SUPREME COURT OF WISCONSIN
Appeal No. 2024AP000164

PRIORITIES USA, WISCONSIN ALLIANCE FOR RETIRED AMERICANS, AND WILLIAM FRANKS, JR.,

Plaintiffs-Appellants,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Respondent,

WISCONSIN STATE LEGISLATURE,

Intervenor-Respondent.

On Appeal from the Circuit Court of Dane County
Case No. 2023CV001900
Honorable Ann M. Peacock Presiding

OPENING MERITS BRIEF OF
PROPOSED INTERVENOR-APPELLANT GOVERNOR TONY EVERS

Dated April 1, 2024

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ISSUE PRESENTED

This Court, in its March 12, 2024 Order, accepted review of the following issue: 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.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court has ordered oral argument on May 13, 2024. The Court's opinion on this issue should be published.

INTRODUCTION

Section 6.87 of the Wisconsin Statutes outlines absentee voting procedure, from how to apply for an absentee ballot to the potential for curing an improperly completed certificate on the absentee ballot return envelope. Paragraph (4)(b)1., which contains the language at issue in this case, is itself nearly 450 words long. Just two sentences address the mechanics of how voters should return their absentee ballots:

> The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots. If the envelope is mailed from a location outside the United States, the elector shall affix sufficient postage unless the ballot qualifies for delivery free of postage under federal law.

Wis. Stat. § 6.87(4)(b)1. The *Teigen* decision turned on the interpretation of that first sentence and produced a reading of the words "to the municipal clerk" that converted the provision from one addressing how voters request, complete, and return absentee ballots into one focused on how municipal clerks may receive them.

Specifically, this Court's *Teigen* decision created an atextual prohibition on drop boxes, as well as a requirement that, if a voter is not returning their absentee ballot by mail, they must personally return their absentee ballot to the municipal clerk at the clerk's office or a designated alternative site. In so concluding, the Court rewrote the text of the law through a circuitous analysis that ended with new, confusing rules for election administration. The ambiguity surrounding the meaning and effect of the *Teigen* decision can be seen in its fractured nature—of the 87 paragraphs in the lead opinion, only 34 garnered majority support.

Wisconsin's election administration system is profoundly and proudly dependent on more than 1,800 municipal clerks,[1] many of whom labor around the

[1] Wisconsin Elections Commission, Municipal Clerk Directory, February 29, 2024, available at https://elections.wi.gov/sites/default/files/documents/WI%20Municipal%20Clerks%20Updated%202-29-2024.pdf.

clock and under enormous pressure to administer free, fair, and secure elections. There are full-time clerks, part-time clerks, clerks working with staff and without, and clerks serving communities of drastically different sizes. In 2020, the Elections & Voting Information Center (EVIC), a nonpartisan academic research center, identified jurisdictions in Wisconsin with as few as 22 registered voters and others with more than 300,000.[2] But the *Teigen* decision imposed one-size-fits-all, judicially created constraints on these municipal clerks' authority to administer elections in a manner that is both responsive to the needs of their unique communities and compliant with the law.

The right to vote is the bedrock of our democracy. Such an important right warrants every effort on this Court's part to ensure that the best and most accurate reading of statutes relating to its exercise prevails. *Teigen* should be overturned.

ARGUMENT

I. The plain text of Wis. Stat. § 6.87(4)(b)1. authorizes drop boxes; *Teigen* rewrote the relevant statutory language.

The *Teigen* majority created ambiguity where none existed and read new words into the operative statute. Drop boxes are valid under the plain language of Wis. Stat. § 6.87(4)(b)1., and their use is consistent with the legislative delegation granting municipal clerks the authority to make decisions and ensure Wisconsin elections are properly administered.

A. Drop boxes comply with Wis. Stat. § 6.87(4)(b)1., and no provision in Wisconsin law prohibits a clerk from maintaining drop boxes to facilitate absentee-ballot returns.

The plain text of Wis. Stat. § 6.87(4)(b)1. does not ban municipal clerks from using drop boxes to implement absentee voting. The relevant statutory text makes no mention of drop boxes; it says only: "The [absentee-ballot] envelope

[2] Elections & Voting Information Center, *Stewarding Democracy in a Pandemic: A Profile of the Wisconsin LEOs*, April 7, 2020, available at https://evic.reed.edu/commentary/stewarding-democracy-in-a-pandemic-a-profile-of-the-wisconsin-leos/.

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 is all. It simply provides the manners in which voters may return their absentee ballots and includes nothing prohibitive regarding how a clerk may facilitate the same.

Voters who return their absentee ballots via a drop box authorized and operated by their municipal clerk are unquestionably delivering the ballot to "the municipal clerk." *Id.* The statutes define "[m]unicipal clerk" to include the clerk "and their authorized representatives." Wis. Stat. § 5.02(10); *see also* Wis. Stat. § 990.001(9) ("If a statute requires an act to be done which may legally be done by an agent, such requirement includes all such acts when done by an authorized agent."). Drop boxes are "set up by the municipal clerk, maintained by the municipal clerk, and emptied by the municipal clerk." *Teigen*, 2022 WI 64, ¶225 (Walsh Bradley, J., dissenting). Depositing a ballot into a drop box maintained by the municipal clerk is a personal delivery to the municipal clerk in much the same way as a ballot is mailed when an individual drops it in the mailbox without waiting to watch it be collected by the postal carrier.

In *Teigen*, however, the majority concluded that the prepositional phrase "to the municipal clerk" means that delivery of an absentee ballot to an "inanimate object, such as a ballot drop box," is not in compliance with the law because a drop box is not "the municipal clerk." *Teigen*, 2022 WI 64, ¶55. Further, per the *Teigen* majority, "municipal clerk" also necessarily means at "***the office of*** the municipal clerk." *Id.*, ¶59 (emphasis added). As set forth below, this reading: (i) is unmoored from the text and contradicts Wisconsin courts' statutory interpretation methodologies; (ii) applies what the majority deemed the "fairest interpretation," instead of the statutory words chosen by the legislature; and (iii) produces absurd and unworkable results.

1. Application of settled methods of statutory interpretation leads to the conclusion that drop boxes are lawful.

The statutes do not preclude municipal clerks from using a receptacle to facilitate ballot returns, nor do they prohibit a voter from using such a method. "When the legislature does not include limiting language in a statute, we decline to read any into it." *State v. Lopez*, 2019 WI 101, ¶21, 389 Wis. 2d 156, 936 N.W.2d 125. On that basis alone, drop boxes are lawful under Wisconsin law.

Going further, if the Legislature wanted a person-to-person, supervised delivery requirement or to bar clerks from using an inanimate object, such as a return box, it would have explicitly included such language. The Legislature has plainly and precisely required voters and clerks to perform other actions person-to-person in other provisions of Wisconsin's elections laws.

For instance, certain electors seeking to register must sign an affidavit "in the presence of the clerk or any officer authorized by law to administer oaths." Wis. Stat. § 6.15(2)(a). Another provision requires same-day registrants to sign forms "in the presence of the election registration official or inspector." Wis. Stat. § 6.55(2)(b). Damaged ballots can be re-made only "in the presence of witnesses[.]" Wis. Stat. § 5.85(3). Indeed, the very statute at issue here requires an elector to fold their ballot and then place it in a proper envelope "in the presence of the witness." Wis. Stat. § 6.87(4)(b)1.

The Legislature chose not to include such limiting language in the sentence about absentee-ballot return, and the Court cannot ignore the "intuitive presumption that 'different words have different meanings.'" *Parsons v. Assoc. Banc-Corp.*, 2017 WI 37, ¶26, 374 Wis. 2d 513, 893 N.W.2d 212 (quoted source omitted).

Moreover, clerks have no proactive duties when receiving absentee ballots that would require their physical presence or a hand-to-hand exchange. *See* Wis. Stat. § 6.88(1)-(2) (describing role of clerk after an absentee ballot "arrives" at the office). While clerks can note errors on an absentee-ballot-return certificate and

may return it to the elector for correction, Wisconsin law does not require that they do so, much less at the time of receipt. Wis. Stat. § 6.87(9). And in any event, absentee ballots cannot be canvassed until election day itself. Wis. Stat. §§ 6.88(1)-(2), 6.15(4).[3]

Thus, unlike the statutes that explicitly require personal supervision of an election-related act, Wis. Stat. § 6.87(4)(b)1. does not state—or even suggest—that the municipal clerk (or anyone else) must observe the delivery of the absentee ballot or perform any proactive function when the voter delivers their absentee ballot.

2. Rather than apply the plain text, the *Teigen* majority erroneously applied what it deemed to be the "fairest interpretation."

The *Teigen* majority expressly conceded that it did not apply the statutory text. Instead, it coined a new canon of statutory construction—"fairest interpretation"—without offering any standard for determining what is "fairest." 2022 WI 64, ¶62.

According to the majority, the "fairest" interpretation of Wis. Stat. § 6.87(4)(b)1. required engrafting certain portions of a different statute, Wis. Stat. § 6.855, thereby allowing the majority to conclude that "municipal clerk" means "municipal clerk at her office." 2022 WI 64, ¶¶61-62. More specifically, Wis. Stat. § 6.855 addresses "Alternate absentee ballot site[s]'" (*i.e.*, clerk-designated and staffed locations where voters can request and complete their ballots on-site). But the Court concluded that Section 6.855 also defined the manner in which ***any*** absentee balloting is allowed. Section 6.855, however, does not address the relevant questions here, including where absentee ballots may be returned, if not mailed, and whether absentee ballots may be returned via drop boxes established

[3] Even the process of returning an absentee ballot by mail is, by design, an independent venture. Any requirement that directs non-mailed returns be subject to heightened supervisory components is not only absent from the statutory text but also would be arbitrary.

and maintained by municipal clerks. By its own terms, Wis. Stat. § 6.855 relates only to alternate absentee ballot sites, if such sites are established, and the Court acknowledged that Wis. Stat. § 6.855 does not address drop boxes. *Id.*, ¶57 ("Ballot drop boxes are not alternate absentee ballot sites under Wis. Stat. § 6.855[.]").

By finding that Wis. Stat. § 6.855 governs all absentee voting (rather than only in-person absentee voting), the Court imported into Wis. Stat. § 6.855 a meaning and purpose that its text does not support, relying on it to ***add*** conditions to the general absentee-ballot-return provision in Wis. Stat. § 6.87(4)(b)1. This it cannot do. *See Jefferson v. Dane Cnty.*, 2020 WI 90, ¶25, 394 Wis. 2d 602, 951 N.W.2d 556 ("We will not add words into a statute that the legislature did not see fit to employ.").

Despite the majority's contortions, it is undeniable that the only statute limiting how all absentee ballots should be returned, Wis. Stat. § 6.87, does not mandate that the ballots be delivered to a clerk ***hand-to-hand at the clerk's office***. Indeed, the statute provides that an envelope is "mailed by the elector … to" and "delivered in person, to" "the municipal clerk issuing the ballot or ballots," Wis. Stat. § 6.87(4(b)1., without specifying a delivery location.[4]

[4] Ruling on a substantially similar statute, the Pennsylvania Supreme Court found drop boxes were permissible. The Pennsylvania statute at issue requires a voter to send an absentee ballot "by mail, postage prepaid, except where franked, or ***deliver it in person*** to said county board of election." 25 P.S. § 3150.16(a) (emphasis added). The court noted that the term "county board"—like the term "municipal clerk" here—referred to the position of "county board" and not the "official central office of the county board of election." *Pa. Democratic Party v. Boockvar*, 662 Pa. 39, 63-64, 238 A.3d 345 (Pa. 2020). The court found that these provisions supported "the view … that the General Assembly did not intend to limit voters to delivering personally their mail-in ballots solely to the established office addresses of their county boards of election." *Id.* at 64. Although the court held that the language was susceptible to multiple interpretations, it ultimately permitted county boards to "accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes." *Id.* at 66.

In Ohio, a state court found the Secretary of State's directive prohibiting county election boards' use of drop boxes contravened the text of an analogous statute. *Ohio Democratic Party v. LaRose*, 159 N.E.3d 1241 (Ohio Ct. App. 2020). Like Wisconsin's statute, the Ohio absentee ballot statute did not mention the use of drop boxes: "The elector shall mail the identification envelope to the director from whom it was received in the return envelope, postage prepaid, ***or the elector may***

The phrase "municipal clerk" in Wis. Stat. § 6.87(4)(b)1. does not require clarification, and the judicial addition of the words "at her office" to the statute for that alleged purpose is not trivial. "[T]he Wisconsin Statutes are replete with references to the 'office of the municipal clerk,' the 'office of the clerk,' or the 'clerk's office.'" *Teigen*, 2022 WI 64, ¶220 (Walsh Bradley, J., dissenting); *see* Wis. Stat. § 5.81(3) ("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" (emphasis added)); *Id.* § 6.88(1) ("When an absentee ballot arrives *at the* ***office of the municipal clerk***…." (emphasis added)). Elsewhere, the statutes require that a document be delivered both (1) to an official and (2) at that official's office. *See, e.g.*, Wis. Stat. § 893.82(5) (notice of claim "shall be served upon the attorney general at his or her office"). *Teigen,* therefore, ignores the statutory text to lend "clarity" where none is needed.

The majority's rebuttal is to create a straw-man argument involving what it refers to as a "hyper-literal interpretation" of the actual words in Wis. Stat. § 6.87. According to the majority, the phrase "to the municipal clerk" standing alone "would permit voters to mail or personally deliver absentee ballots to the personal residence of the municipal clerk or even hand the municipal clerk absentee ballots at the grocery store." *Teigen*, 2022 WI 64, ¶61. But, "error correction for absurdity can be a slippery slope. It can lead to judicial revision of public and private texts to make them (in the judges' view) more reasonable." Antonin Scalia & Bryan A.

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personally deliver it to the director." *Id*. at 1250 (emphasis added). The Secretary interpreted this statute as prohibiting drop boxes anywhere other than the county board of elections' office. *Id*. at 1251. But according to the court, that cramped interpretation would not "explain how the statute's silence on the use or placement of drop boxes that are in the custody and control of the director of a board of elections but at a physical location other than the board of elections offices compels the conclusion that the statute necessarily prohibits the use of such drop boxes in other locations." *Id*. at 1252. Despite the Ohio election code not containing any mention of drop boxes, the court held: "If the statute does not limit the use of drop boxes at locations other than the board of elections, and if a board of elections is willing to install drop boxes in other locations and keep them under the board of elections' control, we fail to see how returning a completed absentee ballot to such a drop box would not accomplish personal delivery of the absentee ballot under [the statute]." *Id*.

Garner, *Reading Law: The Interpretation of Legal Texts* 237 (2012). Regardless, the phrase "municipal clerk" is defined in terms of the clerk's official capacity and, read in context, the use of the phrase "municipal clerk" necessarily implies delivery to the municipal clerk in their official capacity. And, even if the *Teigen* majority's hypothetical posed a real risk, it would be irrelevant. If clerks one day start getting hounded in the dairy aisle, then the political branches—not this Court—would be the proper institutional actors to craft a remedy. *See Sorenson v. Batchelder*, 2016 WI 34, ¶¶23, 45, 368 Wis. 2d 140, 885 N.W.2d 362.

In trying to avoid the "hyper-literal interpretation" of what it means to deliver a ballot to the municipal clerk, the majority dismisses the plain meaning in favor of its preferred meaning. The Court cannot pick-and-choose when to faithfully apply the text—the "people have not given this court the power to 'second-guess' the legislature's policy choices." *Sanders v. State of Wis. Claims Bd.*, 2023 WI 60, ¶48, 408 Wis. 2d 370, 992 N.W.2d 126 (lead op.).

3. The *Teigen* decision produces absurd and unworkable results.

If anything, it is the *Teigen* majority's reading of Wis. Stat. § 6.87(4)(b)1. that leads to an absurd result. If taken to its logical conclusion, the judicial interpolation in *Teigen* barring clerks from using drop boxes to assist them in accepting absentee ballots would hobble municipal clerks' ability to effectively run their offices. A voter now risks potential disenfranchisement by placing their absentee ballot in a secured designated "inanimate" receptacle in the municipal clerk's office if the clerk is not available to directly receive the ballot in person, because, for example, the clerk is assisting other citizens or handling any of the many other time-consuming aspects of their jobs. What functionally amounts to a hand-to-hand delivery requirement imposed in *Teigen* is exactly the type of "absurd or unreasonable result[]" that necessarily follows from the Court's reasoning and that it must avoid when interpreting a statute. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

Notably, before drop boxes became so politically charged, there was consensus that they were lawful and appropriate. The United States Supreme Court recognized their import and validity during the COVID-19 pandemic: "[r]eturning an absentee ballot in Wisconsin is also easy" because, *inter alia*, voters may "hand-deliver their absentee ballots to the municipal clerk's office or other designated site, or they may place their absentee ballots in a secure absentee ballot drop box." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 29, 36 (2020) (Kavanaugh, J., concurring); *see also id.* ("Never mind that voters may return their ballots not only by mail but also by bringing them to a county clerk's office, or various 'no touch' drop boxes staged locally[.]" (Gorsuch, J., concurring)). Similarly, the Legislature has argued many times that drop boxes are lawful in Wisconsin. For example, in 2020 litigation, the Legislature argued:

- "Wisconsin law provides its citizens with multiple, safe options to cast their ballots during the November Election, including returning absentee ballots by mail, in drop-boxes, or at the polling place."[5]
- "Voters may leave completed absentee ballots in a designated drop box utilized by their municipality, hand deliver them to the clerk's office (or another designated site), or even bring them to the polling place on Election Day."[6]
- "Here, the Commission could not adopt or enforce any rules on […] ballot drop boxes, and the like, as all authority on these issues falls expressly to local election officials. *See* Wis. Stat. §§ 7.10, 7.15[.]"[7]

[5] Response in Opposition to Emergency Application to Vacate Stay filed in *Jill Swenson, et al. v. Wisconsin State Legislature et al.*, Nos. 20A64, 20A65, 20A66, (Supreme Court of the United States, October 16, 2020); see also https://www.supremecourt.gov/DocketPDF/20/20A64/157922/20201016114306847_Response%20in%20Opposition%20to%20Emergency%20Application%20to%20Vacate%20Stay.pdf (last accessed April 1, 2024).

[6] "Wisconsin Legislature and Legislative Defendants Omnibus Brief in Opposition to Plaintiffs' Motions for Preliminary Injunction and in Support of Their Motions to Dismiss" filed in *D.N.C., et al v. Bostelmann, et al*, No. 20-cv-249-wmc, Dkt. 454 (W.D. Wis. July 20, 2020) at 55-56.

[7] *Id.* at 102.

- "[T]he decision to implement such drop boxes is also reserved to local election officials under the law."[8]

Or, as Assembly Speaker Robin Vos and then-Senate Majority Leader Scott Fitzgerald—represented by current counsel for the Legislature—aptly put it, drop boxes are a "convenient, secure, and ***expressly authorized*** absentee-ballot-return method[.]" (Gov. App. 005-06 (September 25, 2020 Letter from Misha Tseytlin) (emphasis added))[9]

B. Not only are drop boxes compliant with the relevant statute, but they are also utilized pursuant to express legislative authorizations to municipal clerks.

Under the statutory system adopted by the Legislature, municipal clerks form the core of the State's election administration framework. The statutes are clear: "Each municipal clerk has charge and supervision of elections and registration in the municipality." Wis. Stat. § 7.15(1). The election code holds municipal clerks responsible for specific duties related to elections, such as equipping polling places, preparing ballots, "and any others which may be necessary to properly conduct elections or registration." *Id.*; *see also* Wis. Stat. § 60.33(4)(a). More pointedly, municipal clerks must take action that "may be necessary" to effectively administer elections in their local jurisdictions. Wis. Stat. § 7.15(1). "Municipal clerks are the officials primarily responsible for election administration in Wisconsin." *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶15, 396 Wis. 2d 391, 957 N.W.2d 208.

That practical latitude is necessitated by the Legislature's deliberate choice to create a highly decentralized system. "Unlike many places around the country, Wisconsin has a highly decentralized system for election administration." *Id.*, ¶13. Under that system, "Wisconsin gives some power to its state election agency (the

[8] *Id.* at 84-85 n.12.

[9] The letter was part of the *Teigen* appellate record and is also included in the appendix to this brief.

Commission) and places significant responsibility on a small army of local election officials." *Id.* As the *Teigen* dissent noted, because "[s]ome voters will be unlucky enough to live in a jurisdiction without a full-time clerk, and others will be forced to go to only a single location to return their ballots," the election code's structure must be interpreted so as not to "severely limit[] the return of absentee ballots in all municipalities regardless of their circumstances." *Teigen*, 2022 WI 64, ¶234 (Walsh Bradley, J., dissenting). Because the election code does not contain "an inexorable command that unstaffed drop boxes are banned, Wis. Stat. § 6.87(4)(b)1. gives some discretion to municipal clerks to determine how best to run elections in their respective jurisdictions." *Id.*, ¶232.

The use of drop boxes as an accepted method of absentee ballot delivery underscores that this practice is consonant with the role municipal clerks play in administering Wisconsin elections. The absentee-ballot procedure is intended to facilitate absentee voting—particularly for those voters who must rely exclusively on that option—while maintaining the integrity of Wisconsin elections. *See* Wis. Stat. § 6.20 ("Any qualified elector of this state who registers may vote by absentee ballot[.]"); Wis. Stat. § 6.84(1) (noting legislative finding that "voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse").

Drop boxes accomplish these dual objectives. Hundreds of thousands of voters make use of Wisconsin's absentee-balloting option without compromising election integrity. When the Court declared that drop boxes were now illegal, there was "no evidence at all in th[e] record that the use of drop boxes fosters voter fraud of any kind. None." *Teigen*, 2022 WI 64, ¶244 (Walsh Bradley, J., dissenting). That is presumably why the Legislature previously concluded that drop boxes are a "convenient, secure, and expressly authorized absentee-ballot-return method[.]" (Gov. App. 005-06 (September 25, 2020 Letter from Misha Tseytlin) (emphasis added))

Finally, absentee-ballot provisions must be read within the context of Wisconsin's constitutional design, particularly where a fundamental right is at stake. While a constitutional challenge is not before this Court, (*see* March 12, 2024 Order at 1), this Court likewise cannot ignore that "the right to vote is unlike other rights guaranteed by the Wisconsin Constitution[.]" *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶140, 357 Wis. 2d 360, 851 N.W.2d 302 (Abrahamson, C.J., dissenting); *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949) (noting that the "right of a qualified elector to cast a ballot for the election of a public officer" is "one of the most important of the rights guaranteed to him by the constitution"). As such, "[w]here 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." *Baird v. La Follette*, 72 Wis. 2d 1, 5, 239 N.W.2d 536 (1976).[10]

C. The fractured and unclear decision in *Teigen* reveals the errors of the Court's statutory construction.

Because the *Teigen* decision is unmoored from the plain language of Wis. Stat. § 6.87(4)(b)1., as well as traditional canons of statutory interpretation, it has injected uncertainty and ambiguity for Wisconsinites.

On the one hand, paragraph 4 of the majority *Teigen* decision dictated that "ballot drop boxes are illegal under Wisconsin statutes" and paragraph 55 further

[10] In an effort to dismiss these concerns, the *Teigen* majority seemingly relegated Wisconsinites who use absentee ballots to second-class status in a footnote. *See Teigen*, 2022 WI 64, ¶52 n.25 ("Establishing rules governing the casting of ballots outside of election day rests solely within the power of the people's representatives because such regulations affect only the privilege of absentee voting and not the right to vote itself."). But while the right to vote absentee "is a privilege and a convenience to voters, this does not grant the state the latitude to deprive citizens of due process with respect to the exercise of this privilege." *Frederick v. Lawson*, 481 F. Supp. 3d 774, 792 (S.D. Ind. 2020) (cleaned up). "Once the state creates an absentee voting regime, they must administer it in accordance with the Constitution." *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018). Likewise, here, because the Legislature has created an absentee-ballot regime in Wisconsin, the Court cannot now cut the legs out from under absentee voters by prohibiting a key, lawful method of delivering absentee ballots.

declared that "[a]n inanimate object, such as a ballot drop box, cannot be the municipal clerk." *Teigen*, 2022 WI 64, ¶¶4, 55. Yet, this Court's mandate as to the underlying circuit court order (found in an unnumbered byline at the end of the opinion which the Justices do not expressly join/not join), reads "the judgment and order of the Circuit Court are affirmed." But as the lead opinion noted in paragraph 3, the circuit ***approved*** of the delivery of absentee ballots to ***staffed*** drop boxes. *Id.*, ¶3. To further complicate matters, another numbered paragraph "affirmed" the circuit court's "declarations and permanent injunction" and said "WEC's authorization of ballot drop boxes was unlawful" but did not garner majority support—and therefore does not have force of law. *Id.*, ¶87.

In summary, then, *Teigen* affirmed the circuit court's decision approving delivery of absentee ballots to staffed drop boxes located at a clerk's office, disapproved of delivery to unstaffed drop boxes, held that inanimate objects do not meet the definition of "municipal clerk," and declared ballot drop boxes illegal. If the circuit court order permitting staffed dropped boxes is indeed the operative order, then the decision constitutes a judicial sleight of hand by this Court, relaxing its definitive statement that the use of inanimate objects, and drop boxes in particular, are "illegal." If the circuit court judgment is not the operative order, then competing pronouncements in *Teigen* have rendered the statutory phrase "to the municipal clerk" indecipherable.

Moreover, even if the majority had indicated approval for "staffed" drop boxes, that term is so content-free that it fails to provide any usable guidance. As the dissent notes, the lack of clarity "raise[s] more questions than it answers." *Id.*, ¶226 n.11 (Walsh Bradley, J., dissenting). The majority/lead opinion fails to give any explanation of what "staffed" might require. For example:

- How close to the drop box would clerk's office personnel need to be?
- Would the clerk need to maintain a clear line of sight to a drop box?
- Could a clerk "staff" a drop box while simultaneously executing other responsibilities?
- Would there need to be a mechanism to ensure that no ballots enter a drop box while a clerk is on break or otherwise not available to supervise?
- Would continuous video monitoring of a drop box by a clerk or clerk's agent meet the requirement?

The *Teigen* decision does not answer any of these questions, nor does it provide sufficient guidance for a municipal clerk to reasonably be expected to answer these questions for themself.

II. Stare decisis should not stand in the way of correcting the erroneous ruling in *Teigen*.

Stare decisis is "not a mechanical formula of adherence to the latest decision," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)—it is "neither a straightjacket nor an immutable rule." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶100, 264 Wis. 2d 60, 665 N.W.2d 257. This Court has repeatedly recognized that it would "do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision." *State v. Roberson*, 2019 WI 102, ¶49, 389 Wis. 2d 190, 935 N.W.2d 813 (quoting *Johnson Controls*, 2003 WI 108, ¶100).

Still, the decision to overturn an existing precedent—even one in place for such a short period of time and as fractured as *Teigen*—is not taken lightly and requires consideration of the "special justifications" that this Court has articulated. *State v. Johnson*, 2023 WI 39, ¶¶19-20, 407 Wis. 2d 195, 990 N.W.2d 174. A special justification for overruling precedent exists when: (1) the law has changed in a way that undermines the prior decision's rationale; (2) there is a "need to

make a decision correspond to newly ascertained facts"; (3) our precedent "has become detrimental to coherence and consistency in the law"; (4) the decision is "unsound in principle"; or (5) it is "unworkable in practice." *Id.*, ¶20. Additionally, the Court also "frequently review[s]" a sixth factor: "whether reliance interests are implicated and whether the decision has produced a settled body of law." *Hennessy v. Wells Fargo Bank, N.A.*, 2022 WI 2, ¶28, 400 Wis. 2d 50, 968 N.W.2d 684 (quoting *Johnson Controls*, 2003 WI 108, ¶99).

Here, at least four of these justifications counsel in favor of overturning *Teigen*: the decision: (a) is "unsound in principle"; (b) is "unworkable in practice"; (C) is "detrimental to coherence and consistency in the law"; and (D) has not produced a "settled body of law."

Teigen is unsound in principle. As discussed above in sections I(A) and (B), the *Teigen* decision is "unsound in principle." The decision ignores Wisconsin's established methods of statutory interpretation, instead selecting its own preferred result rather than applying the policy choice made by the political branches. That is no way for a court to interpret a statute—particularly one related to a constitutional right. *See Baird*, 72 Wis. 2d at 5.

Teigen is unworkable in practice. *Teigen* has also proven unworkable in practice because it has produced contradictory guidance that does not give local officials the direction they need to administer elections. As previously discussed, the majority in *Teigen* left the status of "staffed" drop boxes at clerks' offices entirely unclear. *See* Section I(C). As a result, the *Teigen* decision failed to advise clerks and citizens alike what methods of delivering absentee ballots ***are*** permitted, other than hand-to-hand delivery. This unworkable decision has left voters and local officials in the impossible position of guessing what practices might be lawful, and for voters it could mean their ballot is rendered invalid if they rely on their clerk's incorrect reading of the murky decision.

Teigen is detrimental to coherence and consistency in the law. The fractured nature of the *Teigen* decision is detrimental to coherency and consistency

in the law. Of 87 paragraphs in the majority/lead opinion, only 34 paragraphs actually garnered the support of a majority of the Court; there were also three other separate writings. The fractured nature of *Teigen* is particularly problematic with regard to the portions of the decision about absentee ballot drop boxes.

The deeply fractured nature of *Teigen* further demonstrates, under our precedent, that the decision was inconsistent and incoherent from the outset. In *Koschkee v. Taylor*, 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600, this Court overruled a case it had decided just three years earlier, *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520. The majority opinion in *Koschkee* devoted ***only one footnote*** to its stare decisis analysis. 2019 WI 76, ¶8 n.5. The Court provided little explanation of the "special justifications" regarding stare decisis, but it concluded that *Coyne*'s method of interpretation was "objectively wrong when made." *Id.* The Court noted the fractured nature of *Coyne* and concluded that lead opinions can be "troublesome." *Id.* So, too, here.

Relatedly, *Teigen* has led to confusion and inconsistency for those tasked with interpreting it. For example, in *Rise, Inc. v. Wisconsin Elections Commission*, the court of appeals chastised appellants for holding out a lead paragraph that did not garner majority support as though the paragraph had precedential value. 2022AP1838, 2023 WL 4399022 (authored, unpublished opinion); *see also* Gov. App. 007-31. If lawyers at firms known for their election and political representation can incorrectly apply *Teigen;*, it would be unreasonable to demand that clerks and voters fare better. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids." (cleaned up)).

Finally, *Teigen* is detrimental to coherency and consistency in the law. Scarcely two months after the decision, a federal court held that the irreconcilable conflict between *Teigen*'s reading of Wis. Stat. § 6.87(4)(b)1. and the Voting Rights Act ("VRA") required preempting *Teigen*'s interpretation of § 6.87(4)(b)1.

to the extent it prohibits disabled voters from getting help in either mailing or delivering their absentee ballot to the municipal clerk, finding it "impossible to comply with both laws."[11] *See Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1032 (W.D. Wis. 2022); *cf. Johnson*, 2023 WI 39, ¶46, (finding decision detrimental to coherence as a result of tension with other laws and the Wisconsin Constitution).

The Teigen decision has not produced a settled body of law. In addition to considering the "special justifications," the Court frequently reviews whether reliance interests are implicated and whether the decision has produced a settled body of law. *Hennessy*, 2022 WI 2, ¶28. Because *Teigen* is so recent, it has not produced a settled body of law based on its reasoning or holdings, nor has it generated significant reliance interests. *See, e.g.*, *Roberson*, 2019 WI 102, ¶65 ("Given that *Dubose* has not created a substantial body of law, overturning it will have minimal impact.").

CONCLUSION

For the reasons state above, Governor Tony Evers respectfully requests that the Court overrule its holding in *Teigen*, 2022 WI 64, that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks.

[11] The *Carey* court noted that *Teigen* briefly addressed the possibility of preemption without ruling on the issue and that three members of the majority had suggested that other provisions of Wisconsin law might permit "[w]hatever accommodations federal law requires." *Id.* at 1026 (quoting *Teigen*, 2022 WI 64, ¶86 (lead opinion)). But, it concluded, *Teigen*'s stringent reading of § 6.87(4)(b)1. did not permit municipal clerks to waive any of its requirements even to comply with another state law, and that, even if that flexibility existed, the accommodation available under Wisconsin law would still have fallen short of the VRA's requirements, and thus that preemption was unavoidable. *Id.* at 1033.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes Section 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,864 words.

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