No. 2024AP164

In the Supreme Court of Wisconsin

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 Dane County Circuit Court,
The Honorable Ann M. Peacock, Presiding
Case No. 2023CV1900

RESPONSE BRIEF OF INTERVENOR-RESPONDENT THE WISCONSIN STATE LEGISLATURE

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ISSUE PRESENTED

Whether this Court should overrule *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, and hold that Wis. Stat. § 6.87 authorizes municipal clerks to decide whether to collect absentee ballots via drop boxes.

The Circuit Court did not address this question. App.15 (R.100 at 11).

INTRODUCTION

Less than two years ago, this Court held that Wisconsin law does not authorize clerks to use so-called "drop boxes" to collect absentee ballots. *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 4, 403 Wis. 2d 607, 976 N.W.2d 519. That statutory-interpretation decision generated a three-Justice dissent, which dissent fully joined issue with the majority over the statutory-interpretation question presented. *Id.* ¶¶ 216–41 (A.W. Bradley, J., dissenting). Petitioners now ask this Court to adopt the *Teigen* dissenting opinion in whole, without pointing to any factual or legal development since *Teigen*, let alone any post-*Teigen* developments significant enough to justify departing from the powerful doctrine of statutory *stare decisis*. Simply put, if *stare decisis* is to retain any meaning in this State, then this Court cannot overrule a statutory-interpretation case decided less than two years ago because this Court's composition has changed.

ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument for this case for May 13, 2024. By granting Petitioners' Petition For Bypass, this Court has indicated that this case is appropriate for publication.

STATEMENT OF THE CASE

A. Legal Background

1. Article III of the Wisconsin Constitution provides for the right to vote, Wis. Const. art. III, § 1, while also explicitly recognizing the Legislature's authority to enact laws governing voting, including laws that "[p]rovid[e] for absentee voting," *id.* § 2. The Legislature has exercised this authority to make "lots of rules that make voting easier" in the State. *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). Thus, "[r]egistering to vote is easy in Wisconsin," *Frank v. Walker*, 768 F.3d 744, 748 & n.2 (7th Cir. 2014), as is voting in-person on Election Day, *see Luft*, 963 F.3d at 672; *accord Frank*, 768 F.3d at 748 & n.2.

In addition to enacting laws empowering citizens to exercise their right to vote in-person on Election Day, the Legislature has also long provided citizens with the privilege of voting absentee. *See, e.g.*, 1862 Wis. Act 11 (Special Sess.) (absentee voting for soldiers in the U.S. army during the Civil War);[1] 1915 Wis. Act 461 (first comprehensive absentee-voting regime).[2] Wisconsinites ratified the constitutional amendment recognizing the Legislature's authority to enact laws "[p]roviding for absentee

[1] Available at https://docs.legis.wisconsin.gov/1862/related/acts/62ssact011.pdf (all websites last visited Apr. 24, 2024).

[2] Available at https://docs.legis.wisconsin.gov/1915/related/acts/461.pdf.

voting" in 1986. Wis. Const. art. III, § 2. And today, Wisconsin has a comprehensive statutory scheme providing all Wisconsinites with the "privilege" of voting absentee, in one of the most generous absentee-voting regimes in the Nation. Wis. Stat. § 6.84(1)–(2). Under this no-excuse-needed absentee-voting regime, any qualified, registered voter in Wisconsin who "for any reason is unable or unwilling to appear at the polling place in his or her ward or election district" may request an absentee ballot and vote absentee. *Id*. § 6.85(1); *see id.* §§ 6.86, 6.87.

2. Chapter 6 of Wisconsin Statutes has long specified how absentee voters must return their absentee ballots. Wis. Stat. § 6.87(4)(b)1 directs that absentee voters must return their completed absentee ballot (enclosed in the proper envelope and bearing the required certification) using one of two return methods: 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). The term "municipal clerk" in this provision refers to "the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized representatives," as well as "the clerk of a school district" "[w]here applicable." *Id.* § 5.02(10). Thus, under Section 6.87(4)(b)1, absentee voters must return their completed ballots directly to their designated clerk, regardless of whether the absentee voter does so by mail or by in-person delivery. Wis. Stat. § 6.87(4)(b)1.

Wisconsin has permitted these two absentee-ballot return methods—and only these methods—since it enacted its first comprehensive absentee-voting regime in 1915. *See* 1915 Wis. Act 461, § 44m–6 ("Said envelope shall be mailed by such voter, by registered mail, postage prepaid, to the officer issuing the ballot, or if more convenient it may be delivered in person."); 1965 Wis. Act 666, § 1 (creating Wis. Stat. § 6.87) ("The envelope shall be mailed by the elector, postage prepaid, or delivered in person, to the municipal clerk issuing the ballot.").

Absentee voters electing to return their absentee ballots via in-person delivery—the second return method, described above—may deliver their completed absentee ballots either to their municipal clerk's office on or before Election Day, or to an alternative absentee-ballot voting site designated by the clerk up to two weeks before Election Day, during designated "early voting" times. Wis. Stat. § 6.855.[3] A designated alternative absentee-ballot voting site under Section 6.855 must allow voters both to request their absentee ballots and vote absentee at the site. *Id.* § 6.855(1). Further, designated alternative absentee-ballot voting sites must comply with other detailed requirements, including, for

[3] Wisconsin also offers additional options for obtaining and casting absentee ballots to voters who are living overseas, Wis. Stat. § 6.87(3)(d), in the military, *id.*; *id.* § 6.865, residing in nursing or retirement homes, *id.* § 6.875, or indefinitely confined, *id.* § 6.86(2)(a).

example, that the location of the site may not "afford[ ] an advantage to any political party." *Id.*

3. Two years ago, this Court held in *Teigen*, 2022 WI 64, that voters returning absentee ballots to ballot receptacles not located at the clerk's office—colloquially known as "drop boxes"—is "unauthorized by law." *Id.* ¶ 55 (capitalization altered); *see* 403 Wis.2d at 615 (listing paragraphs constituting the *Teigen* majority opinion). Pursuant to WEC guidance issued in 2020, clerks had erected free-standing drop boxes at locations away from their actual offices, including "near or on college campuses, and public buildings, such as libraries and community centers," SA45, or "fire stations," Br. of Amicus Curiae Wisconsin Elections Officials at 10, *Priorities USA v. WEC*, No.2024AP164 (Apr. 18, 2024). These drop boxes purported to allow "municipal clerk[s] to perform [ ] official duties related to the acceptance of ballots at any location beyond those statutorily prescribed." *Teigen*, 2022 WI 64, ¶ 61. *Teigen* held that, as a matter of statutory interpretation, Section 6.87(4)(b)1 requires absentee ballots to be returned in one of two exclusive ways: either (1) "by mail," or (2) by "personal[ ] deliver[y] . . . to the municipal clerk at the clerk's office or a designated alternate site," *id.* ¶ 4, with drop boxes fitting into neither of these categories.

Teigen began its statutory-interpretation analysis with the recognition that the Legislature requires this Court to "take a

skeptical view of absentee voting," including because of the statutory commands of Wis. Stat. § 6.84(1)–(2). 2022 WI 64, ¶ 53. The Legislature mandated in Section 6.84(1)–(2) that "statutory requirements governing absentee voting must be completely satisfied or ballots may not be counted," *id.*, and explained that absentee voting is a privilege, not a right, under Wisconsin law, *id.* ¶¶ 52–53 & n.25. *Teigen* thus framed the statutory-interpretation inquiry *not* as whether a "statute expressly prohibits [drop boxes]," but rather as whether "any statute authoriz[es] ballot drop boxes." *Id.* ¶ 54. Because "[n]othing in the statutory language detailing the procedures by which absentee ballots may be cast mentions drop boxes or anything like them," *id.*, this Court "decline[d] to read into the statutes a monumentally different voting mechanism not specified by the legislature," *id.* ¶ 63, and accordingly held that the use of drop boxes was "unauthorized," *id.* ¶ 55 (capitalization altered).

Beginning with the text of Section 6.87(4)(b)1, *Teigen* explained that this provision's requirement that absentee ballots "shall be mailed by the elector, or delivered in person, to the municipal clerk" provides absentee voters with only two ways to return their absentee ballots: (1) by mail, or (2) by personal delivery to the clerk's office or an alternate site designated under Section 6.855. *Id.* ¶¶ 55–56. "The prepositional phrase '*to* the municipal clerk' is key and must be given effect," and "[a]n

inanimate object, such as a ballot drop box, cannot be the municipal clerk," meaning that "dropping a ballot into an unattended drop box is not delivery 'to the municipal clerk.'" *Id.* ¶ 55. Drop boxes are also "not alternate absentee ballot sites under Wis. Stat. 6.855" because, by Section 6.855's plain text, alternate ballot sites must be "staffed" and must permit a voter to both *request* and *cast* a ballot. *Id.* ¶ 57. Moreover, alternate sites designated under Section 6.855 "serve[ ] as a *replacement for*" Section 6.87(4)(b)1's "office of the municipal clerk" language, "rather than an *additional site* for absentee voting." *Id.* ¶ 59 (emphasis added).

Teigen then considered the statutory context and the absurd-or-unreasonable-results canon, finding that they both supported the conclusion that Wisconsin law does not authorize drop boxes. Other related statutes also referred to absentee ballots as returned "by mail" or "in person in the office of the municipal clerk," supporting the conclusion that "[t]he legislature did not contemplate" the return of absentee ballots "via a drop box." *Id.* ¶ 60 (citing Wis. Stat. § 5.81(3)). Additionally, interpreting "to the municipal clerk" in Section 6.87(4)(b)1 to authorize the use of drop boxes would "border on the absurd," *id.* ¶ 62, as it 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," *id.* ¶ 61. *Teigen*'s

interpretation avoids such bizarre outcomes. "Municipal clerk' . . . denotes a public office, held by a public official acting in an official capacity when . . . accepting ballots," such that the municipal clerk may not perform any of its statutory duties "at any location beyond those statutorily prescribed." *Id.* This is "[t]he fairest interpretation" of the statutory text. *Id.* ¶ 62.

Teigen also rejected the various arguments made by the Wisconsin Elections Commission ("WEC"). By interpreting Section 6.87(4)(b)1 as not authorizing drop boxes, *Teigen* rejected WEC's argument that drop boxes satisfy Section 6.87(4)(b)1's "personal[ ] deliver[y] *to* a municipal clerk" requirement because those ballots eventually end up in the clerk's possession. *Id.* ¶ 61; SA97–98. *Teigen* also rejected WEC's assertion that delivery to a drop box constitutes delivery "*to* a municipal clerk" because other related statutes—but not Section 6.87(4)(b)1—require certain conduct to occur at the clerk's *office*. 2022 WI 64, ¶ 60; SA98. *Teigen* also refuted WEC's claim that drop boxes had a longstanding use in Wisconsin, finding that there was no evidence of such historical record. 2022 WI 64, ¶¶ 64–68 (lead op.); *see generally id.* ¶¶ 145–204 (Hagedorn, J., concurring) (not departing from the lead opinion on this point); *id.* ¶¶ 205–49 (A.W. Bradley, J., dissenting) (not disputing the lead opinion on this point). Finally, *Teigen* explained that "drop boxes trigger the very concerns the legislature expressly seeks to avoid" because, as the

Teigen plaintiffs had argued, drop boxes are "prime target[s] for would-be tamperers" given that they "contain[ ] only ballots, and lots of them in one place at the same time." *Id.* ¶ 71 (lead op.).

Teigen generated three separate concurrences, with none of these concurring opinions casting any doubt on the case's holding that Wisconsin law does not authorize the use of drop boxes. Justice Roggensack concurred with the majority's holding, writing separately to explain her view that, when a ballot is "returned by mail, it is the '*elector*' who does the mailing." *Id.* ¶ 107 (Roggensack, J., concurring). Justice Rebecca Grassl Bradley, joined by Chief Justice Ziegler and Justice Roggensack, also concurred with the majority's core holding, writing to explain her view that the WEC guidance memoranda at issue in *Teigen* were invalid for the "additional reason" that they amounted to unpromulgated administrative rules. *Id.* ¶ 118 (R.G. Bradley, J., concurring). Finally, Justice Hagedorn also concurred, writing to explain that, as relevant here, *Teigen* was "not about the risk of fraudulent votes being cast or inspiring confidence in elections," nor was it about "ensuring everyone who wants to vote can." *Id.* ¶ 145 (Hagedorn, J., concurring). Instead, *Teigen* was "about applying the law as written," *id.*, which compelled the conclusion that, "to return an absentee ballot in person, voters must personally deliver their ballot to the clerk or the clerk's authorized

representative at either the clerk's office or a designated alternate site," not to a drop box, *id.* ¶¶ 145, 171.

Justice Ann Walsh Bradley, joined by Justice Dallet and Justice Karofsky, dissented. The dissent criticized the *Teigen* majority for "ignor[ing] an important distinction" in Section 6.87(4)(b)1—namely, that it "uses the phrase 'municipal clerk,'" not "municipal clerk's office." *Id.* ¶ 219 (A.W. Bradley, J., dissenting). "[E]lsewhere the Wisconsin Statutes are replete with references to the 'office of the municipal clerk,' the 'office of the clerk,' or the 'clerk's office.'" *Id.* ¶ 220 & n.9 (citing Wis. Stat. §§ 5.81, 6.18, 6.32(2), 6.855(2), 12.035(3)(d)). Further departing from the *Teigen* majority, the dissent explained that, in the dissenting Justices' view, Section 6.855 "does not apply to drop boxes and tells us nothing about whether their use is permissible." *Id.* ¶ 226. Finally, the dissent concluded that affording "clerks . . . at least the discretion to place a drop box outside the office or in another location" is a "common sense reading" of the relevant statutes "that is consistent with the decentralized manner in which Wisconsin elections are run." *Id.* ¶¶ 233–34.

Subsequent to this Court's decision in *Teigen*, the Legislature passed a law that would have amended provisions in Section 6.87, but not Section 6.87(4)(b)1. *See* 2023 Assembly Bill 570 (report vetoed by Gov. Evers, March 21, 2024). The Governor vetoed those amendments. *Id.*

B. Litigation Background

1. Petitioners filed their Complaint on July 20, 2023, less than two years after this Court's decision in *Teigen*. Petitioners alleged that several of Wisconsin's absentee-voting statutes violate Article III of the Wisconsin Constitution and asserted four associated claims against Defendant WEC. First, Petitioners claimed that Section 6.87(4)(b)1's requirement that an absentee ballot be witnessed is unconstitutional because it "severely burdens the[ ] fundamental right to vote." R.2 ¶¶ 75–82. Second, Petitioners claimed that *Teigen*'s prohibition on drop boxes renders Section 6.87(4)(b)1's provisions unconstitutional or, alternatively, that *Teigen* should be overruled. R.2 ¶¶ 83–96. Third, Petitioners claimed that Section 6.87(6)'s requirement that an absentee voter must correct a deficient absentee-ballot certificate envelope by 8:00 p.m. on Election Day was also unconstitutional. R.2 ¶¶ 97–106. Finally, Petitioners claimed that Section 6.84, which explains that voting by absentee ballot is a "privilege," not a right, under Wisconsin law, is unconstitutional. R.2 ¶¶ 107–112.

2. After successfully moving to intervene as a Defendant in the Circuit Court below, R.73, the Legislature moved to dismiss Petitioners' Complaint for failure to state a claim, App.8 (R.100 at 4); *see also* Rs.59–60. As particularly relevant here, the Legislature explained that Petitioners' challenge to *Teigen* failed as a matter of law, and that all of Petitioners claims failed because

the Wisconsin Constitution does not include absentee voting within the constitutional right to vote. R.60 at 12–19. WEC filed its own motion to dismiss Petitioners' Complaint, App.8 (R.100 at 4); *see also* Rs.64–65, likewise asserting that Petitioners failed to state a claim as to any of their four counts, *see generally* R.65 at 6–33, and specifically arguing that the prohibition on absentee-ballot drop boxes is constitutional, R.65 at 18–22.

3. The Circuit Court granted the Legislature's and WEC's motions to dismiss in part and denied them in part in a January 24, 2024 order. App.8, 16 (R.100 at 4, 12). The Circuit Court concluded that Petitioners' claims did not state viable facial constitutional challenges to Wisconsin's absentee-voting laws, as the facts alleged in the Complaint cannot support Petitioners' claims that the absentee-voting laws severely burden "all voters or even all absentee voters." App.10–14 (R.100 at 6–10). And with respect to Petitioners' challenge to *Teigen*'s drop-box prohibition, in particular, the Circuit Court explained that even if it "agree[d] that *Teigen* was incorrectly decided," it "must follow the *Teigen* precedent." App.15 (R.100 at 11). The Circuit Court then concluded that Petitioners' Complaint did state viable hybrid constitutional challenges to the absentee-ballot witness requirement and to Section 6.84. App.16 (R.100 at 12). Petitioners then voluntarily dismissed those hybrid constitutional claims with

prejudice, and the Circuit Court entered final judgment on January 29, 2024. App.17 (R.103).

4. Petitioners appealed to the Court of Appeals, R.104, and then filed a Petition To Bypass with this Court before merits briefing occurred, Pet. To Bypass at 1, *Priorities USA v. WEC*, No.2024AP164 (Feb. 9, 2024) ("Pet."). Petitioners raised three issues in their bypass petition: First, "[w]hether laws that burden the right to vote, including by burdening absentee voting, are subject to strict scrutiny just like laws burdening other fundamental rights, such that the State must prove that the burden they impose is narrowly tailored to serve a compelling state interest." Pet.4. Second, "[w]hether a voting law is immune from facial challenge where it imposes some unjustifiable burden on all voters it regulates, but some voters are more burdened than others." Pet.4. And third, "[w]hether to overrule the Court's holding in *Teigen* . . . that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks." Pet.4. The Legislature opposed the Petition For Bypass, Resp. of Intervenor-Respondent The Wisconsin State Legislature In Opp. To Pet. For Bypass, *Priorities USA v. WEC*, No.2024AP164 (Feb. 23, 2024), while WEC opposed bypass only as to the first two issues, Wisconsin Elections Commission's Resp. to Pet. for Bypass, *Priorities USA v. WEC*, No.2024AP164 (Feb. 23, 2024).

5. On March 12, 2024, this Court granted the Petition To Bypass as to Petitioners' third issue only: that is, whether this Court should overrule its conclusion in *Teigen* "that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks." Order at 1, *Priorities USA v. WEC*, No.2024AP164 (Mar. 12, 2024) ("March 12 Order"). Justice Rebecca Grassl Bradley, joined by Chief Justice Ziegler, dissented from the Court's March 12 Order, explaining her view that "petitioners offer[ed] no reason why *Teigen* should be reconsidered." *Id.* at 2–7 (R.G. Bradley, J., dissenting).

STANDARD OF REVIEW

This Court "review[s] de novo a lower court's decision to grant or deny a motion to dismiss." *Wis. Mfrs. & Com. v. Evers*, 2022 WI 38, ¶ 7, 977 N.W.2d 374, *reconsideration denied*, 2023 WI 5, 405 Wis. 2d 478, 984 N.W.2d 402; *State ex rel. City of Waukesha v. City of Waukesha Bd. of Rev.*, 2021 WI 89, ¶ 11, 399 Wis. 2d 696, 967 N.W.2d 460. Similarly, this Court also interprets de novo a lower court's interpretation of a statute, as that is a "question of law." *City of Waukesha*, 2021 WI 89, ¶ 12. Thus, when reviewing a circuit court's order granting a motion to dismiss, this Court must independently "interpret[ ]" any contested "statutory provisions" underlying the plaintiff's claims. *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 13, 387 Wis. 2d 511, 929 N.W.2d 209; *Wis. Mfrs. & Com.*, 2022 WI 38, ¶ 7.

ARGUMENT

I. Overruling *Teigen*—A Statutory-Interpretation Case That This Court Decided Just Two Years Ago, After Considering All Of The Same Arguments Petitioners Make Here—Would Make A Mockery Out Of Well-Established Principles Of *Stare Decisis*

Petitioners ask this Court to overrule *Teigen*, a statutory-interpretation case decided just two years ago, where the majority and dissenting opinions fully joined issue on the key statutory question. Under this Court's test for departing from *stare decisis*—a test that is particularly demanding in statutory-interpretation cases—this Court will not overrule a prior decision unless a sufficiently compelling and intervening change in the law or facts exists. *Infra* Part I.A. Here, there is no special justification for overruling *Teigen*, as there are no intervening changes in law or facts casting doubt on *Teigen*, let alone a sufficiently compelling change to overcome statutory *stare decisis*. *Infra* Part I.B. Indeed, neither Petitioners nor the Governor identify any intervening change in the law or facts, opting instead to relitigate the same arguments that *Teigen* rejected. *Infra* Part I.C.

A. This Court "follows the doctrine of stare decisis scrupulously," as its adherence to past cases "is fundamental to the rule of law." *Johnson Controls, Inc. v. Employers Ins. Of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257; *see also, e.g.*, *State v. Johnson*, 2023 WI 39, ¶ 19, 407 Wis. 2d 195, 990 N.W.2d

174; *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶ 66, 389 Wis. 2d 669, 937 N.W.2d 37; *State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592; *accord State v. Lindell*, 2001 WI 108, ¶¶ 145–48, 245 Wis. 2d 689, 629 N.W.2d 223 (A.W. Bradley, J., concurring); *Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶ 58, 396 Wis. 2d 434, 957 N.W.2d 261 (A.W. Bradley, J., dissenting). This faithful observance of *stare decisis* "promotes evenhanded, predictable, and consistent development of legal principles . . . and contributes to the actual and perceived integrity of the judicial process." *Johnson Controls*, 2003 WI 108, ¶ 95. Without such "[f]idelity to precedent," "deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results." *Id.* ¶ 94 (citations omitted).

This Court will depart from *stare decisis* and overturn its prior decisions only when a "special justification" is present—that is, sufficiently compelling and intervening developments in the law or the facts that justify "rejecting" an "established rule of law." *Id.* ¶¶ 95–96 (citation omitted). When determining whether such a "special justification" exists to depart from *stare decisis*, this Court looks to: (1) whether "changes or developments in the law have undermined the rationale behind a decision," *id.* ¶ 98 (citation omitted); (2) whether "there is a need to make a decision correspond to newly ascertained facts," *id.* (citation omitted); (3) whether "there is a showing that the precedent has become detrimental to coherence and consistency in the law," *id.* (citation

omitted); and (4) "whether the prior decision is unsound in principle, whether it is unworkable in practice, and whether reliance interests are implicated," *id.* ¶ 99 (citations omitted). "[T]he decision to overturn a prior case must not be undertaken merely because the composition of the court has changed." *Id.* ¶ 95 (citing *State v. Stevens*, 181 Wis. 2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring)); *see also Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 44, 281 Wis. 2d 300, 697 N.W.2d 417; *accord Lindell*, 2001 WI 108, ¶ 146, (A.W. Bradley, J., concurring). When "nothing [has] changed but the bodies on this court," *Lindell*, 2001 WI 108, ¶ 146, (A.W. Bradley, J., concurring), this Court will not overturn "valid precedent" and "substitute[ ] its will over its obligation to stare decisis," *id.* ¶¶ 146, 148.

This Court's mere disagreement with a prior decision cannot justify departing from *stare decisis*. *Johnson Controls*, 2003 WI 108, ¶¶ 94–95; *Romanshek*, 2005 WI 67, ¶ 46; *accord Lindell*, 2001 WI 108, ¶¶ 145–46 (A.W. Bradley, J., concurring). Even where a Justice of this Court believes a prior decision "was wrongly decided"—and even where the Justice "continued to dissent" from that decision in later cases—that Justice should "acknowledge [that decision] as valid precedent," "[o]ut of respect for the law and this court as an institution." *Lindell*, 2001 WI 108, ¶¶ 145–46 (A.W. Bradley, J., concurring); *accord Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) ("Respecting stare decisis means sticking

to some wrong decisions."). Relatedly, this Court will not overturn a prior decision by revisiting the same arguments that it has already ruled upon, "even if this court were now persuaded by [the] arguments rejected in" the prior decision, as "that is not a sufficient reason to overturn the decision." *Romanshek*, 2005 WI 67, ¶ 50; *accord Schultz v. Natwick*, 2002 WI 125, ¶ 38, 257 Wis. 2d 19, 653 N.W.2d 266; *Lindsay v. Fay*, 25 Wis. 460, 462–63 (1870); *Kimble*, 576 U.S. at 455 ("[A]n argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent."); *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *Pope & Talbot v. Hawn*, 346 U.S. 406, 412 (1953).

Finally, and especially important for this case, these *stare decisis* principles take on greater force when a party asks this Court to reconsider a prior decision interpreting a statute. *See State v. Lynch*, 2016 WI 66, ¶ 31 n.18, 371 Wis. 2d 1, 885 N.W.2d 89 (quoting *Kimble*, 576 U.S. at 456). "[S]tare decisis concerns are paramount where a court has authoritatively interpreted a statute," given that "the legislature remains free to alter its construction." *Romanshek*, 2005 WI 67, ¶ 45. "'[U]nlike in a constitutional case,' critics of a statutory interpretation case can take their objections to the Legislature, and it can then 'correct any mistake it sees.'" *Lynch*, 2016 WI 66, ¶ 31 n.18 (quoting *Kimble*, 576 U.S. at 456); *see also Reiter v. Dyken*, 95 Wis. 2d 461, 470, 290 N.W.2d 510 (1980) ("[W]ell-established principles of judicial

decision-making" require the Court to maintain its "chosen construction . . . unless and until the legislature either amends or repeals the statute."); *Zimmerman v. Wis. Elec. Power Co.*, 38 Wis. 2d 626, 633–34, 157 N.W.2d 648 (1968). Or, as Justice Kagan has explained, writing for the U.S. Supreme Court in *Kimble*, "*stare decisis* carries enhanced force when a decision . . . interprets a statute," as such decisions "effectively become part of the statutory scheme," with the legislative branch having the responsibility for subsequent changes to that statutory regime. 576 U.S. at 456. A court's statutory-interpretation decisions "are balls tossed into Congress's court, for acceptance or not as that branch elects," *id.*—and only "a superspecial justification" could overcome "this superpowered form of *stare decisis*," *id.* at 458.

B. Here, *stare decisis* compels this Court to adhere to *Teigen*, as there are no intervening developments in the law or the facts that could justify overturning *Teigen*'s statutory holding.

To begin, *Teigen* is "a statutory interpretation case," *Lynch*, 2016 WI 66, ¶ 39 n.18, reflecting this Court's "authoritative[ ] interpret[ation]" of Section 6.87(4)(b)1 and its related statutes, *Romanshek*, 2005 WI 67, ¶ 45, meaning that this Court must have "a superspecial justification" to overcome the "superpowered form of *stare decisis*" given to such statutory-interpretation decisions, *Kimble*, 576 U.S. at 458; *see also, e.g.*, *Romanshek*, 2005 WI 67, ¶ 45. After all, "critics of [*Teigen*] can take their objections to the

Legislature," *Lynch*, 2016 WI 66, ¶ 31 n.18 (citation omitted), as the Legislature "remains free to alter [*Teigen*'s] construction" of Section 6.87(4)(b)1 if it so desires, *Romanshek*, 2005 WI 67, ¶ 45 (citation omitted). In fact, subsequent to *Teigen*, the Legislature has sought to amend other provisions within Section 6.87, not related to *Teigen*'s statutory-interpretation holding, *see* 2023 Assembly Bill 570 (report vetoed by Gov. Evers, March 21, 2024), but has not sought to overrule *Teigen*.

As the Legislature explains immediately below, there are no intervening and compelling developments since *Teigen*—in either the facts or the law—that could possibly provide the special justification needed for this Court to overrule this decision.

<u>*No changes in the relevant law*</u>. There have been no "changes or developments in the law [that] have undermined the rationale behind" *Teigen*, nor have any intervening decisions from this Court suggested that *Teigen* is "detrimental to coherence and consistency in the law" or "unsound in principle." *Johnson Controls*, 2003 WI 108, ¶¶ 98–99 (citations omitted). Rather, *Teigen* applied this Court's longstanding approach to statutory interpretation to conclude that "ballot drop boxes are illegal under Wisconsin statutes," 2022 WI 64, ¶ 4, including by citing *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, among other authorities, *Teigen*, 2022 WI 64, ¶ 62. Further, Chapter 6's absentee-ballot voting regime likewise remains

unchanged since *Teigen*, *compare* 2017 Wis. Act 369, § 1, *with* Wis. Stat. § 6.87(4)(b)1, thus no subsequent statutory developments even arguably undermine *Teigen*'s "rationale" or "coherence" either, *see Johnson Controls*, 2003 WI 108, ¶¶ 98–99.

No changed or new facts. There are no "newly ascertained facts" since *Teigen* that call its statutory interpretation into question. *Id.* ¶ 98. Petitioners did not even allege a relevant change in facts since *Teigen* in their Complaint. *See generally* R.2. Rather, Petitioners alleged only that in 2020, when some clerks utilized drop boxes, fewer absentee ballots were returned late than in 2018 or in 2022—two election years in which "a similar number of [absentee] ballots were returned late." R.2 ¶¶ 36–50. This Court considered a similar fact-based argument in *Teigen* regarding the disparity between absentee-ballot return rates in 2018 and 2020. *See* SA49–52 (collecting absentee-ballot return data from 2016 to 2020). And since Petitioners alleged in their Complaint that the 2022 absentee-ballot return rate was "similar" to the 2018 rate presented to the Court in *Teigen*, the 2022 absentee-ballot return rate does not qualify as a "newly ascertained fact[ ]" since *Teigen*, *see Johnson Controls*, 2003 WI 108, ¶ 98—let alone a sufficiently compelling, newly ascertained fact that could support departing from statutory *stare decisis*, *see, e.g.*, *Romanshek*, 2005 WI 67, ¶ 45; *accord Kimble*, 576 U.S. at 458.

Not unworkable in practice. *Teigen* is not "unworkable in practice." *Johnson Controls*, 2003 WI 108, ¶ 99. Under *Teigen*, Chapter 6 requires Wisconsin voters wishing to vote via absentee ballot to return their completed absentee ballots to their clerks through one of two exclusive avenues, either: (1) "by mail," or (2) by "personal[ ] deliver[y] . . . to the municipal clerk at the clerk's office or a designated alternate site." 2022 WI 64, ¶ 4. Chapter 6 does not allow absentee voters to return their ballots to clerks at offsite locations, *id.*, such as "near or on college campuses, and public buildings, such as libraries and community centers," SA45, or "fire stations," Br. of Amici Curiae Wisconsin Elections Officials at 10, *Priorities USA v. WEC*, No.2024AP164 (Apr. 18, 2024). Thus, *Teigen* simply holds that one short-lived and limited method of returning absentee ballots is not authorized, while leaving two other methods fully available. *See* 2022 WI 64, ¶ 4. This is a workable, easily administrable rule, which is why Wisconsinites have successfully cast absentee ballots without the use of drop boxes for more than a century, including since *Teigen*. *Id.* ¶¶ 65–68 (lead op.); *see generally id.* ¶¶ 145–204 (Hagedorn, J., concurring) (not departing from the lead opinion on this point); *id.* ¶¶ 205–249 (A.W. Bradley, J., dissenting) (not disputing the lead opinion on this point); *supra* pp.10–11. And, of course, *Teigen* has no effect on the availability of in-person voting in Wisconsin on

Election Day, which in-person voting is easy to use. *See Luft*, 963 F.3d at 672.

* * *

In all, no intervening and compelling developments in either fact or law provide any special justification for this Court to depart from statutory *stare decisis* and overturn *Teigen*. Rather, the only change since *Teigen* has been to "the composition of the court," *Johnson Controls*, 2003 WI 108, ¶ 95, which is not a basis for the Court to cast aside *stare decisis* and overturn a "valid precedent" like *Teigen*, *Lindell*, 2001 WI 108, ¶¶ 145–46 (A.W. Bradley, J., concurring); *see also Stevens*, 181 Wis. 2d at 442 (Abrahamson, J., concurring); *Romanshek*, 2005 WI 67, ¶ 44.

C. In urging this Court to overturn *Teigen*, Petitioners and the Governor offer unpersuasive arguments for departing from a recent decision of this Court, particularly in light of the especially stringent *stare decisis* standard applicable here. Indeed, Petitioners understanding of *stare decisis* would justify reconsideration of *every* statutory-interpretation case from this Court that sparked a dissenting opinion, depriving the bedrock doctrine of *stare decisis* of any meaning in this State.

First, Petitioners and the Governor assert that *Teigen* is "unsound in principle," Pet.Br.21; Gov.Br.22, because, in their view, the dissenting opinion in *Teigen* had the better interpretation of the text of Section 6.87(4)(b)1 and the related statutes, *see* Pet.Br.21–29; Gov.Br.22. For example, Petitioners

claim that *Teigen* is unsound in principle because it failed to adhere to the "plain" meaning of Section 6.87(4)(b)1, Pet.Br.22 (citing *Kalal*, 2004 WI 58, ¶ 45), and "rewrote Section 6.87(4)(b)1," Pet.Br.24 (citations omitted). But in virtually *every* divided statutory-interpretation case, the dissent believes that the majority opinion has adopted an incorrect interpretation that is contrary to the statutory text. Yet, "an argument that [the Court] got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble*, 576 U.S. at 455–56; *accord Johnson Controls*, 2003 WI 108, ¶ 9; *Romanshek*, 2005 WI 67, ¶ 46; *Lindell*, 2001 WI 108, ¶¶ 145–46 (A.W. Bradley, J., concurring). In other words, an argument that the dissent's reading of a statute is more persuasive than the majority's interpretation is not a "*special* justification" that supports a departure from statutory *stare decisis*, *Johnson Controls*, 2003 WI 108, ¶ 94 (emphasis added) (citations omitted), as such a justification is present in every divided statutory-interpretation case.

Petitioners and the Governor attempt to recast their disagreements with *Teigen*'s statutory holding as criticisms of the soundness of *Teigen*'s statutory-interpretation *methodology*, but this fares no better. Petitioners argue that "[t]he *Teigen* approach to statutory interpretation threatens a destabilizing new reality where courts may revise statutory text even in the absence of

ambiguity," Pet.Br.23, but *Teigen* assumed no such power. Instead, *Teigen* invoked this Court's bedrock, "plain-meaning" approach to statutory-interpretation—including by citing *Kalal*, *Teigen*, 2022 WI 64, ¶ 62—just as Petitioners do here, Pet.22–23.

The Governor, for his part, argues that *Teigen* "coined a new canon of statutory construction—'fairest interpretation'—without offering any standard of determining what is 'fairest.'" Gov.Br.12 (citation omitted); *see* Gov.Br.22 (invoking this merits argument as part of the Governor's *stare decisis* arguments). But the "fairest interpretation" phrasing is a well-established component of statutory analysis, which comports with the requirement that statutory language be given its ordinary meaning. *See Kosak v. United States*, 465 U.S. 848, 854 (1984) ("fairest interpretation"); *accord Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 19 (2013) (giving statutory provision its "fairest reading"); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 329 (2015) ("'fairest reading"). *Teigen*'s reference to adopting "[t]he fairest interpretation" of Section 6.87(4)(b)1, 2022 WI 64, ¶ 62, flows from *Kalal*, which provides that this Court must interpret statutory text "reasonably," *Kalal*, 2004 WI 58, ¶ 46, in line with its "common, ordinary, and accepted meaning," *id.* ¶ 45 (citation omitted). This Court unanimously applied this principle in *Brey v. State Farm Mutual Automobile Insurance Co.*, explaining that "the plain-meaning approach . . . focuse[s] on deriving the fair meaning of the

text itself." 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1 (citations omitted).

Petitioners then focus their unsound-in-principle arguments on *Teigen*'s interpretation of Section 6.84(2)'s legislative-policy statement, Pet.Br.24–27, which provides that "matters relating to the absentee ballot process . . . shall be construed as mandatory" and that "[b]allots cast in contravention of the procedures specified . . . may not be counted," Wis. Stat. § 6.84(2). Here again, Petitioners' claim merely raises a merits dispute with *Teigen*'s treatment of Section 6.84(2). *Teigen*'s interpretation of Section 6.84(2) does not "give[ ] Wisconsin courts vast discretion to disenfranchise absentee voters." Pet.Br.24. Rather, *Teigen* interprets Section 6.84(2)'s legislative-policy statement as requiring strict adherence to the absentee-voting procedures set out *by the Legislature*, including by limiting the return of absentee ballots to the two exclusive methods provided by the Legislature in Section 6.87(4)(b)1, *Teigen*, 2022 WI 64, ¶¶ 53–54, 80—"by mail," or (2) by "personal[ ] deliver[y] . . . to the municipal clerk at the clerk's office or a designated alternate site," *id.* ¶ 4.

Petitioners claim that *Teigen* is further unsound in principle because it gave "insufficient weight to the importance of voting as a fundamental right under the Wisconsin Constitution." Pet.Br.27–29. This is just an impermissible attempt to shoehorn into this appeal Petitioners' arguments that absentee voting is a

protected constitutional right, *see* Pet.7–13, even though this Court's bypass order provided that the parties may not raise such issues, *see* March 12 Order at 1. In any event, *Teigen*'s conclusion that the Wisconsin Constitution does not guarantee a right to vote by absentee ballot—and thus that its interpretation of Section 6.87(4)(b)1 as not authorizing drop boxes did not raise any constitutional right-to-vote issues—does not evidence any unsoundness. *Teigen*, 2022 WI 64, ¶¶ 52–54 & n.25. The Constitution specifically explains that the Legislature "may . . . [p]rovid[e] for absentee voting," Wis. Const. art. III, § 2(3); Section 6.84(1) states that absentee voting is a "privilege, not a "right"; this Court's precedents have long supported the conclusion that absentee voting is not a constitutional right, *see State ex. rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949); *Gradinjan v. Boho* (*In re Chairman in Town of Worcester*), 29 Wis. 2d 674, 684–85, 139 N.W.2d 557 (1966); *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶¶ 19–21, 357 Wis. 2d 360, 851 N.W.2d 302, and other courts are in accord, *see Teigen*, 2022 WI 64, ¶ 53 (citing *McDonald v. Bd. of Elections Comm'rs of Chi.*, 394 U.S. 802, 807–09 (1969); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020)).

Second, Petitioners assert that *Teigen*'s construction of Section 6.87 is unworkable in practice, Pet.Br.29–30; Gov.Br.19–21, but they again fail to provide any support for this claim. Except

for a brief period in 2020, absentee voters have returned their completed ballots by mail or by delivering them in-person to the clerk's office or alternate voting sites. *See* 1862 Wis. Act 11 (Special Sess.); 1915 Wis. Act 461. *Teigen* simply required absentee-ballot return procedures to revert to the pre-pandemic status quo that had been in place since at least 1915. *Supra* pp.10–11. Petitioners resort to speculation, relying on a hypothetical parade of horribles to suggest that *Teigen* leaves too many questions open, and stating that voters may face "potential" risks. Pet.Br.29–30; Gov.Br.15. But Petitioners have not offered *any* evidence of any risks or confusion since *Teigen*, in the real world. Were Petitioners' fears well-founded, they should have been able to point to *actual evidence* of any confusion, as the plaintiffs have done in other pending litigation involving various provisions of Wisconsin's absentee-voting regime. *See* SA109–10 (discussing evidence submitted by plaintiff of municipal-clerks offices' using varying protocols concerning the rejection of incomplete absentee ballots). And the underlying facts in *Teigen* did not involve any of the scenarios that Petitioners claim to be concerned about, *see* 2022 WI 64, ¶¶ 4–9 (majority op.); *id.* ¶¶ 1–3 (lead op.); *id.* ¶¶ 152–56 (Hagedorn, J., concurring), because there was no "case or controversy" requiring *Teigen* "to answer th[o]se questions," Pet.Br.30; U.S. Const. art. III, § 2, cl. 1. This Court, like the U.S. Supreme Court, does not issue advisory opinions. *State ex rel.*

Collison v. City of Milwaukee Bd. of Rev., 2021 WI 48, ¶ 46, 397 Wis. 2d 246, 960 N.W.2d 1. Therefore, that *Teigen* did not address Petitioners' hypothetical scenarios is of no moment.

Third, Petitioners' arguments that "there are no reliance interests that could justify upholding *Teigen*[]" and that overruling *Teigen* would "not harm anyone," Pet.Br.31, misunderstand what types of reliance interests *stare decisis* endeavors to protect, *Johnson Controls*, 2003 WI 108, ¶ 94. Petitioners claim that overruling *Teigen* would "restore" to voters "an option that voters and municipal clerks had previously found useful," rather than "*require* anyone to do anything." Pet.Br.31; *see* Gov.Br.24. But the previous conditions that Petitioners refer to did not permit use of drop boxes. *See Teigen*, 2022 WI 64, ¶¶ 64–69 (lead op.); *see generally id.* ¶¶ 145–204 (Hagedorn, J., concurring) (not departing from the lead opinion on this point); *id.* ¶¶ 205–49 (A.W. Bradley, J., dissenting) (not disputing the lead opinion on this point). Further, Section 6.87 has always "required" voters and municipal clerks to abide by its terms, and only during the COVID-19 pandemic did WEC briefly interpret Section 6.87 as permitting the use of drop boxes. Contrary to Petitioners' assertion, overruling *Teigen* would upset reliance interests because it would authorize the use of a new method of absentee voting. As for Petitioners' suggestion that overruling *Teigen* would not "harm anyone," Pet.Br.31, Petitioners ignore the harm to the rule of law that would

result from a decision overturning a less-than-two-year-old precedent based upon a change in this Court's composition. *See Romanshek*, 2005 WI 67, ¶ 43 ("[*S*]*tare decisis* is of fundamental importance to the rule of law." (citations omitted)). Further, not authorizing clerks to utilize extra-statutory return methods prevents additional burdens on their already limited time and resources. This clearly defines the role of municipal clerks in accepting in-person ballot returns, and these clear expectations are necessary for them to perform successfully their other important election administration duties. *Teigen*'s interpretation of Section 6.87(4)(b)1 minimizes the risk of voter confusion because it can be implemented uniformly, ensuring that voters across Wisconsin are subject to the same in-person ballot return rules.

Fourth, the Governor also characterizes *Teigen* as a "deeply fractured" opinion and suggests that this is a reason to justify its reversal. Gov.Br.23. But the purportedly "fractured" nature of an opinion is not one of the "special circumstances" that justify this Court's departure from its own precedent under *Johnson Controls*, 2003 WI 108. The Governor's reliance on *Koschkee v. Taylor*, 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600, for this proposition is misplaced, because there, this Court declined to apply *stare decisis* in part because the "lead opinion" in the challenged precedent "ha[d] no common legal rationale with [the] concurrences," such that the *Koschkee* Court was unable to analyze whether any

"changes or developments in the law ha[d] undermined the rationale behind [the] decision." *Id.* ¶ 8 n.5 (citations omitted). ***Teigen's three concurring opinions are not divided with respect to the issue here: whether Wisconsin law authorizes drop boxes***. On this issue, the four concurring Justices were in complete agreement, with Justice Roggensack writing "further to explain" her position concerning the mailing of absentee ballots not at issue here, *Teigen*, 2022 WI 64, ¶ 88 (Roggensack, J., concurring); Justice Rebecca Grassl Bradley and Chief Justice Zeigler addressing the validity of the procedure WEC employed, *id.* ¶ 121 (R.G. Bradley, J., concurring); and Justice Hagedorn providing "additional insight into the statutory context and history of the relevant statutes," *id.* ¶ 149 (Hagedorn, J., concurring). Thus, *Teigen* is not "fractured" with respect to the issue here, let alone in the same way as the opinion overruled by *Koschkee*.

Finally, the Governor's other arguments in favor of overruling *Teigen*, Gov.Br.23–24, are misguided. The Governor asserts that *Teigen* "is detrimental to coherency and consistency in the law" because one federal district court has held that the Voting Rights Act preempts *Teigen*'s holding invalidating a WEC guidance document that purported to allow voters to use third-party assistance to return their absentee ballots—which is not an issue in this case. Gov.Br.23–24 (citing *Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1032 (W.D. Wis. 2022)). Similarly,

the Governor claims that overruling *Teigen* is appropriate because it is a recent decision that "has not produced a settled body of law." Gov.Br.24. But if that were part of the *Johnson Controls* analysis, it would cast doubt on all recently decided, divided cases.

II. Section 6.87 Of The Wisconsin Statutes Does Not Permit Municipal Clerks To Decide Whether To Collect Absentee Ballots Via Drop Box

Teigen correctly interpreted the Wisconsin Statutes as applied to drop boxes, *infra* Part II.A, notwithstanding the counterarguments of Petitioners and the Governor, *infra* Part II.B. At minimum, as shown immediately below, Section 6.87 is "by no means a model of clarity," and "[r]easonable minds might read [it] differently," *Teigen*, 2022 WI 64, ¶ 150 (Hagedorn, J., concurring), so this Court should not take the extraordinary step of overruling its recent precedent interpreting the provision.

A. Section 6.87 Only Authorizes Electors To Return Their Completed Absentee Ballots By Mail Or By In-Person Delivery To The Clerk

1. Wisconsin courts making a "determination of statutory meaning" have a "solemn obligation" to "faithfully give effect to the laws enacted by the legislature." *Kalal*, 2004 WI 58, ¶ 44. When interpreting a statute, the court must "begin[ ] with the language of the statute," giving that language its "common, ordinary, and accepted meaning," unless a different technical or special meaning clearly applies. *Id.* ¶ 45 (citations omitted). When "the meaning

of the statute is plain, [courts] ordinarily stop the inquiry" there, giving effect to the plain statutory text. *Id.* (citations omitted). Both the "context" in which statutory language is used and the relationship between the statutory language and "surrounding or closely-related statutes" is relevant to this analysis. *Id.* ¶ 46 (citation omitted); *accord State v. Dinkins*, 2010 WI App. 163, ¶ 12, 330 Wis. 2d 591, 794 N.W.2d 236 (citation omitted). Finally, the court must construe a statue in a manner that "avoid[s]" "unreasonable results," *Kalal*, 2004 WI 58, ¶ 46 (citations omitted), and may also reference statutory history to inform its interpretation, *id.* ¶ 48 (citations omitted); *see Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581; *State v. Cox*, 2018 WI 67, ¶ 10, 382 Wis. 2d 338, 913 N.W.2d 780.

2. Section 6.87's text does not authorize drop boxes, and the statutory context, related statutes, and absurd results canon are all best understood as confirming this conclusion. Wis. Stat. § 6.87.

a. The plain text of Section 6.87 directs voters to return their absentee ballots in one of only two ways, leaving no room to read in an implied authorization for voters to return absentee ballots by "dropping a ballot into an unattended drop box." *Teigen*, 2022 WI 64, ¶ 55; *see Kalal*, 2004 WI 58, ¶ 46.

Section 6.87(4)(b)1 requires that after an elector completes an absentee ballot and has it certified by a witness, the elector

must either "mail" the absentee ballot, or "deliver[it] in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. The Legislature has defined "municipal clerk," as used in Chapter 6 of Wisconsin Statutes, to mean "the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized representatives," as well as "the clerk of a school district" "[w]here applicable." *Id.* § 5.02(10). While "in person" and "deliver" in Section 6.87 are not defined by statute, the "common, ordinary, and accepted meaning" support the Legislature's understanding of the provision. The Oxford English Dictionary defines "in person" as "with or by one's own action or physical presence, personally," *In Person*, Oxford English Dictionary Online (Feb. 2024),[4] and the term "deliver" means "[t]o convey and hand over (something, esp. letters, parcels, or goods); to take (something) to . . . a specified recipient or address," *Deliver*, Oxford English Dictionary Online (Mar. 2024);[5] *see also Delivery,* Black's Law Dictionary (11th ed. 2019) ("the act of bringing goods, letters, etc. to a particular person or place"). Moreover, Section 6.87(4)(b)1's "deliver[ ] in person" requirement contemplates such delivery as occurring at the office where that official conducts business, *see* Wis. Stat. § 6.87(4)(b)1—here,

[4] Available at https://doi.org/10.1093/OED/6205189904 (subscription required).

[5] Available at https://doi.org/10.1093/OED/8804111959 (subscription required).

meaning the clerk's office—from which he or she conducts official activities like absentee-ballot collection. Thus, Section 6.87(4)(b)1's requirement that electors "mail[ ]" or "deliver[ ] in person" their completed absentee ballots "to the municipal clerk" must be understood, given the commonly accepted meaning of these terms, as requiring electors who vote absentee to either (1) utilize the traditional mail processes that all or nearly all Wisconsinites use on a daily basis, or (2) travel to their local municipal clerk's office or designated alternate site staffed by that clerk to drop off their completed ballot.

Section 6.87(4)(b)1 does not authorize a "third option," *Teigen*, 2022 WI 64, ¶ 59—such as drop boxes—for absentee-ballot returns. In addition to Section 6.84(2)'s directive that Section 6.87(4)'s requirements "be construed as mandatory," *see infra* pp.43–44; Wis. Stat. § 6.84(2), there is no language in Section 6.87(4)(b)1 that suggests the two ballot return methods expressly listed in the statute—"mail[ ]" or "deliver[y] in person"—are included to illustrate some of the possible permissible options, Wis. Stat. § 6.87(4)(b)1. Rather, "the express mention" of these two methods "excludes other similar m[ethods] not mentioned" in the statutory text, *James v. Heinrich*, 2021 WI 58, ¶ 18, 397 Wis. 2d 517, 960 N.W.2d 350 (citations omitted); *see FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶ 27, 301 Wis. 2d 321, 733 N.W.2d 287, under "the well-established canon of *expressio unius est exclusio*

alterius," *State v. Delaney*, 2003 WI 9, ¶ 22, 259 Wis. 2d 77, 658 N.W.2d 416; *see* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107–11 (2012) ("The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*).").

Finally, "the power to prescribe the manner of conducting elections is clearly within the province of the Legislature," *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 906 (1930), and if "the legislature did not *specifically* confer" on Wisconsin's municipal clerks the power to supplement Section 6.87's absentee-ballot return methods, then "the exercise of that power is not authorized," *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974) (emphasis added).

b. The statutory context confirms that Wisconsin law does not authorize drop boxes. *See Kalal*, 2004 WI 58, ¶ 46.

As an initial matter, Section 6.84(2)'s interpretative framework supports reading Section 6.87(4)(b)1 as not authorizing the use of drop boxes for absentee-ballot collections. Section 6.84(2) requires many of Wisconsin's absentee voting provisions—including Section 6.87(4)(b)1—to "be construed as mandatory." Wis. Stat. § 6.84(2). As this Court recognized in *Teigen*, "[m]andatory" election requirements "must be strictly adhered to" and "strictly observed." 2022 WI 64, ¶ 53 (quoting *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 592–

93, 263 N.W.2d 152 (1978)). Interpreted through this lens, Section 6.87(4)(b)1 is best read as authorizing those absentee-ballot return methods explicitly referenced in the statute—mail, in-person delivery to the clerk's office, or in-person delivery to an alternative site under Section 6.855.

Additionally, drop boxes are not within the location requirements for alternate absentee-ballot sites in Section 6.855—particularly in light of Section 6.84's interpretative directive. Wis. Stat. § 6.855; *see id.* § 6.84(2). Section 6.855 permits a municipality "to designate a site other than the office of the municipal clerk . . . as the location . . . to which absentee ballots shall be returned by electors for any election," as long as the site complies with the provision's important limits and rules. *Id.* § 6.855. The site must "be staffed by the municipal clerk . . . or employees of the clerk," and the clerk must "prominently display a notice of the designation of the alternate site selected." *Id.* "[N]o site may be designated that affords an advantage to any political party." *Id.* Finally, if an alternate site or sites are designated, "no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk." *Id.* The interpretative principle discussed above—that the "express mention of one matter excludes other similar matters [that are] not mentioned," *James*, 2021 WI 58, ¶ 18; *supra* pp.42–43, applies with equal force here, as the express

creation of this narrow alternative site exception in Section 6.855 precludes this Court from reading in any additional implied exceptions to the general rule that absentee ballots are to be mailed or returned in person to the municipal clerk's office. Thus, the default location "to which voted absentee ballots shall be returned" is "the office of the municipal clerk," except where a municipality elects to use the exception to that rule and follows Section 6.855's procedure and requirements for designating alternate sites. Wis. Stat. § 6.855.

Section 7.41, which defines the public's right to access voting sites and observe the voting process, further supports this understanding. The provision authorizes members of the public to "be present at any polling place, in the office of any municipal clerk whose office is located in a public building on any day that absentee ballots may be cast in that office, or at an alternate site under s. 6.855 on any day that absentee ballots may be cast at that site for the purpose of observation of an election and the absentee ballot voting process." Wis. Stat. § 7.41(1). Section 7.41 contemplates only two locations where in-person absentee voting may occur: "the office of any municipal clerk" or "an alternate site under s. 6.855." *Id.* To ensure the public's right to access and observe to the absentee-ballot voting process, Section 6.87(4)(b)1's in-person ballot return option must be understood as requiring the delivery to occur at the municipal clerk's official place of

business—the clerk's office—unless the municipality has elected to utilize Section 6.855's alternate site option.

Finally, construing Section 6.87 to prohibit drop boxes is an easily administrable standard that avoids absurd results. *See Kalal*, 2004 WI 58, ¶ 46. This reading clearly defines the permissible in-person return locations, leaving clerks to ensure that they are available to accept ballots in-person at the clerk's office or at an alternate site designated under Section 6.855. Wis. Stat. §§ 6.87(4)(b)(1), 6.855; *see Teigen*, 2022 WI 64, ¶ 4.

B. Petitioners' And The Governor's Counterarguments Do Not Overcome This Plain-Text Understanding Of Section 6.87

Petitioners and the Governor present the same arguments that this Court rejected in *Teigen*. Pet.Br.13–16; Gov.Br.9–12, *supra* pp.15–16. This Court should decline to reweigh those arguments now, less than two years after it rejected them, under *stare decisis* principles. *Supra* Part I. In any event, the Legislature respectfully submits that those arguments are incorrect.

First, Petitioners claim that the term "to the municipal clerk" should not be read as referring to the clerk's office, Pet.Br.13–16, arguing 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," Pet.Br.14 (emphasis omitted). But, as discussed

above, *supra* p.42, the clerk's office is his or her principal place of business and designated mailing address. And instead of recognizing that the "ordinary," *Kalal*, 2004 WI 58, ¶ 45, meaning of a provision directing citizens to deliver a document "*to*" a government official requires such delivery to occur at the office where that official conducts business, *see* Wis. Stat. § 6.87(4)(b)1, Petitioners ask this Court to read into the statute an implied grant of broad discretion to municipal clerks authorizing them to receive absentee ballots via whatever mechanism they deem suitable, which is not the law.

Second, Petitioners' assertion that Section 6.84 says "nothing about the substance of what Section 6.87(4) . . . requires," Pet.Br.17, fails to recognize that Section 6.84 provides the statutory "context" in which Section 6.87(4) should most reasonably be understood, *Kalal*, 2004 WI 58, ¶ 46 (citation omitted); *accord Dinkins*, 2010 WI App. 163, ¶ 12 (citation omitted). Section 6.84, which governs the "[c]onstruction" of Wisconsin's absentee-voting laws, *see* Wis. Stat. § 6.84, expresses the Legislature's intention to "carefully regulate" "the privilege of voting by absentee ballot," *id.* § 6.84(1), and requires that "matters relating to the absentee ballot process"—including Section 6.87(4)—"be construed as mandatory," *id.* § 6.84(2). It provides that "[b]allots cast in contravention of" those procedures "may not be counted." *Id.* By identifying Section 6.87(4) as one of

the absentee ballots provisions that must be construed as mandatory and requiring strict compliance, Section 6.84 requires Section 6.87(4) to be interpreted narrowly, in a manner that does not expand the statutory text.

Third, Petitioners' discussion of Section 6.855, which governs "alternate absentee ballot sites," Pet.Br.18–19, fares no better. Section 6.855 allows municipalities to "designate a site *other* than the office of the municipal clerk . . . as the location from which electors . . . may request and vote absentee ballots and to which voted absentee ballots shall be returned." Wis. Stat. § 6.855 (emphasis added). Section 6.855 creates a narrow exception to the default rule that absentee ballots must be returned to "the office of the municipal clerk." *Id.* Principles of statutory interpretation, including the *expressio unius est exclusio alterius* canon, *James*, 2021 WI 58, ¶ 18, prevent reading Section 6.87(4) in a way that would create an additional, implied "alternate absentee ballot[ ] site" without complying with Section 6.855's procedures.

Fourth, Petitioners criticize *Teigen*'s consideration of Section 5.81(3) as part of the statutory context in which Section 6.87(4)(b)1 must be analyzed. Pet.Br.20–21. Section 5.81 provides that, in jurisdictions that use an electronic voting system, "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). But as

Teigen correctly explained, Section 5.81(3) provides options: paper absentee ballots can either be "voted in person in the office of the municipal clerk," or, they can be "*voted by mail*." 2022 WI 64, ¶ 60 (emphasis added). Section 5.81(3) does not contemplate any third, extra-textual alternative.

Fifth, the Governor claims that, "[n]ot only are drop boxes compliant with the relevant statute, but they are also utilized pursuant to express legislative authorizations," Gov.Br.17, but that is incorrect. As explained above, drop boxes are inconsistent with Section 6.87(4)(b)1's statutory text. *See supra* pp.40–43. That Wisconsin has a "highly decentralized system" of election administration that gives authority to municipal clerks to oversee election procedures within their jurisdictions, Gov.Br.17–18, does not authorize the clerks to implement absentee-ballot collection measures that are incompatible with the relevant laws.

Sixth, the Governor claims that reading Wis. Stat. § 6.87(4)(b)1 to prohibit drop boxes "leads to an absurd result," Gov.Br.15, but he both fails to provide any actual support for this claim, Gov.Br.15–17, and ignores the absurd results that his preferred interpretation creates, *see supra* pp.14–15. The Governor fears that *Teigen*'s interpretation will result in the invalidity of absentee ballots placed "in a secured designated 'inanimate' receptacle in the municipal clerk's office," Gov.Br.15, but that feigned concern is unfounded because *Teigen* did not

decide whether receptacles located in clerks' offices would be permissible (and therefore did not prohibit their use in that location). 2022 WI 64, ¶¶ 61–62 (lead op.); *id.* ¶ 3 (lead opinion); *id.* ¶¶ 186, 204 (Hagedorn, J., concurring). Rather, *Teigen* explained that interpreting the phrase "to the municipal clerk" as authorizing the delivery of absentee ballots to locations outside of clerks' offices could ostensibly permit voters to "seek out their municipal clerk" in any number of locations, including at her "personal residence" or "the grocery store." *Id.* ¶¶ 61–62 (majority op.). And while Petitioners try to assuage this fear by explaining that the statute "leaves municipal clerks free to decide for themselves when and where such ballots may be delivered," Pet.Br.14, that means that each municipal clerk would, under this interpretation, have the authority to accept ballots offered to them *anywhere*.

Finally, Petitioners and the Governor present *Teigen*'s construction of Section 6.87(4)(b)1 as a recent development, *see* Pet.Br.30–31; Gov.Br.21, 24, but that ignores that drop boxes are a COVID-19-related innovation. WEC disrupted the absentee-ballot voting regime by authorizing the use of drop boxes in 2020 in response to COVID-19, and Plaintiffs and the Governor present no evidence "that ballot drop boxes [had] been in common and longstanding use" in Wisconsin before that point. *Teigen*, 2022 WI 64, ¶ 65 (lead op.); *see generally id.* ¶¶ 145–204 (Hagedorn, J.,

concurring) (not departing from the lead opinion on this point); *id.* ¶¶ 205–49 (A.W. Bradley, J., dissenting) (not disputing the lead opinion on this point). Rather, the historical record reveals that only two methods of returning absentee ballots have been employed during the over 100-year history of Wisconsin's absentee-voting regime—mail and personal delivery to the clerk's office—which two methods the Legislature provided for in Section 6.87(4)(1)b. *See supra* pp.10–11.

CONCLUSION

This Court should affirm the Circuit Court's grant of the Legislature's Motion To Dismiss.

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 10,171 words.

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