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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2024AP164

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

Plaintiffs-Appellants,

GOVERNOR TONY EVERS,

Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Respondent,

WISCONSIN STATE LEGISLATURE,

Intervenor-Respondent.

APPEAL FROM A FINAL DECISION AND JUDGMENT GRANTING MOTIONS TO DISMISS, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE ANN PEACOCK, PRESIDING

WISCONSIN ELECTIONS COMMISSION'S RESPONSE BRIEF

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INTRODUCTION

Until July 2022, Wisconsin municipal clerks regularly chose to designate drop boxes as a way for voters to deliver their absentee ballots. By spring 2021, 570 drop boxes were placed across 66 of Wisconsin's 72 counties. National and state leaders commented favorably on that choice as a way to make returning a ballot "easy" (Justice Brett Kavanaugh),[1] "safe" (Wisconsin Legislature)[2], and "convenient, secure, and expressly authorized" (Speaker Robin Vos and then-Senate Majority Leader Scott Fitzgerald)[3].

Clerks, who are given discretion to identify administrative tools to properly conduct elections and assist voters, wisely recognized the value of drop boxes. The share of Wisconsin voters casting an absentee ballot increased from 6 to 30 percent between 2002 and 2022,[4] and drop boxes allowed voters to deliver their ballots simply even if they lived far from the clerk's office, worked hours or had caregiving responsibilities that made it difficult to visit the clerk's office during business hours, or cast their ballots too late to be sure that, given U.S. Postal Service delays, their ballot would arrive on time.

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[1] *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 29, 36 (2020) (Kavanaugh, J., concurring).

[2] Intervenor-Defendant Wisconsin State Legislature's Brief in Opposition to Plaintiff's Motion for Preliminary Injunction and Support of their Motions to Dismiss, *Democratic Nat'l Comm. v. Bostlemann,* 488 F. Supp. 3d 766 (W.D. Wis. 2020) (No. 20-CV-249), 2020 WL 6692946.

[3] Letter from Misha Tseytlin, Attorney, Troutman Pepper, to Maribeth Witzel-Behl, Clerk, City of Madison, re: "Democracy in the Park" (Sept. 25, 2020); (R. App. 108–09).

[4] Wis. Elections Comm'n, *Voter Turnout,* https://elections.wi.gov/statistics-data/voter-turnout, (choose "General Election Voter Registration and Absentee Statistics 1984–2022" hyperlink) (last visited Apr. 22, 2024).

In response to inquiries from clerks, the Wisconsin Elections Commission issued guidance about drop boxes and providing security recommendations from the U.S. Cybersecurity and Infrastructure Security Agency. The results of the November 2020 general election were contested, checked, and audited, but the *Teigen* plaintiffs produced no evidence of fraud or mistakes related to drop box delivery.[5]

But in July 2022, a majority of this Court concluded in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, that clerks are prohibited from designating drop boxes as an absentee ballot delivery option, at least if they are located outside the clerk's office. The majority recognized that this was not based on the literal language of the absentee ballot return provision, Wis. Stat. § 6.87(4)(b)1., and described its ruling instead as the "fairest interpretation." *Teigen*, 403 Wis. 2d 607, ¶ 62.

Stare decisis is a core principle of our judicial system and critical to its stability. But it does not serve those purposes in situations where a decision was unsound at the outset and has proved unworkable as legal doctrine, leading to incoherence in the law and poorly serving Wisconsin citizens. That is the case here. *Teigen*'s guiding legal principles were incorrect, and it veered from plain language to a policy-based method of reading statutes. As a result, litigants and lower courts applying *Teigen* have misunderstood other Wisconsin elections statutes, and already some voters whose votes could count have probably had their ballots arrive too late.

This Court should overrule *Teigen*.

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[5] *Teigen v. WEC*, 2022 WI 64, ¶ 244, 403 Wis. 2d 607, 976 N.W.2d 519 (A. W. Bradley, J., dissenting).

ISSUE PRESENTED

Whether this Court should overrule *Teigen*'s holding that Wis. Stat. § 6.87 precludes municipal clerks from offering drop boxes for the return of absentee ballots.

SUPPLEMENTAL STATEMENT OF THE CASE

The issue accepted for bypass is a narrow one: whether Wisconsin statutes permit municipal clerks to offer drop boxes for the in-person return of voted ballots. For purposes of completeness, the Commission provides a procedural history that discusses all issues raised by Petitioners.

I. Background of the current case.

Petitioners Priorities USA, *et. al*. brought this case in the Dane County Circuit Court, challenging four absentee voting provisions under the Wisconsin Constitution: (1) the absentee ballot witness requirement in Wis. Stat. § 6.87(4)(b)1.; (2) the prohibition, as interpreted by *Teigen*, on clerks' offering drop boxes for returning absentee ballots under Wis. Stat. § 6.87(4)(b)1.; (3) the deadline to cure mistakes on absentee ballot certifications in Wis. Stat. § 6.87(6); and (4) the statement of policy in Wis. Stat. § 6.84. The Commission took the position that all these statutes were constitutional.

The circuit court ultimately ruled in the Commission and Intervenor Wisconsin Legislature's favor in large part, dismissing Petitioners' facial constitutional challenges. (R. 59; 64.) The circuit court permitted a hybrid constitutional challenge to the witness requirement to advance. However, Petitioners decided not to pursue that claim. The court dismissed the case and entered judgment. (R. 103.)

Petitioners appealed and petitioned the Court to bypass the court of appeals. (R. 112.) The Court granted the petition to bypass the court of appeals as to only one issue: whether to

overrule *Teigen's* holding that Wis. Stat. § 6.87 precludes the use of drop boxes for the return of absentee ballots to municipal clerks. (Ct. Ord. 1, Mar. 12, 2024.) The Court ordered that the remaining issues in the case—the constitutional challenges to other absentee voting provisions—be held in abeyance. (*Id*.)

II. Use of drop boxes, Commission guidance, and court decisions prior to *Teigen*.

Absentee voting has increased dramatically over the past two decades, from 102,905 absentee voters in 2002 to 763,775 in 2022.[6] In the 2022 election, almost one third of all Wisconsin voters voted absentee.

In spring 2020, in response to even higher demand for absentee voting due to the COVID-19 pandemic, the Commission issued two memoranda providing information and guidance to municipal clerks about drop box options for absentee ballot return. *Teigen*, 403 Wis. 2d 607, ¶ 6.

The first memorandum about drop boxes, issued in March 2020, described a drop box as a "secure, locked structure operated by local election officials." *Id*. ¶ 1. It explained that voters may return their ballot in a drop box at any time until Election Day, and that "drop boxes could be staffed or unstaffed, temporary or permanent." *Id*. The second memorandum, issued in August 2020, encouraged municipal clerks to employ "creative solutions" to facilitate drop-box use by voters. *Id*. It recommended that clerks establish at least one drop box at the primary municipal building in their jurisdiction. *Id*. ¶ 7. The Commission outlined multiple

[6] Wis. Elections Comm'n, *Voter Turnout*, (choose "General Election Voter Registration and Absentee Statistics 1984–2022" hyperlink), *supra*. Excluding the 2020 election, absentee voting reached a height of 819,316 absentee electors in 2016.

measures to ensure the security and proper chain of custody of completed absentee ballots, such as:

- [D]rop boxes must be "secured and locked at all times" such that "[o]nly an election official or a designated ballot drop box collection team should have access" to them.
- "In addition to locks, all drop boxes should be sealed with one or more tamper evident seals."
- "Chain of custody logs must be completed every time ballots are collected."
- "All ballot collection boxes/bags should be numbered to ensure all boxes are returned at the end of the shift, day, and on election night."
- "Team members should sign the log and record the date and time, security seal number at opening, and security seal number when the box is locked and sealed again."

(R. App. 104–07.) The guidance followed recommendations by a working group of the U.S. Cybersecurity and Infrastructure Security Agency. (R. App. 104.)

By spring 2021, there were 570 drop boxes placed across 66 of Wisconsin's 72 counties. *Teigen*, 403 Wis. 2d 607, ¶ 8. Hundreds of drop boxes were used statewide to conduct the November 2020 general election and used before and after. *Id*. ¶ 24.

Courts discussed drop boxes in two cases prior to the *Teigen* litigation.

In *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 36 (2020),[7] the Wisconsin Legislature challenged an effort by the Governor to postpone

[7] This case was initially captioned *Democratic National Committee v. Bostelmann*, 488 F. Supp. 3d 776 (W.D. Wis. 2020); *see also Democratic National Committee v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020).

the spring 2020 elections during the height of the COVID-19 pandemic. The Legislature asserted that extending the election deadline was unnecessary because Wisconsin made it easy to vote absentee, including through the use of drop boxes: "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."[8]

The U.S. Supreme Court agreed. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. at 36. Specifically, Justice Kavanaugh noted that "secure absentee ballot drop boxes," along with other methods to return absentee ballots, have made "absentee voting in Wisconsin is 'really easy.'" *Id.* (Kavanaugh, J., concurring); *see also id.* at 29 ("Wisconsin has made considerable efforts to accommodate early voting," in part because "voters may return their ballots not only by mail but also by bringing them to a county clerk' office, or various 'no touch' drop boxes staged locally.") (Kavanaugh, J., Gorsuch, J., concurring).

Later, following the November 2020 general election, then-President Trump sought a recount of the election results in two counties and then appealed the result of that recount. *Trump v. Biden*, 2020 WI 91, ¶¶ 4–5, 394 Wis. 2d 629, 951 N.W.2d 568. Among the grounds for his challenge was the theory that voters who had delivered their ballots to the clerk via staffed events at parks that included drop boxes had voted illegally, and their votes could not be counted. *Id.* ¶¶ 19–21. This Court rejected that basis to disallow votes, concluding that the claim was barred by laches. *Id.* ¶¶ 12, 21. It stated that the "claims here are not of improper electoral activity.

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[8] Republican Party of Wisconsin and Legislative Defendants' Omnibus Brief in Opposition to Plaintiff's Motions for Preliminary Injunction and in Support of Motions to Dismiss, *Democratic Nat'l Comm. v. Bostlemann,* 488 F. Supp. 3d 766 (W.D Wis. 2020) (No. 20-CV-249), 2020 WL 6692946.

Rather, they are technical issues that arise in the administration of every election." *Id.* ¶ 31.

The *Teigen* litigation commenced in 2021, when two individual voters challenged WEC's drop box guidance. The voters did not allege that their ability to vote was harmed by the availability of drop boxes as a way to return a ballot to the clerk, but instead asserted that other voters' use of them "diluted" their own votes. *Teigen,* 403 Wis. 2d 607, ¶¶ 20, 24–25 (Grassl Bradley, J., plurality opinion).

In a divided opinion, this Court held that WEC's memoranda were invalid because drop boxes are unlawful under Wisconsin election laws. *Id.* ¶ 4.

On the question of standing, a three-justice plurality concluded that the plaintiffs had standing because unlawful election practices harm voters by creating a risk of illegitimate results. *Id.* ¶¶ 14–31 (Grassl Bradley, J., plurality opinion). A one-justice concurrence determined that the plaintiffs had standing for a different reason: that Wisconsin voters have a protected interest in requiring local election officials to comply with election law. *Id.* ¶¶ 164–66 (Hagedorn, J., concurring).

On whether clerks could choose to offer drop boxes as a ballot return device, the *Teigen* Court concluded they could not, for three main reasons. The majority began by combining the two subsections in Wis. Stat. § 6.84 into a "skeptical" lens though which to view absentee ballot statutes. It then interpreted Wis. Stat. § 6.87(4)(b)1., which provides that absentee ballots "shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." *Id.* ¶ 55. The majority concluded that the provision prohibited clerks from designating drop boxes for two reasons: (1) "an inanimate object, such as a ballot drop box, cannot be the municipal clerk . . . dropping a ballot into an unattended drop box is not delivery to the municipal clerk," *id.*; and (2) other statutes, particularly Wis. Stat. § 6.855 and Wis. Stat.

§ 5.81(3), describe absentee voting taking place at the clerk's "office." *Id.* ¶¶ 56–60. The Court recognized that this was not a reading of the statute's literal words, but concluded it was the "fairest interpretation." *Id.* ¶ 62.

The holding as applied to drop boxes in clerk's offices was unclear. The circuit below had concluded clerks could use drop boxes as long as they were in a staffed drop box. *Id.* ¶ 3. This Court did not weigh in on that issue, but it affirmed the lower court's ruling generally. *Id.* ¶ 87 ("The judgment and order of the Circuit Court is affirmed.").

III. Post-*Teigen* election litigation.

Since *Teigen*, lower courts and litigants have relied on it for two interpretive principles.

First, recent cases have relied on *Teigen's* proposition that Wis. Stat. § 6.84 requires absentee voting statutes to be construed though a "skeptical" lens. *See, e.g.*, *Brown v. WEC*, No. 2024AP0232 (Wis. Ct. App., Dist. II) (bypass petition pending); *Kormanik v. WEC,* 2024AP0408 (Wis. Ct. App., Dist. II) (bypass petition pending).

Second, litigants have relied on *Teigen's* reasoning to challenge elections policies aimed at assisting voters based on the theory that the specific tool is not explicitly authorized in Wisconsin statutes. *See, e.g., Brown,* No. 2024AP0232; *Sidney v. WEC*, No. 2024AP0190 (Wis. Ct. App., Dist. III).

ARGUMENT

Stare decisis is a central legal principle to our judicial system, but this Court wisely recognizes factors that counsel against it in specific cases. *Teigen* is one such case. It ignored the discretion given to clerks in choosing administrative tools needed to properly conduct elections and crafted a new "skeptical" interpretive lens based on Wis. Stat. § 6.84. Having made these errors in approach, the Court's majority interpreted Wis. Stat. § 6.87(b)(1). based on words not in the

provision and other statutes with different language and purposes. That misinterpretation has spread to other matters, where litigants and courts rely on *Teigen*'s interpretative approach to misread other statutes.

I. Stare decisis generally promotes integrity in the legal system and the rule of law, but departure from that rule is warranted where a case was unsound when decided and has proved unworkable in practice.

The doctrine of stare decisis is fundamental to the rule of law. *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. If all existing precedent were open to revision at all times, the judicial process becomes an exercise driven by judicial will. *Id.* ¶¶ 94–95. Stare decisis promotes balanced legal development and the integrity of the judicial system. *Id.* ¶ 95.

However, stare decisis not always the right result, and there are circumstances when a prior decision should be revisited. *Id.* ¶ 96. Specifically, it may be appropriate to overturn precedent when a decision: (1) has been undermined by changes in the law; (2) cannot be sustained based on new facts; (3) has become detrimental to "coherence and consistency in the law;" (4) is unsound in principle; (5) is unworkable in practice; or (6) implicates reliance interests. *Id.* ¶¶ 98–99. Under a seventh consideration, "the decision to overrule a prior case may turn on whether the prior case was correctly decided and whether it has produced a settled body of law." *Id.* ¶ 99.

The third, fourth, and fifth, and seventh principles apply here. The Commission agrees that, in the normal course, stare decisis is the right course of action, particularly in a case that was recently decided. But *Teigen* is among the exceptional cases that satisfies the criteria to depart from that course. Its holding is unsound: it misunderstands the interpretive framework for evaluating how clerks run

elections and relies on atextual interpretations of the election statutes. Also, as time has shown, the decision has been detrimental to coherence and consistency in the law and been unworkable in practice. And on the ground, it has probably invalidated votes that could have counted and will continue to do so until it is overruled.

II. *Teigen*'s interpretative approach to Wisconsin election law was unsound when decided.

The *Teigen* majority made three interpretative errors to reach its conclusion: (1) ignoring the discretion given to election clerks to utilize administrative tools to assist in properly conducting elections; (2) treating Wis. Stat. § 6.84, a general statute about policy and compliance with certain absentee provisions, as a "skeptical" rule of construction; and (3) misreading Wis. Stat. § 6.87(4)(b)1., providing for in-person return of voted ballots to the municipal clerk. Each of these choices was unsound when decided. Courts in at least two other states have concluded that language like that in Wis. Stat. § 6.87(4)(b)1. permits election officials to offer drop boxes.

A. *Teigen* ignored the discretion conferred on municipal clerks to utilize tools to assist in properly administering elections.

Wisconsin's election system relies on the efforts of more than 1,850 municipal clerks,[9] who work unceasingly to administer fair and secure elections. *Teigen*'s unstated premise is these clerks can take no steps to administer elections—an immense, complex effort taking place within strict time deadlines—unless that action is expressly authorized in an election statute. This view of Wisconsin

[9] Wis. Elections Comm'n, *Directory of Wisconsin Municipal Clerks*, https://elections.wi.gov/clerks/directory (last visited Apr. 22, 2024)

election law is incompatible with the design of Wisconsin elections statutes, which vest discretion to municipal clerks and local elections officials to choose tools to assist them in properly administering elections responsive to the needs of their jurisdictions.

The Wisconsin Legislature created a "highly decentralized system for election administration . . . [r]ather than a top-down arrangement with a central state entity or official controlling local actors, Wisconsin gives some power to its state election agency (the Commission) and places significant responsibility on a small army of local election officials." *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208 (citation omitted).

The statutes charge municipal clerks with the supervision of elections, including any duties necessary to properly conduct them: "Each municipal clerk has charge and supervision of elections and registration in the municipality. The clerk shall perform [certain enumerated] duties and *any others which may be necessary to properly conduct elections or registration* . . . ."[10] Wis. Stat. § 7.15(1). In addition to municipal clerks, the statutes confer authority on county clerks, municipal commissioners, county commissioners, and inspectors to carry out various elections-related duties. Wis. Stat. §§ 7.10, 7.20–.22.

Many elections provisions describe this type of broad authority, stating that municipal clerks and other local elections officials may make determinations about what is "necessary," "proper," and "practicable." *See, e.g.*, Wis. Stat. § 5.25(1) (selection of polling places); Wis. Stat. § 5.68(2) (procurement of election materials, supplies, and equipment),

[10] This mandate covers several absentee voting procedures, including the preparation and distribution of absentee ballots. Wis. Stat. § 7.15(cm), (j). So the Legislature did not intend to limit the discretion of municipal clerks to in-person voting.

Wis. Stat. § 5.15(1)(b) (aspects of the creation of wards); Wis. Stat. § 5.81(1) (ballot design); Wis. Stat. § 7.15(1)(d) (election notice preparation), 7.15(1)(f) (disciplinary actions again election officials); Wis. Stat. § 7.25(6) (setup and arrangement of polling places); Wis. Stat. § 7.36 (supervision of election inspectors); Wis. Stat. § 7.37(1) (polling place relocation on election day); Wis. Stat. § 7.31 (maintenance of order during elections, including requests for law enforcement).

When carrying out these numerous responsibilities, clerks may select tools to facilitate the administration of elections. This court has recognized that challenges to this type of practice—including creating processes for handling missing witness information, producing a streamlined absentee ballot application, and even collecting completed absentee ballots at staffed park events—are "not [claims] of improper electoral activity. Rather, they are technical issues that arise in the administration of every election." *Trump*, 394 Wis. 2d 629, ¶ 31. Drop boxes are no different. They are simply another tool to facilitate elections administration within the province of municipal clerks to authorize.

The *Teigen* majority did not confront or explain how its approach was consistent with clerks' statutory authority and responsibility to devise tools to properly conduct elections. It confused situations where courts have required explicit authority for the state to confine individuals' conduct with administrative tools to facilitate in the administration of elections.

B. *Teigen*'s interpretation of Wis. Stat. § 6.84 is unsound: it requires no reading the statutes through a "skeptical lens."

After failing to recognize how the statutes provide clerks with discretion to choose tools that assist in properly administering elections, *Teigen* went on to misread both

components of Wis. Stat. § 6.84, adding text in order to reach its holdings.

Wisconsin Stat. § 6.84 has two subsections: a policy subsection stating that the privilege of voting by absentee ballot must be carefully regulated to prevent fraud and abuse, Wis. Stat. § 6.84(1); and a mandatory application subsection, requiring that specific provisions of the absentee voting procedures must be followed for a ballot to be counted, Wis. Stat. § 6.84(2). The *Teigen* majority combined these two subsections to create a general principle that "Legislative Policy Directs Us to Take a Skeptical View of Absentee Voting." *Teigen,* 403 Wis. 2d 607, title preceding ¶ 53. It did not explain its precedent for combining statutory subsections to mean something beyond their text, what this "skepticism" translated to as a legal principle, or even how this view served the goal of preventing fraud or abuse in absentee voting.

As for Wis. Stat. § 6.84(1), the idea that a legislative policy statement could "Direct[ ] [the Court] to Take a Skeptical View of Absentee Voting" strains the principles of statutory interpretation. *Id.* When the Legislature wants a statute to be interpreted in a particular way, it does so by choosing the correct words in that statute, not by codifying a policy-based "canon." Scalia & Garner, *Reading Law*, 233 (2012). Wisconsin Stat. § 8.64(1) explains the Legislature's reason for regulating absentee voting more closely than in-person voting: it was concerned about fraud and abuse. The provision is not a license to interpret absentee ballot provisions in a particular way.

As to Wis. Stat. § 6.84(2), the Court treated it as standing for principles the statute nowhere states. Wisconsin Stat. § 6.84(2) says only that certain enumerated statutes relating to the absentee ballot process "shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted." *Teigen,* 403 Wis. 2d 607, ¶ 53. This means that if a ballot is cast in a

way that violates specific absentee ballot procedures, it cannot be counted. For example, an absentee ballot cannot be counted if the voter fails to complete the required witness certification or does not return the absentee ballot on time. *See* Wis. Stat. § 6.87(4)(b)1. Treating those specific procedures as mandatory distinguishes them from the general rule that the election statutes are to be construed as directory only, and satisfied as long as there is substantial compliance. Wis. Stat. § 5.01(1).

The *Teigen* Court treated "mandatory" not as a standard for compliance, but instead as an interpretive rule, allowing it to add words to statutes to reach a meaning.

The Court relied on *State ex rel. Ahlgrimm v. State Elections Board*, 82 Wis. 2d 585, 264 N.W.2d 152 (1978), for this idea. *Teigen*, 403 Wis. 2d 607, ¶ 54. But *Ahlgrimm* was about something else: not how to read a statute, but whether candidates must strictly follow explicit commands in a mandatory statute.

Ahlgrimm addressed mandatory filing deadlines for candidates and held they must be "strictly adhered to" in order for candidates to appear on the ballot. 82 Wis. 2d at 592–93. The adverb "strictly" did not modify how to construe a statute; it modified how a candidate must comply with an unambiguous statutory deadline.[11]

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[11] *Lee v. Paulson* also has been cited for the idea that Wis. Stat. § 6.84(2) is a "strict construction requirement, applicable to statutes relating to the absentee ballot process." 2001 WI App 19, ¶ 7, 241 Wis. 2d 38, 623 N.W.2d 577. But *Lee* did not conduct any statutory interpretation, either. It addressed whether absentee ballots not requested in writing, as statutorily required, could be counted. *Id.* ¶ 8. *Lee* does not support a "strict" interpretive rule for all absentee statutes.

C. *Teigen*'s interpretation of Wis. Stat. § 6.87 is unsound: the statute does not limit clerks' discretion to designate a tool for the proper return of absentee ballots.

Applying these interpretive errors—ignoring the discretion conferred on clerks, and treating section 6.84 as a "skeptical" lens—the *Teigen* Court felt equipped to add words to Wis. Stat. § 6.87(4)(b)1.'s ballot return provision that the statute nowhere includes.

Section 6.87(4)(b)1. allows voters to return absentee ballots by mail or "in person to the clerk." The statute does not purport to limit how clerks manage the return of ballots to them, but the Court offered two reasons why the statute did not permit clerks to utilize drop boxes: (1) "to" must mean handing the ballot to the clerk rather than to a receptacle created by the clerk; and (2) because other statutes contemplated having events like voting occur at the "clerk's office," Wis. Stat. § 6.87 must impliedly be limited to the clerk's office, too.

Both these interpretations were unsound, and appellate courts in other states have interpreted similar language the opposite way.

1. Section 6.87(4)(b)1. says nothing about a direct handoff to the municipal clerk, and clerks can designate places and people where ballots can be returned.

Wisconsin Stat. § 6.87(4)(b)1. says that after the voter votes and places her ballot in the envelope and seals it, "the envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." The Court's conclusion that the phrase "to the clerk" requires an in-person handoff, forbidding the clerk from designating a

return receptacle, finds no support in the prepositional phrase.

Statutory interpretation "begins with the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Courts "attempt to find the common sense meaning and purpose of the words employed in the statute." *State ex rel. Reimann v. Cir. Ct. for Dane Cnty.*, 214 Wis. 2d 605, 617, 571 N.W.2d 385 (1997). Statutes must be logically interpreted and cannot be construed in contravention to common sense. *State v. Clausen*, 105 Wis. 2d 231, 246, 313 N.W.2d 819 (1982). And courts may not add words into a statute that are not there. *Jefferson v. Dane County*, 2020 WI 90, ¶ 25, 394 Wis. 2d 602, 951 N.W.2d 556.

Section 6.87(4)(b)1. permits absentee ballots to be returned by "deliver[y] in person, to the municipal clerk." This phrase says nothing suggesting that returning a cast ballot "to the clerk" must occur in a hand-to-hand transaction. Rather, the provision's generic language permits the clerk to devise sensible, safe methods for voters to return their ballots, including through secure receptacles like drop boxes.

Secure drop boxes approved by the municipal clerk accomplish the statute's instructions. An absentee ballot is personally delivered to a municipal clerk when it is placed in a drop box authorized by the municipal clerk. Under the Commission's former guidance, ballots should be retrieved from drop boxes and returned to the clerk's office by authorized representatives of the clerk.[12] Then, a clerk or authorized representative places them in a secure storage location until Election Day, just like absentee ballots mailed or delivered to the clerk's office. *See* Wis. Stat. § 6.88. A ballot

[12] Authorized representatives are election officials under Wis. Stat. § 5.02(4e), and are legally equivalent to the clerk under Wis. Stat. § 5.02(10).

deposited into an authorized secure drop box has been "delivered in person, to the municipal clerk," within the meaning of Wis. Stat. § 6.87(4)(b)1.

The *Teigen* Court assumed that "to the clerk" prevents ballot return to a receptacle because "[a]n inanimate object, such as a ballot drop box, cannot be the municipal clerk." *Teigen*, 403 Wis. 2d 607, ¶ 55. But "to" does not address whether the clerk can designate a receptacle or other person for return. And when election statutes require voters to have in-person contact with a clerk, other officer, or witness, they say so.

As a starting place, "municipal clerk" is an official role, not the human being who happens to have the job at a given time. Wisconsin Stat. § 5.02(10) defines "municipal clerk" as a general term that includes city, town and village clerks, the director of city elections commission, and authorized representatives of these officials.

Further, an item is delivered "to" someone when it is placed where the person designated or can be expected to find it—for example, on a desk or in a mailbox. The most relevant dictionary definition of "to" is used in the example phrase, "gives a dollar to the man." *To*, Merriam Webster Dictionary (12th ed. 2024). It means: "a function word to indicate the receiver of an action or the one for which something is done or exists." *Id.* A direct, hand-to-hand transaction is not required or even implied by the word "to." Contract cases dating back to the 1800's describe vendors delivering various goods to the purchaser at a place he designates. *See, e.g., Palmer v. Yager*, 20 Wis. 91, 92 (1865) (contract providing "to deliver to [buyer]" sheep and wool, "said wool to be delivered at such place . . . as the said [buyer] shall designate").

When elections statutes require voters to have person-to-person contact with a clerk or other official, they say so explicitly. Some require electors to sign certain affidavits for voter registration "in the presence of the clerk or any officer

authorized by law to administer oaths." Wis. Stat. § 6.15(2)(a). Same-day registrants must sign forms "in the presence of the election registration official or inspector." Wis. Stat. § 6.55(2)(b). Damaged ballots must be remade "in the presence of witnesses." Wis. Stat. § 5.85(3). And the very same provision as the return requirement, section 6.87(4)(b)1., requires a voter marking an absentee ballot to do so "in the presence of a witness." Wis. Stat. § 6.87(4)(b)1. These provisions require voters to act in another person's presence because of the nature of the task at issue: another person's presence is required to confirm the voter's identity or conformance with voting procedures, for example.

In contrast, placing a completed ballot into a drop box designated by the clerk requires no confirmation of the voter's identity or compliance with voting procedures. Neither does returning an absentee ballot by mail. Unsurprisingly, section 6.87(4)(b)1. says nothing about accomplishing the drop-off "in the presence of" anyone. In-person interaction is not needed to return an already-voted ballot.

The *Teigen* majority not only read a requirement into Wis. Stat. § 6.87(4)(b)1. that does not exist; it also ignored the ramifications of its reading. The notion that clerks must either personally be available or designate staff (if they are lucky enough to have them) to accept ballots would hamstring those officials during their busiest time leading up to Election Day.

2. Section 6.87(4)(b)1. says nothing about delivering ballots to the "clerk's office."

The *Teigen* Court added language to section 6.87(4)(b)1. in a second way, changing "clerk" to "clerk's office." *Teigen*, 403 Wis. 2d 607, ¶ 62. This reading similarly ran afoul of *Kalal* and *Jefferson* and basic principles of statutory interpretation.

Wisconsin Stat. § 6.87(4)(b)1. provides for return of an absentee ballot "to the municipal clerk." The word "office" appears nowhere. It is unlike many other statutes that describe events happening in the "clerk's office."

The election statutes are peppered with such statutes. They include allowing voters voting absentee to vote "in person in the office of the municipal clerk," Wis. Stat. § 5.81(3); and make absentee ballot applications "at the office of the . . . clerk," Wis. Stat. § 6.86(1)(a)2. *See also Teigen*, 403 Wis. 2d 607, ¶ 220 & n.9 (Walsh Bradley, J., dissenting) (listing multiple examples).

The *Teigen* court focused on Wis. Stat. § 6.855, which governs alternate ballot sites for in-person absentee voting. The majority said this statute "shows the unlawfulness of ballot drop boxes," *id.* ¶ 56, but it is unclear why. Wisconsin law allows municipalities to designate sites other than the clerk's office for in-person absentee voting leading up to the election. Wis. Stat. § 6.855(1), (5). That says nothing about whether clerks can designate a drop box for the return of already-voted ballots.

The Court similarly misinterpreted Wis. Stat. § 5.81(3) by analyzing it out of context. Wisconsin Stat. § 5.81(3) provides that, for municipalities using electronic voting systems, "absentee ballots may consist of ballots utilized with that system or paper ballots and envelopes voted in person in the office of the municipal clerk or voted by mail." Wis. Stat. § 6.87(4)(b)1. It means that in these municipalities, absentee voters may vote using ballots that are compatible with the electronic voting system or with paper ballots that are completed at the clerk's office or elsewhere if the voter received their ballot by mail. Wis. Stat. § 5.81(3) says nothing about how absentee ballots are *returned*.

It is a fundamental principle of statutory interpretation that courts may not insert words into statutes to achieve a specific result. *State v. Schultz*, 2020 WI 24, ¶ 49, 390 Wis. 2d

570, 939 N.W.2d 519. And when the Legislature chooses to use language in one statute but omits that language from a related or closely located statute, courts presume that a different meaning was intended. *See Responsible Use of Rural & Agric. Land v. PSC,* 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888.

This is especially true when the differences are found in multiple subsections of the same statute. *Id.*; *Oney v. Schrauth*, 197 Wis. 2d 891, 902, 541 N.W.2d 229 (Ct. App. 1995). Here, the very statute at issue—Wis. Stat. § 6.87—refers to the "office" of the municipal clerk four times, but it did not do so for ballot return. Wis. Stat. § 6.87(4)(b)4., (3)(a). If the Legislature wanted in-person delivery of absentee ballots to take place only at the clerk's office, that is what it would have said.

The *Teigen* majority realized that it was departing from a plain-language approach, discarding it as "literalistic," in favor of a "fairest interpretation" standard. *Teigen*, 403 Wis. 2d 607, ¶ 62. The Court cited as a justification the goal of avoiding the result of having ballots pressed upon clerks at places like the grocery store. *Id.* ¶¶ 61–62.

The Commission is aware of no other Wisconsin decision that has blessed abandoning plain language in favor of whatever a judge decides is the "fairest interpretation." That standard appears to lie in the eye of the beholder, but what is fair to one person may not seem so to another. The statutory text must guide decision making.

And the reason the Court offered for this path—an expressed concern about intruding on the personal lives of municipal clerks, was unjustified. Municipal clerk is a position, not an individual. But in any case, if clerks choose to offer receptacles for in-person return in addition to their offices, they may designate those, and only those, as delivery sites. They are under no legal obligation to accept ballots from fellow shoppers at the grocery store.

3. Drop boxes are widely used nationwide, and other states' appellate courts have construed language like Wis. Stat. § 6.87(4)(b)1. to permit clerks to offer drop boxes as an in-person return method.

Drop boxes are commonly used for elections administration nationwide. In 2020, for example, 39 states in addition to Wisconsin employed them.[13] Further, two other states' appellate courts have construed language similar to Wis. Stat. § 6.87(4)(b)1. as permitting election officials to designate drop boxes for in-person delivery of absentee ballots to the clerk.

In *Ohio Democratic Party v. LaRose*, 159 N.E.3d 1241 (Ohio Ct. App. 2020), the Ohio Secretary of State sought to prohibit county boards of elections from designating absentee ballot drop boxes other than in county elections board offices. The relevant statute at that time, Ohio Revised Code 3509.05, provided that an elector can mail her ballot or "personally deliver it to the director." *LaRose,* 159 N.E.2d at 1250. The court of appeals held that this language permitted county boards of elections to designate drop boxes at locations other than at their offices. *Id.* at 1254.

In so ruling, the court reasoned that "deliver" did not indicate whether the ballot must be returned to the board of elections office and that "[g]enerally, a court cannot add a requirement that does not exist in a statute." *Id.* at 1250–51 (citations omitted). The court contrasted the statute with other Ohio laws that did require activities to be conducted at the "office" of the board. *Id.* at 1251. The court also noted the internal inconsistency of the secretary's position that

[13] Axel Hufford, *Ballot Drop Boxes in the 2020 Elections, Stanford-MIT Healthy Elections Project* (Mar. 10, 2021), https://web.mit.edu/healthyelections/www/sites/default/files/2021-06/Ballot_Drop_Boxes.pdf.

"deliver" did include transmittal to a person other than the board director, and even included a drop box located within the office. *Id. at* 1251–52. The court concluded:

> 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 R.C. 3509.05(A).

Id. at 1252.

Similarly, in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), the Pennsylvania Supreme Court held that the county election board could choose to accept hand-delivered absentee ballots at locations other than the board's offices, including at designated drop boxes. The statute at issue there permitted voters to return their ballots in person "to said county board of election." *Id.* at 360. The court pointed out that the statute did not include the word "office." *Id.* While the court found that the opposing party also presented a reasonable interpretation of that language, their interpretation carried less weight because it restricted voters' rights. *Id.* at 361.

The language in Wis. Stat. § 6.87(4)(b)1. is not meaningfully distinguishable from the statutory language at issue in *LaRose* and *Boockvar*. Each statute allows in-person delivery to the local clerk or board of elections, and none requires that such delivery occur at their "office." The Ohio and Pennsylvania courts concluded that this language allows local clerks to designate drop boxes for that in-person delivery if they choose. This Court should do the same.

III. *Teigen* has created substantial confusion in the law and failed to produce settled precedent.

Teigen's teachings—that absentee voting statutes must be construed through a "skeptical" lens and that clerks can administer election laws using only those tools specifically set forth in statute—have created substantial confusion in the law and proved unworkable as guiding precedent.

First, litigants have treated Wis. Stat. § 6.84 as a principle of construction. This issue is present in three matters pending before this Court and featured in additional cases in the lower cases.

One is this case. Petitioners maintain a constitutional challenge to Wis. Stat. § 6.84 built on *Teigen's* "skeptical view" of absentee voting, contending that Wis. Stat. § 6.84 impermissibly differentiates in-person from absentee voting and denies absentee voters adequate constitutional protections and disenfranchises them. (R. 2:27–28.) A second is *Brown v. Wisconsin Elections Commission*, No. 2024AP0232 (Wis. Ct. App., Dist. II) (bypass petition pending), where the circuit court determined that Wis. Stat. § 6.84 supplied "the lens through which absentee voting statutes are . . . viewed," and then construed the relevant statutes based on that premise. (R. App. 117 (quoting *Teigen*, 403 Wis. 2d 607, ¶ 103 (Roggensack, J., concurring)).) A third is *Kormanik v. Wisconsin Elections Commission,* No. 2024AP0408 (Wis. Ct. App., Dist. II) (bypass petition pending), where the circuit court asserted that Wis. Stat. § 6.84 "needs to be recognized as setting very firm guardrails to curb the analysis." (R. App. 137.)

Litigants have made similar arguments in cases not before this Court. *See, e.g., Rise, Inc. v. WEC*, No. 22-CV-2446; 2022AP1838,[14] (intervenor contending that the definition of "address" in absentee witness certification requirement must be construed to add words); *Sidney v. Wis. Elections Comm'n*, No. 22-CV-300, 2024AP0190, (R. App. 143–68 (plaintiff contending that statutes related to absentee voting should be warily construed).)

Second, *Teigen's* express language requirement has invited litigation challenging any procedural tool that a clerk might utilize to assist voters that is not explicitly found in the statutes.

Brown is again illustrative. There, the Racine clerk used a mobile voting unit parked at properly designated alternate absentee ballot sites that allowed her to transport voting equipment and materials easily and efficiently during the in-person absentee voting period. Relying on *Teigen*, the circuit court concluded that because the alternate-site statute, Wis. Stat. § 6.855, does not explicitly authorize mobile units, Racine's clerk had erred in utilizing that tool. (R. App 111–27.)[15]

Similarly, in two additional Wisconsin cases, plaintiffs challenged an online tool, the Commission's MyVote voting information website, that helps clerks fulfill email requests for absentee ballots. Plaintiffs in both cases relied on *Teigen*

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[14] *Rise, Inc. v. WEC*, No. 22-CV-2446, 2022 WL 21727750 (Wis. Cir. Ct. Dane Cnty. Oct 3, 2022), Memo. in Support of Mot. to Intervene; *see* Intervention decision, *Rise, Inc. v. WEC*, No. 2023 WI App 44, ¶ 2, 2023 WL 4399022 (Wis. Ct. App. July 7, 2023) (unpublished).

[15] *Brown* also involves a challenge to how Racine designated alternate in-person voting sites, holding that a site can be designated only if located in a voting ward with past voting patterns mirroring those of the ward where the clerk's office is located. (R. App. 111–27.)

to assert that if no statute expressly permits such a tool, clerks and the Commission cannot utilize it. *Sidney*, No. 22-CV-300, 2024AP0190, (R. App. 166); *Stone v. Wis. Elections Comm'n,* no. 22-CV-0958 (Wis. Cir. Ct. Kenosha Cnty.), (R. App. 170.)

These many applications of *Teigen* have already led to misinterpretations of the relevant statutes. They illustrate why the case is unworkable in practice and has been detrimental to coherence and consistency in the law. *Johnson Controls, Inc.*, 264 Wis. 2d 60, ¶¶ 98–99.

IV. Barred from using drop boxes for ballot return, clerks must invalidate ballots that arrive too late due to U.S. Postal Service delays.

Beyond its application to interpreting other election laws, *Teigen* has likely led to the unnecessary rejection of ballots. That rejection—not required by our statutes—will continue as long as *Teigen* remains in force.

In the 2022 general election, 763,775 Wisconsin residents voted by casting absentee ballots. This number represents almost 30 percent of voters in that election, an increase from just 6 percent of general election voters 20 years ago, in 2002.[16] Drop boxes afford absentee voters important benefits: the ability to deliver ballots easily when a voter lives far from the clerk's office and a ballot-return option open 24-7 for voters whose work or caregiving hours straddle the clerk's office's normal hours.

They also offer the certainty that even last-minute voters or those who received their absentee ballots late can return their ballot in time to be counted. Drop boxes are an especially helpful alternative to returning a ballot via the

[16] Wis. Elections Comm'n, *Voter Turnout*, (choose "General Election Voter Registration and Absentee Statistics 1984–2022" hyperlink), *supra*.

Postal Service. In recent years, the U.S. Postal Service has seen significant delays affecting certain regions of the United States, including Wisconsin.

In 2020, the attorneys general of 14 states, including Wisconsin, sued U.S. Postmaster General Louis DeJoy challenging operational changes implemented before the 2020 general election, and that had resulted nationwide mail delays, especially for election mail. *Washington v. Trump*, 487 F. Supp. 3d 976, 979 (E.D. Wash. 2020). As for Wisconsin specifically, the lawsuit alleged that the closure of several Madison-based mail distribution centers meant that all Madison mail had to be routed 90 miles to Milwaukee for sorting and routing, and that Wisconsin's Lakeland District, which includes Milwaukee, had not met on-time delivery targets for four years. (R. App. 206–12.) After the states obtained a preliminary nationwide injunction and service improved, the parties settled the case and the lawsuit was dismissed. *Washington*, 487 F. Supp. 3d at 984.

However, mail delays still regularly affect Wisconsin residents. For mail statewide, only 78 percent of outbound mail delivery is delivered on time, according to Postal Service statistics so far in 2024. This percentage falls below the 89 percent of on-time mail in the same period last year, and it is significantly below of the national on-time target of 92.50 percent.[17]

That delivery problem appears worse in certain regions of the State. In January 2024, Representative Marc Pocan wrote to Postmaster General Louis DeJoy reporting widespread delays and disruptions to mail delivery in South

[17] United States Postal Service, *USPS Service Performance Dashboard*, https://spm.usps.com/#/main (last visited Apr. 22, 2024; (R. App. 213–14).

Central Wisconsin.[18] According to news reports cited in the letter, some Madison residents did not receive mail for an entire week. Just a few months later, then-U.S. Representative Mike Gallagher and State Representative Joel Kitchens of the First Assembly District wrote similar letters to the Postmaster General DeJoy after residents complained about late and unreliable mail service in their districts for months.[19] In a response to Representative Gallagher, the Postal Service acknowledged the substandard postal services, attributing the delays to mail volume and staffing.[20] *See also* Office of Inspector General, U.S. Postal Service, Mail Delivery, Customer Service, and Property Conditions Review-Select Units, Milwaukee, WI Region, Audit Report, October 17, 2022 (identifying delayed mail at three of the four Milwaukee facilities that were reviewed, including 19,254 pieces of delayed mail on one morning that an audit took place).[21]

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[18] Press Release, Mark Pocan, Representative, House of Representatives, Pocan Calls on DeJoy to Address Postal Delays in South Central Wisconsin (Jan. 24, 2024), https://pocan.house.gov/media-center/press-releases/pocan-calls-dejoy-address-postal-delays-south-central-wisconsin; (R. App. 216–19).

[19] *Lawmakers Ask Postal Service for Answers*, Door County Pulse (Feb. 1, 2024), https://doorcountypulse.com/lawmakers-ask-postal-service-for-answers/; (R. App. 223).

[20] Debra Fitzgerald, *USPS Admits Mail Delays, Says They're Addressed*, Door County Pulse (Mar. 7, 2024), https://doorcountypulse.com/usps-admits-mail-delays-says-theyre-addressed/; (R. App. 231, 236–37).

[21] Office of Inspector General, United States Postal Service, *Mail Delivery, Customer Service, and Property Conditions Review, - Select Units, Milwaukee Region,* Audit Report, Report Number 22-147-R23 (Oct. 17, 2022), https://www.uspsoig.gov/sites/default/files/reports/2023-01/22-147-R23.pdf; (R. App. 243).

The Postal Service recommends that voters mail their completed absentee ballots at least one week prior to the applicable state's deadline.[22] But voters may not place their absentee ballots in the mail early enough—or even receive their absentee ballot in time—to permit them to allow for these potential delays in utilizing U.S. mail return. And voters may be unaware of the Postal Service's recommendation or that they need longer than a few days for mail delivery.

By avoiding Postal Service delays, drop boxes help ensure that voters have an opportunity to cure ballot defects by the deadline of 8:00 p.m. on election day.[23] Wis. Stat. § 6.87(6), (9). For voters who wish to or can only vote during the week leading up to an election, drop boxes are a reliable and convenient option for ballot return.

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[22] United States Postal Service, *Voting by Mail* (Mar. 13, 2021), Voting by Mail (usps.com).

[23] As the Wisconsin Elections Officials' amicus brief explains, when a clerk receives an absentee ballot with a defective witness certificate, the clerk may contact the voter and allow them to correct the defect when time permits. The earlier that clerks receive absentee ballots, the more time clerks have to identify defects and provide an opportunity to for voters to cure. By eliminating Postal Service delays, drop boxes facilitate the ballot-curing process. (Br. of Amici Curiae Wis. Election Officials 18.)

CONCLUSION

For the reasons provided above, this Court should overrule *Teigen* and conclude that drop boxes are permitted under Wisconsin elections statutes.

Dated this 24th day of April 2024.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,020 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 24th day of April 2024.

Electronically signed by:

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