the elector, voted elsewhere, and then "mailed by the elector, or delivered in person, to the municipal clerk."

In the context of those provisions, Section 5.81(3)'s discussion of ballots "voted in person in the office of the municipal clerk" is a clear reference to in-person absentee voting under Section 6.87(3)(a). Section 5.81(3)'s reference to ballots "voted by mail" must, therefore, cover *all* ballots that are mailed to the elector, completed elsewhere, and then returned—whether "mailed by the elector, or delivered in person." Wis. Stat. § 6.87(4)(b)1. That is the only way to harmonize all three provisions. And so understood, Section 5.81(3) just does not address the specific means by which absentee ballots that were mailed to electors are returned to municipal clerks. That is the exclusive province of Section 6.87(4)(b)1. And as explained above,

Section 6.87(4)(b)1 does not preclude the use of drop boxes. *See supra* Section I.A.

II. Stare decisis does not require upholding *Teigen*.

Because *Teigen*'s interpretation of Section 6.87(4)(b)1 was wrong as a matter of law, the Court must decide whether stare decisis nonetheless requires adherence to *Teigen*'s holding. *See Johnson Controls, Inc.*, 2003 WI 108, ¶ 28. "Stare decisis is neither a straightjacket nor an immutable rule." *Id.* at ¶ 100. And "[t]his court has a duty to overrule precedential decisions that are objectively erroneous." *State v. Johnson*, 2023 WI 39, ¶ 49, 407 Wis. 2d 195, 990 N.W.2d 174 (Grassl Bradley, J., concurring).

In deciding whether to overrule precedent, the Court considers "whether the prior decision is unsound in principle, whether it is unworkable in practice, and whether reliance interests are implicated." *Johnson Controls*, 2003 WI 108, ¶ 99. As this Court has recognized, there are times when the Court would "do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision." *Id.* ¶ 100. This is one of those times. *Teigen*'s interpretation is unsound in principle and unworkable in practice, and it does not implicate any legitimate reliance interests. The Court should overrule it.

A. *Teigen*'s construction of Section 6.87(4)(b)1 is unsound in principle.

Teigen's construction of Section 6.87(4)(b)1 as prohibiting the return of absentee ballots to drop boxes is unsound in principle because it flouts Wisconsin's textualist approach to statutory interpretation, improperly gives courts vast discretion to disenfranchise absentee voters without statutory basis, and

creates an unnecessary conflict with the constitutional right to vote. Each of those reasons justifies the Court in overruling it.

1. *Teigen* flouts Wisconsin's textualist approach to statutory interpretation.

Teigen's drop box prohibition is unsound in principle, first, because it defies bedrock principles of statutory interpretation by inserting a restriction on where and how municipal clerks may accept absentee ballots that appears nowhere in the statute's text. By doing so, *Teigen* undermines the very aims of stare decisis: consistency, stability, and predictability of the law.

Teigen's adoption of an extratextual restriction on election procedures is an affront to the traditional approach to statutory interpretation consistently adopted and applied by this Court, and other Wisconsin courts,[2] for at least two decades until *Teigen*. Under the traditional approach, "if the language of a statute is clear and unambiguous, the court must not look beyond the statutory language to ascertain the statute's meaning." *VanCleve v. City of Marinette*, 2003 WI 2, ¶ 17, 258 Wis. 2d 80, 655 N.W.2d 113. "[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain, [courts] ordinarily stop the inquiry." *State v. Rector*, 2023 WI 41, ¶ 10, 407 Wis. 2d 321, 990 N.W.2d 213 (alteration in original) (quoting *Kalal*, 2004 WI 58, ¶ 45). Legislative intent "is expressed in the statutory

[2] *See, e.g.*, *Sec. Health Plan of Wis. Inc. v. Am. Standard Ins. Co. of Wis.*, 2018 WI App 68, ¶ 20, 384 Wis. 2d 545, 920 N.W.2d 340; *Arty's, LLC v. Wis. Dep't of Revenue*, 2018 WI App 64, ¶¶ 14–16, 384 Wis. 2d 320, 919 N.W.2d 590; *White v. City of Watertown*, 2017 WI App 78, ¶¶ 13–14, 378 Wis. 2d 592, 904 N.W.2d 374, *aff'd*, 2019 WI 9, 385 Wis. 2d 320, 922 N.W.2d 61; *Wall v. Pahl*, 2016 WI App 71, ¶ 9, 371 Wis. 2d 716, 886 N.W.2d 373; *Madison Metro. Sch. Dist. v. Evers*, 2014 WI App 109, ¶ 12, 357 Wis. 2d 550, 855 N.W.2d 458.

language" and "[i]t is the enacted law, not the unenacted intent, that is binding." *Kalal*, 2004 WI 58, ¶ 44. "Only when statutory language is ambiguous may [courts] examine other construction aids such as legislative history, context, and subject matter." *VanCleve*, 2003 WI 2, ¶ 17. Thus, while "explicit statements of legislative purpose or scope" may be instructive in determining the meaning of *ambiguous* statutory terms, *Kalal*, 2004 WI 58, ¶ 49, Section 6.87 is not ambiguous, *see supra* Section I.A. Likewise, the oft-cited Section 6.84 does not provide any guidance as to the meaning of any purportedly ambiguous terms, or the permissibility of drop boxes specifically, by merely expressing a need for regulation of absentee voting. *See supra* Section I.B.1. Yet, absent any indication of ambiguity that needed resolution, *Teigen* violates the "seminal canon of textual interpretation that [courts] do not insert words into statutes." *Schultz*, 2020 WI 24, ¶ 49.[3]

The *Teigen* approach to statutory interpretation threatens a destabilizing new reality where courts may revise statutory text even in the absence of ambiguity, and where legislators will be unable to predict the scope and effect of their legislation. "It poses a grave threat to democracy to mislead the people into believing" any court is a super-legislature. *Teigen*, 2022 WI 64, ¶ 52 n.25. "The people of Wisconsin gave the legislature—not this court—the legislative power. . . . This court does not create laws, nor does it fix laws that fail to meet their objectives. Instead, this court has a more modest and circumscribed constitutional role—interpreting and applying laws as written." *State ex rel. Davis v. Cir. Ct. for Dane Cnty.*, 2024 WI 14, ¶ 72 (cleaned up) (Grassl Bradley, J.,

[3] In other words, "[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*)." *Schultz*, 2020 WI 24, ¶ 49 (quoting Scalia & Garner, *supra*, at 93).

concurring). *Teigen* "improperly rewrote" Section 6.87(4)(b)1, and the proper solution is to "overrule [it] and simply apply the statute's text." *Id.* at ¶ 47.

2. *Teigen* misconstrued Section 6.84(2) to give courts vast discretion to disenfranchise voters who do not violate any statute.

Teigen's drop box holding is also unsound in principle because it reflects an erroneous construction of Section 6.84(2) that improperly gives Wisconsin courts vast discretion to disenfranchise absentee voters based on perceived procedural deficiencies that do not directly contravene any Wisconsin statute.

Section 6.84(2) provides that "with respect to matters relating to the absentee ballot process," certain statutory provisions, including Section 6.87(4),

> shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Wis. Stat. § 6.84(2). *Teigen* reasoned that this language meant that drop boxes were lawful only if they were expressly mentioned in some other statute, and concluded that drop boxes were therefore unlawful under Section 6.84(2) because "[n]othing in the statutory language detailing the procedures by which absentee ballots may be cast mentions drop boxes or anything like them." *Teigen*, 2022 WI 64 ¶ 54. *Teigen* got this exactly backwards, and dangerously so.

The key word in Section 6.84(2) is "contravention"—the statute provides only that ballots cast "*in contravention* of the procedures specified" in certain statutes "may not be counted" or

included in election results. As a matter of plain meaning, to "contravene" is "to go or act contrary to," to "violate," or to "contradict." Contravene, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/contravene (last accessed Apr. 1, 2024).[4]

"Contravention" therefore requires *conflict*—a ballot is cast "in contravention of" statutory procedures only if it *conflicts* with those procedures. Statutory silence on the matter cannot be enough. Yet statutory silence is precisely what *Teigen* relied on: it acknowledged that "no statute expressly prohibits" drop boxes and accordingly rested its conclusion entirely on the fact that no statute expressly "mentions" them. *Teigen*, 2022 WI 64 ¶ 54.

That is a major problem, because to say that ballots must be discarded because something about how they were cast was not expressly authorized by statute is to license courts practically to discard ballots at will. Already the Racine County Circuit Court has relied on this rationale to conclude that ballots cast at a mobile van absentee voting site were cast "contrary to law," because there is no express statutory authorization for the use of a mobile van as a voting site, even though there is no express prohibition either. App. 34 (Slip Op. at 17, *Brown v. Wis. Elections Comm'n*, No. 22-cv-1324 (Wis. Cir. Ct. Racine Cnty. Jan. 10, 2024), Dkt. 99).

Absent reversal of *Teigen* by this Court, any manner of election practices may become targets for plaintiffs seeking to restrict voting rights. There is simply no principled way for Wisconsin courts to decide whether any given practice that is

[4] *See also*, *e.g.*, Contravene, *Oxford English Dictionary*, https://www.oed.com/dictionary/contravene_v (Sept. 2023) ("Of things, actions, etc.: To run counter to, be contrary to, come in conflict with.").

neither expressly mentioned nor expressly prohibited by statute is of such significance that it should be deemed impliedly precluded by statutory silence under *Teigen*'s reasoning. It is entirely in the eye of the beholder. *Teigen*'s approach thus leaves courts free to decide, even after the fact, that ballots cast in compliance with every statutory requirement must nevertheless be discarded because some aspect of their casting was not expressly authorized by law. Such a rule is a loaded gun pointed at the heart of democracy.

This threat evaporates when Section 6.84(2) is read strictly in accordance with its text, so that only ballots cast "in *contravention*" of—that is, in direct conflict with—specified statutory procedures may not be counted. Under that approach, Section 6.84(2) would preclude courts from holding that the specified statutory procedures are merely directory, not mandatory. But it would not have anything to say about the lawfulness of practices—like drop boxes—that are neither expressly required nor expressly prohibited by Wisconsin law.

Under this construction, Section 6.84(2) would not entirely overrule *Sommerfeld v. Board of Canvassers of the City of St. Francis*, 269 Wis. 299, 69 N.W.2d 235 (1955). *See Teigen*, 2022 WI 64, ¶¶ 79–82. *Sommerfeld* held *both* that the delivery rules for absentee ballots are "directory only" *and* that the statute should not be "construed to mean that the voter shall himself mail the ballot or personally deliver it to the clerk." 269 Wis. at 303–04, 69 N.W.2d at 238. The enactment of Section 6.84(2) would, at most, affect the holding that the delivery requirement is directory. It would not alter *Sommerfeld*'s separate holding that, as a substantive matter, the statute did not require personal delivery rather than delivery by an agent. And that holding would carry

over to the modern Section 6.87. *See Storey*, 2017 WI 99, ¶ 51; *Munninghoff v. Wis. Conservation Comm'n*, 255 Wis. 252, 258, 38 N.W.2d 712 (1949) ("[R]e-enactment of the statute on which there existed a judicial determination indicates an intent to adopt the judicial determination as a part of the statute.").

3. *Teigen* fails to give effect to the Wisconsin Constitution's protection of the fundamental right to vote.

Teigen's approach is also unsound in principle because it gives insufficient weight to the importance of voting as a fundamental right under the Wisconsin Constitution and as core to the state's democracy. "Nothing can be clearer under [Wisconsin's] Constitution and laws than that the right of a citizen to vote is a fundamental, inherent right." *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563, 565 (1922). Even if Section 6.87(4)(b)1 were ambiguous regarding drop boxes, the Court should have sought a construction that avoided burdening that fundamental right. *See Baird v. La Follette*, 72 Wis.2d 1, 5, 239 N.W.2d 536, 538 (1976) ("Where there is serious doubt of constitutionality, we must look to see whether there is a construction of the statute which is reasonably possible which will avoid the constitutional question."); *Fleming v. Amateur Athletic Union of U.S., Inc.*, 2023 WI 40, ¶ 76, 407 Wis. 2d 273, 990 N.W.2d 244, *reconsideration denied* (July 3, 2023) (Karofsky, J., dissenting) ("When faced with an ambiguous statute where one reading of the statute raises serious constitutional questions, [the] court has long favored the reading of the statute that avoids constitutional issues.").

"At the Wisconsin Constitutional Convention of 1846, the Judiciary Committee reported that judges as well as legislatures

and executives should be selected in accordance with an axiom of government in this country, that the people are the source of all political power, and to them should their officers and rulers be responsible for the faithful discharge of their respective duties." Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 885–86 (2021) (internal quotation marks omitted). The fundamental nature of the right to vote is evident throughout the charter that emerged from the convention: The Wisconsin Constitution explicitly guarantees the right to vote to "*[e]very* United States citizen age 18 or older," Wis. Const. art. III, § 1 (emphasis added). The Constitution further guarantees "inherent rights . . . secure[d] . . . [by] governments . . . deriving their just powers from the consent of the governed." *Id.* art. I, § 1. It ensures "[t]he right of the people peaceably to assemble, to consult for the common good, and to petition the government," *id.* art. I, § 4— specifically, a "free government," *id.* art. I, § 22.

And this Court has long recognized that the Wisconsin Constitution protects the right to vote as a "sacred right of the highest character," with "a dignity not less than any other of many fundamental rights." *State v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910). The Court has described this right "which shall be free and equal, [a]s one of the most important of the rights guaranteed to [Wisconsinites] by the constitution." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949).

The *Teigen* decision wrongly dismissed the fundamental right to vote as irrelevant on the theory that absentee voting somehow falls outside of constitutional protection. *Teigen*, 2022 WI 64, ¶¶ 52–53 & n.25. That principle is entirely unsound. Absentee voting has been an important part of Wisconsin elections since the

Civil War, and it is the means by which a very substantial portion of Wisconsinites cast their ballots every election. And federal law gives many voters the right to vote absentee. *See, e.g.*, 52 U.S.C. §§ 10502(d), 20302(a)(1). The conclusion underlying *Teigen*'s statutory holding that all of those voters cast their ballots without any constitutional protection cannot be sustained consistent with this Court's recognition of the importance of this fundamental right, providing another reason why *Teigen*'s imposition of atextual limitations on the absentee ballot process should be overruled.

B. *Teigen*'s construction of Section 6.87(4)(b)1 is unworkable in practice.

The *Teigen* construction of Section 6.87 is also unworkable in practice. By holding that drop boxes are prohibited because they are not expressly authorized by statute, *Teigen* opens up a bottomless pit of uncertainty over the manner in which voters may return, and municipal clerks may accept, absentee ballots.

Can a clerk accept ballots using a staffed drop box in her office? *Teigen* seems to say yes, because it affirmed a circuit court order that allowed that option. 2022 WI 64, ¶ 3. Yet *Teigen*'s reasoning suggests the answer should be no, at least if the voter places the ballot in the box herself, lest the voter be deemed to deliver the ballot "to" the drop box instead of "to" the clerk. *Id.* ¶ 55; *see also supra* Section I.A. Either way, what if a voter places a ballot on the counter and the clerk picks it up from there? What if a voter places the ballot in a basket or inbox? In a mailbox or mail slot just outside? What if a voter hands the ballot to the clerk through an open window at the clerk's office? An open door? In the hallway? In the parking lot?

It only gets worse from there. Can a clerk establish a drive-through at her office with pneumatic tubes like those used by some banks? If so, it is presumably because the tube would be considered a mere means by which the voter delivered the ballot "to" the clerk. But if that suffices, then why would a drop box not suffice based on the same reasoning? Or conversely, does *Teigen*'s approach demand, contrary to all logic and common sense, that a voter who used such a drive-through be deemed to have delivered his ballot "to" the tube itself, and somehow not to have delivered it "to" the clerk's office at the other end of the tube?

Teigen does not merely fail to answer these questions—it fails even to provide a framework for analyzing them or questions like them. The decision leaves it entirely unclear whether what matters is physical proximity to the clerk, physical proximity to the clerk's office, direct physical contact with the clerk, a line of sight to the clerk, or some combination of all of that, much less *how much* proximity (of whatever type) is demanded. And the statute itself, of course, says absolutely nothing about any of it. But the clerk had better get it right, because if she guesses wrong, then *Teigen* seems to suggest that Section 6.84(2) prescribes disenfranchisement as the penalty. *See supra* Section II.A.2.

Before *Teigen*, questions like these were left to the discretion of the municipal clerk, who could develop solutions appropriate for her county and her circumstances (subject to WEC's guidance). Now, there is no way for a municipal clerk to know beforehand whether even simple solutions such as placing an inbox on her desk could result in the invalidation of absentee ballots.

Teigen has therefore created a profoundly unworkable regime, which further justifies the Court in overruling it.

C. No reliance interests exist in favor of upholding *Teigen*'s statutory holding.

Finally, there are no reliance interests that could justify upholding *Teigen*'s erroneous holding. Reliance interests counsel against overruling precedent where people have structured their affairs in reliance on a prior interpretation of law, such as by issuing or purchasing insurance policies based on a prior interpretation of policy terms. *See Johnson Controls*, 2003 WI 108, ¶¶ 116–18. But overruling *Teigen*'s holding prohibiting the use of drop boxes cannot possibly damage reliance interests of that type.

Teigen eliminated an option that voters and municipal clerks had previously found useful in streamlining the return of absentee ballots. Overruling *Teigen* would restore that option. But it would not *require* anyone to do anything. It would therefore not harm anyone: Municipal clerks and voters who prefer not to use drop boxes could proceed after *Teigen*'s overruling precisely as they would have proceeded regardless. Because overruling *Teigen* would not require anyone to do anything differently, a concern for reliance interests does not justify adhering to *Teigen*'s erroneous holding.

* * *

Ultimately, the law as written must govern: This Court "cannot mistake the law for the opinion of the judge because the judge may mistake the law." *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶ 259, 400 Wis. 2d 626, 971 N.W.2d 402 (Grassl

Bradley, J., dissenting).[5] Here, just such a mistake has occurred, and the Court should now take the opportunity to fix it.

CONCLUSION

The Court should overrule the statutory holding of *Teigen* and hold that Section 6.87(4)(b)1 does not prohibit municipal clerks from accepting delivery of absentee ballots via secure drop boxes.

Dated: April 1, 2024. Respectfully submitted,

Electronically signed by Diane M. Welsh

[5] *Cert. granted, opinion rev'd sub nom. Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398 (2022), and *overruled by Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶ 63, 410 Wis. 2d 1, 998 N.W.2d 370.

Diane M. Welsh,
SBN 1030940
PINES BACH LLP
122 W. Washington Ave.,
Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

David R. Fox*
Justin Baxenberg*
Richard A. Medina*
Omeed Alerasool*
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
Telephone: (202) 986-4490
Facsimile: (202) 986-4498
dfox@elias.law
jbaxenberg@elias.law
rmedina@elias.law
oalerasool@elias.law

*Admitted *pro hac vice*
pursuant to SCR 10.03(4)(b)

Attorneys for Petitioners

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes Sections 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,210 words, exclusive of the appendix.

Dated: April 1, 2024.

Respectfully submitted,
Electronically signed by Diane M. Welsh