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SUPREME COURT OF WISCONSIN
Appeal No. 2024AP000164

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

Plaintiffs-Appellants,

GOVERNOR TONY EVERS,

Intervenor-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Respondent,

WISCONSIN STATE LEGISLATURE,

Intervenor-Respondent.

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

REPLY BRIEF OF INTERVENOR-APPELLANT GOVERNOR TONY EVERS

Dated May 6, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

INTRODUCTION 7

ARGUMENT 7

I. The statute's plain text authorizes drop boxes 7

A. This Court should curtail *Teigen*'s flawed application of Section 6.84(2) 7

B. The Legislature perpetuates *Teigen*'s error of ignoring the statutory grant of authority to municipal clerks 8

C. The Legislature relies on irrelevant provisions 9

II. Multiple grounds support departing from stare decisis here 13

CONCLUSION 15

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a) 17

TABLE OF AUTHORITIES

Cases

Brey v. State Farm Mut. Auto. Ins. Co.,
2022 WI 7, 400 Wis. 2d 417, 970 N.W.2d 1 10

California v. Acevedo,
500 U.S. 565 (1991) 15

Kimble v. Marvel Ent., LLC,
576 U.S. 446 (2015) 13

State ex rel. Ahlgrimm v. State Elections Bd.,
82 Wis. 2d 585, 263 N.W.2d 152 (1978) 7

Teigen v. Wis. Elections Comm'n, 2022 WI 64,
403 Wis. 2d 607, 976 N.W.2d 519 ..... *passim*

Wis. Voter All. v. Secord,
2023AP36, 2023 WL 8910882 14

Statutes

52 U.S.C. § 10307 10

Wis. Stat. § 6.84 ..... 7, 8

Wis. Stat. § 6.855 ..... 7, 9

Wis. Stat. § 6.87 ..... *passim*

Wis. Stat. § 7.08 8

Wis. Stat. § 7.10 ..... 8, 12

Wis. Stat. § 7.15 ..... 8, 9, 10, 12

Wis. Stat. § 7.41 ..... 9, 10

Other Authorities

2021 Senate Bill 203 14

2021 Senate Bill 209 14

INTRODUCTION

The Legislature's brief is notable not for what it says, but, rather, for what it does not say. The Legislature dodges engaging with statutory text, the parties' stare decisis arguments, and its prior position on this very issue. This Court should uphold the statutory commands of the enacted law and overrule *Teigen.*

ARGUMENT

I. The statute's plain text authorizes drop boxes.

The Legislature cannot identify a statute that bars drop boxes. And it cannot justify its argument that they must be expressly permitted. Instead, the Legislature ignores large portions of statute, cherry picks provisions, and misapplies statutory interpretation methods to justify inserting "office" into the statute.

A. This Court should curtail *Teigen*'s flawed application of Section 6.84(2).

Teigen transformed Section 6.84(2) from a provision that establishes consequences for procedural noncompliance into a license to treat the exercise of the right to vote via absentee ballot with "skeptic[ism]." *Teigen v. Wis. Elections Comm'n,* 2022 WI 64, ¶¶52 n.25, 53, 403 Wis. 2d 607, 976 N.W.2d 519. But that is simply not the purpose of Section 6.84(2). Like other mandatory election statutes, it dictates the consequences for a violation. *See, e.g.*, *State ex rel. Ahlgrimm v. State Elections Bd*., 82 Wis. 2d 585, 591-93, 263 N.W.2d 152 (1978) (mandatory nominating deadlines). But nothing in the text of Section 6.84(2) dictates ***how*** to determine if there is a violation—it merely dictates ***what*** to do when there is one.

Extending *Teigen*'s interpretation of the effect of Section 6.84(2), the Legislature argues that "[i]nterpreted through [the] lens [of Section 6.84(2)], 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." (Leg. Br. at 44) That

interpretation not only inserts words into Section 6.87(4)(b)1.,[1] it also reads too much into the text and purpose of Section 6.84(2), which simply provides that ballots cast in contravention of ***actual*** statutory requirements cannot be counted. The Court should cabin Section 6.84(2) to its plain language and purpose, and limit its function to setting the consequences for noncompliance, rather than converting it into a skeptical interpretive gloss that vaguely authorizes intrusions on the constitutionally protected right to vote.

B. The Legislature perpetuates *Teigen*'s error of ignoring the statutory grant of authority to municipal clerks.

The Legislature concedes Wisconsin's election system "gives authority to municipal clerks to oversee election procedures within their jurisdictions," (Leg. Br. at 49), but does not once cite Section 7.15(1), which authorizes clerks to do certain enumerated tasks, along with "any others which may be necessary to properly conduct elections or registration." (Gov. Br. at 17) Indeed, Wis. Stat. ch. 7 authorizes clerks to administer elections in a manner that facilitates access to the franchise, identifying as a "fact that ***election officials should help, not hinder, electors in exercising their voting rights***." Wis. Stat. § 7.08(3)(b) (emphasis added).

The Legislature asserts that the grant of authority to clerks within Wisconsin's highly decentralized election administration system "does not authorize the clerks to implement absentee-ballot collection measures that are incompatible with the relevant laws." (Leg. Br. at 49) But as noted below, drop boxes ***are*** compatible with the law. And the Legislature cannot now run from the authority given in Section 7.15(1), which the Legislature itself has previously relied upon to argue that the authority to "adopt or enforce any rules on […] ballot drop boxes […] ***falls expressly to local election officials***. *See* Wis. Stat. §§ 7.10, 7.15[.]" (*See infra,* Chart A (emphasis added))

[1] Section 6.87(4)(b)1. ***does not*** **"**explicitly reference[] in the statute ... the clerk's office[.]" (Leg. Br. at 4)

C. The Legislature relies on irrelevant provisions.

The Legislature ignores the plain text of Section 6.87(4)(b)1., which provides that absentee ballots can be returned "to the municipal clerk" and lacks limitations on how a clerk can receive ballots. Section 6.87(4)(b)1. does not mention the municipal clerk's "office" nor dictate that the clerk personally receive the ballot—as other provisions do. (Gov. Br. at 11, 14) Instead, the Legislature relies on a handful of inapposite provisions to incorrectly contextualize the return provision.

First, the Legislature argues that drop boxes are invalid alternate absentee ballot sites under Wis. Stat. § 6.855. (Leg. Br. at 44-45) But Section 6.855(1) governs how certain clerk functions may be moved in full to a different place for what is commonly referred to as "in-person absentee voting,"[2] *i.e.* where electors request ***and*** vote absentee ballots. No one is arguing that drop boxes are allowable because they qualify as alternate absentee ballot sites. Section 6.855 relates chiefly to a different voting method—in-person absentee voting—and says nothing about a clerk's general authority to establish drop boxes to facilitate the return of ballots delivered per Section 7.15(1)(cm) and returned per Section 6.87(4)(b)1.

Second, the Legislature points to Section 7.41(1), which allows public access to observe in-person absentee ballot vote ***casting*** as a reason why ballot ***return*** cannot occur at a drop box. (Leg. Br. at 45-46) Once again, the Legislature incorrectly draws on a provision dealing with in-person absentee ***voting*** to make a point about ballot ***return*** under Section 6.87(4)(b)1. Section 7.41(1) does not provide for public observation of voters returning delivered absentee ballots to drop boxes, but nor does it do so with the return of ballots to a mailbox or post office.

[2] *See* Wis. Elections Comm'n, *What is in-person absentee voting and how can [I] do it?, available at* https://elections.wi.gov/node/1290. Ballots distributed ***at*** the clerk's office or ***at*** an alternative site must be voted on-site. Wis. Stat. § 6.87(3).

Section 7.41(1) need not say that such activities can be observed because, whether a ballot is dropped in a mailbox or a drop box, it is necessarily in public.[3]

Ultimately, the Legislature does not identify any provision expressly prohibiting drop boxes or ambiguously drafted such that proper tools of statutory construction suggest the best reading prohibits drop boxes. Instead—concerned that a "hyper-literal interpretation," *Teigen*, 2022 WI 64, ¶61, would enable ballot delivery to clerks shopping at their local grocery—the Legislature embraces *Teigen*'s "fairest interpretation"[4] that delivery must occur "at the office where [the] official conducts business[.]" (Leg. Br. at 14-15) That interpretation is based upon the *Teigen* Court's conclusion that a clerk "may not perform … statutory duties 'at any location beyond those statutorily prescribed.'" (*Id*. at 15 (*quoting Teigen*, 2022 WI 64, ¶61)) But this "fairest interpretation" falls flat: if clerks must do all their duties only at their offices, then they could not, for example, go to a copy shop to "[p]repare the necessary notices and publications," Wis. Stat. § 7.15(1)(d), or go to the local high school to assist in "conducting educational programs," § 7.15(9). Notably, the Legislature's argument is divorced from the reality that, currently, several hundred municipal clerks use P.O. boxes as their official mailing addresses,

[3] Anyone is free to observe these activities at public locations so long as they do not intimidate or threaten voters. *See, e.g.*, 52 U.S.C. § 10307(b).

[4] "Fairest interpretation" is not the "well-established component of statutory analysis" that the Legislature asserts. (Leg. Br. at 32) The Legislature equates the phrase "fairest interpretation" with cases where the Court said it was determining the "fair meaning of the text itself." (*Id.*) But the latter is a principle derived from this Court's emphasis on the whole-text canon, *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶¶11, 13, 400 Wis. 2d 417, 970 N.W.2d 1, not grounds to convert one phrase to something else entirely. The Legislature cites to three cases from the United States Supreme Court that use the phrase "fairest interpretation" or "fairest reading" (Leg. Br. at 32) but, upon closer look, the phrase in each case is used sparingly (1-2 times) and only in the context of interpreting patently ambiguous terms or phrases—a far cry from relying on a "fair interpretation" lens to decide that the Legislature meant to insert a word that does not appear.

meaning those clerks already must collect ballots from inanimate receptacles outside their offices.[5]

Moreover, the Legislature's response avoids taking a position on how it believes clerks ***are*** permitted to receive ballots delivered in person to their office. No wonder. Although the Legislature claims that it, and *Teigen*, support a "plain language" reading of the words "delivered ... to the municipal clerk," only two potential readings in *Teigen* include "plain language" interpretations that offer directions a clerk could follow. The first is one which requires a literal hand-to-hand transfer of absentee ballots or a "person-to-person" interaction. *See, e.g.*, 2022 WI 64, ¶¶175, 177 (Hagedorn, J., concurring). But such a reading would be impractical and hyper-literal.[6] The other reading, endorsed by Petitioners, WEC, the Governor, and *amici* clerks reads "to the municipal clerk" as a provision addressing how voters ***return*** their ballots, not one on how clerks may effectuate receipt, and encompasses delivery to receptacles the clerks have designated, consistent with how "delivery to" has traditionally been understood. (*See* Pet. Br. 13-16; WEC Br. at 22-25)

By comparison, a "staffed drop box" middle ground[7] is a policy decision that implicitly concedes that the statute gives clerks ***some*** ability to accept absentee ballots other than by hand, but limits that universe by inserting a court-created requirement that drop boxes be "staffed." *Teigen*, 2022 WI 64, ¶3. That limitation is both atextual and ambiguous (*see* Gov. Br. at 20-21), and therefore cannot stand.

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[5] *See* Wis. Elections Comm'n, WI Municipal Clerks Updated 4-19-2024, *available at* https://elections.wi.gov/sites/default/files/documents/WI%20Municipal%20Clerks%20Updated%204-19-2024.pdf.

[6] It also ignores statutory context. The election statutes include: (a) language indisputably requiring clerk participation or viewing for certain things through such language as "in the presence of" and (b) language indisputably requiring certain acts occur at the office through inclusion of the word "office." (Gov. Br. at 11, 14) But under a reading that Wis. Stat. § 6.87(4)(b)1. requires a hand-to-hand transmission, the simple phrase "to the municipal clerk" would need to be read to trigger ***both*** these requirements despite it containing none of the textual specificity.

[7] The inclusion of "office" under either potential theory is ***not*** rooted in the text. (Gov. Br. at 14)

Finally, the Legislature contends that Petitioners' and the Governor's reading fail, but that reading is precisely the one that the Legislature once embraced:

CHART A **Legislature's Position on Drop Boxes**	
Then	***Now***
"Wisconsin law provides its citizens with multiple, safe options to cast their ballots during the November Election, including returning absentee ballots by mail, in drop-boxes, or at the polling place."[8]	"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." (Leg. Br. at 40 (internal quotations omitted)).
"Here, the Commission could not adopt or enforce any rules on […] ballot drop boxes, and the like, as all authority on these issues falls expressly to local election officials. *See* Wis. Stat. §§ 7.10, 7.15[.]"[9]	"*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." (Leg. Br. at 37)
"[T]he decision to implement such drop boxes is also reserved to local election officials under the law."[10]	"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." (Leg. Br. at 47)
Drop boxes are a "convenient, secure, and expressly authorized absentee-ballot-return method[.]" (Gov. App. 005-06; *see also* Gov. Br. at 17)	"Section 6.87(4)(b)1 does not authorize a 'third option,' … such as drop boxes—for absentee-ballot returns." (Leg. Br. at 42)

[8] Brief for Respondents Wisconsin State Legislature in Opposition to Emergency Application to Vacate Stay, *Swenson v. Wis. State Legislature, et al.*, 2020 WL 6134184, at *35 (U.S. Oct. 16, 2020).

[9] Brief for Intervenor-Defendant Wisconsin Legislature and Legislative Defendants in Opposition to Plaintiff's Motions for Preliminary Injunction and in Support of Their Motions to Dismiss, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 6537181, at 40 (W.D. Wis. Sep. 20, 2020).

[10] *Id.* at n.12.

The Legislature makes no effort to explain how the same statutes could possibly mean different things before different courts. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110 ("It is the enacted law, not the unenacted intent, that is binding on the public.").

II. Multiple grounds support departing from stare decisis here.

The Legislature's stare decisis argument focuses primarily on two factors that no party asserts are implicated—subsequent changes in law or fact—while glossing over the many factors that favor departing from *Teigen*. As explained in earlier briefs, *stare decisis* does not require adherence to a decision that: (a) is "unsound in principle" because it applied a new, unwarranted interpretive approach (*see* Gov. Br. at 12-15; WEC Br. at 19-21) and failed to respect clear statutory language (*see* Gov. Br. at 9-12, 17); (b) is "detrimental to coherence and consistency in the law" because of confusion about the case's holdings (*see id.* at 22-24); or is (c) "unworkable in practice" because it cannot be implemented without guesswork by election officials and courts (*see id.* at 19-21) Moreover, *Teigen*'s reversal would disrupt nothing. (*See id.* at 24)[11]

Rather than meaningfully engage with the stare decisis arguments raised, the Legislature argues *Teigen* merits special protection as a statutory-interpretation decision. (Leg. Br. at 26) True, Courts have weighed stare decisis heavily in statutory-interpretation cases, reasoning an interpretative decision "become[s] part of the statutory scheme," *Kimble,* 576 U.S. at 456, and, as the Legislature points out, "critics of a statutory interpretation case can take their objections to the Legislature, [which] can then 'correct any mistake it sees.'" (Leg. Br. at 25) But this case presents a unique scenario that favors dispensing with any "superpowered"

[11] In this regard, this case is plainly distinguishable from *Kimble v. Marvel Ent., LLC*, 576 U.S. 446 (2015) which the Legislature cited eight times. *Kimble* contemplated overruling a ***fifty-year-old*** precedent which had a "close relation to a whole web of precedents [which] means that reversing it could threaten others," and involved "property and contract rights," where "considerations favoring *stare decisis* are at their acme." 576 U.S. at 457-58 (cleaned up).

stare decisis. Pre-*Teigen,* the Legislature, in near concert with its many statements touting drop boxes as lawful (*see supra* Chart A), passed 2021 Senate Bill 203, which would have inserted a requirement that electors return ballots "to the office of the municipal clerk …"[12], and which the Governor vetoed.[13] We know the law did not mean what this Court decided it meant in *Teigen* because the Legislature tried, and failed, to pass into law the very interpretation of Section 6.87(4)(b)1. that the *Teigen* Court ultimately imposed.

The Legislature further contends *Teigen* created no confusion "in the real world" and that it "prevents additional burdens" on clerks. (Leg. Br. at 35, 37) The clerks themselves say the opposite and make clear that municipalities have used drop boxes for decades. (Officials Br. at 9-12) Those clerks are struggling to apply *Teigen*'s unclear requirements. (*Id.* at 14-15; *see also* Gov. Br. at 20-21 (implementation questions left unanswered by *Teigen*))

The Legislature argues that "Petitioners have not offered ***any*** evidence of any risks or confusion" and that "they should have been able to point to ***actual evidence*** of any confusion[.]" (Leg. Br. at 35) But courts and litigants alike are confused about what *Teigen* held. (*See* Gov. Br. at 23; *see also* WEC Br. at 30-32) The Court of Appeals recently quoted certain paragraphs of *Teigen* without acknowledging that those paragraphs failed to garner majority support. *See Wis. Voter All. v. Secord*, 2023AP36, ¶¶14, 18, 19 & nn.16-17, 2023 WL 8910882 (authored, unpublished opinion). And, in addition to private litigants (Gov. Br. at 23), the Legislature itself has repeatedly miscited *Teigen* in this litigation:

[12]2021 Wis. S. B. 203, https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb203. Underline denotes proposed added language. This was not the Legislature's sole recognition that, as currently drafted, the election code permits drop boxes. 2021 Senate Bill 209 would have restricted the location and number of ballot boxes a municipal clerk could implement, but it failed to pass both houses. Adverse Disposal, State of Wis. Assemb. J., Mar. 15, 2022, at 906, https://docs.legis.wisconsin.gov/2021/related/journals/assembly/20220315/_134.

[13] Governor's Veto Message, State of Wis. S. J., Aug. 10, 2021, at 460, https://docs.legis.wisconsin.gov/2021/related/journals/senate/20210810/_24.

- Referring to ¶¶61-62 as "lead op." when they have majority support. (Leg. Br. at 50);

- Citing ¶87, which does not have majority support, for proposition that "the Supreme Court majority held" something. (R. 99 at 4);

- Citing ¶72, which does not have majority support, for proposition that the "[t]he Supreme Court in *Teigen*, 2022 WI 64, concluded" certain things. (R. 60 at 9); and

- Citing ***ten*** paragraphs of *Teigen* (¶¶64-72, 87) without labeling the citations as a "lead op." or otherwise acknowledging those paragraphs failed to garner majority support. (R. 60 at 9, 20)

As yet another example of problems the *Teigen* decision has created, the Legislature deployed unorthodox citations to manufacture majority support for statements that did not, in fact, garner majority support. (Leg. Br. at 51 (citing a concurrence as "not departing from the lead opinion on this point" and a dissent as "not disputing the lead opinion on this point"))

Although the "doctrine of *stare decisis* serves profoundly important purposes in our legal system," the Court can "overrule[] a prior case on the comparatively rare occasion when it has bred confusion[.]" *California v. Acevedo*, 500 U.S. 565, 579 (1991). This is that case.

CONCLUSION

Governor Tony Evers respectfully requests that the Court overrule its holding in *Teigen*, which precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks.

Dated: May 6, 2024.

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

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes Section 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,986 words.

Dated: May 6, 2024.

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