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SUPREME COURT

No. 24AP164

In the Supreme Court of Wisconsin

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 Dane County Circuit Court,
The Honorable Ann M. Peacock, Presiding,
Case No. 23CV1900

NON-PARTY BRIEF OF RICHARD TEIGEN, RICHARD THOM, AND THE ASSOCIATION OF MATURE AMERICAN CITIZENS, INC.

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INTRODUCTION

There is no good reason to overturn this Court's interpretation of Wis. Stat. § 6.87(4)(b)1. in *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519. *Teigen* decided the drop box question less than two years ago in a majority opinion that was—and still is—correct on the merits.

Petitioner Parties[1] provide no materially different reason to change that result: instead, they reiterate the *Teigen* dissent and largely repackage the arguments that failed in *Teigen*. In addition, multiple elections have been held post-*Teigen,* and there is no indication that municipal clerks have been unable to comply with *Teigen* in practice.

Indeed, only thing that has changed since the *Teigen* decision is the membership of this Court into a new majority that Petitioner Parties believe is sympathetic to their interests. But that is not a sufficient reason to overturn *Teigen's* interpretation of Wis. Stat. § 6.87(4)(b)1. *See Hinrichs v. DOW Chemical Co*., 2020 WI 2, ¶ 67, 389 Wis. 2d 669, 937 N.W.2d 37 ("When existing law is open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results … Accordingly, any departure from stare decisis requires 'special justification.'") (citations omitted).

The fact remains that drop boxes are not permitted under Wisconsin law, and if this Court decides to authorize them anyway, that decision will have a consequential impact on Wisconsin's longstanding

[1] "Petitioner Parties" refers to the Petitioners (Priorities USA, Wisconsin Alliance for Retired Americans, and William Franks, Jr.), Governor Evers, and WEC (because WEC argues for overturning *Teigen* despite its Respondent designation).

principles of statutory interpretation, fundamental tenets of administrative law, and uniform election administration. For these reasons, Amici Curiae Richard Teigen, Richard Thom, and the Association of Mature American Citizens, Inc. ("AMAC"), write in support of upholding *Teigen's* interpretation of § 6.87(4)(b)1.

INTEREST OF AMICUS

Amici curiae Richard Teigen and Richard Thom are the successful plaintiffs in *Teigen v. WEC* and registered Wisconsin voters. Amicus curiae Association of Mature American Citizens, Inc. ("AMAC") is a membership-based nonpartisan organization that represents nearly 50,000 members in the State of Wisconsin and over two million members nationwide.

Amici are interested in this action as Wisconsin voters, and an organization representing tens of thousands of Wisconsin voters, who believe that adherence to the statutory provisions for election administration is crucial for efficient, uniform election administration, and maintaining public trust in election results.

ARGUMENT

This case seeks to upend existing Wisconsin law in pursuit of a desired policy outcome: this Court's permission for Wisconsin election clerks to use drop boxes as a method of absentee ballot return. This Court should reject Petitioner Parties' request to overturn *Teigen*. This Court got it right last time: the existing statutes do not provide for drop boxes, and there are no laws in place to ensure that if clerks use drop boxes, they will be used in a safe and uniform manner.

I. Petitioner Parties' statutory interpretation arguments are wrong on the merits.

This case involves a single statutory interpretation question: are drop boxes a permitted method of absentee ballot return under Wis. Stat. § 6.87(4)(b)1.? The answer, according to longstanding statutory interpretation principles and a majority of the Justices in *Teigen*, is no.

As the *Teigen* court concluded, Wis. Stat. § 6.87(4)(b)1. does not permit drop boxes. *Teigen*, 2022 WI 64, ¶¶ 55–63. A plain reading of the statutory language reveals that Wis. Stat. § 6.87(4)(b)1. is not ambiguous and that absentee ballots may only be returned through one of two methods: by mail, or by delivery *in person* to the municipal clerk. *See State ex rel Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted); *See also* Wis. Stat. § 6.87(4)(b)1. And because drop boxes are inanimate objects that cannot achieve a person-to-person exchange of the ballot at either the clerk's office or an appropriately designated alternate site as required by the statutes, drop boxes are not "authorized representatives" of the "municipal clerk" under Wis. Stat. § 5.02(10), and are not permitted under Wisconsin law. *See Teigen*, 2022 WI 64, ¶ 55.

Moreover, the *Teigen* Court's conclusions on this issue constitute a binding, majority holding. Indeed, four members of the *Teigen* court explicitly acknowledged that Wis. Stat. § 6.87 contemplates "return of absentee ballots through two and only two means: mailing by the voter to the municipal clerk, or personal delivery by the voter to the municipal clerk" and that "personal delivery to the clerk contemplates a person-to-person exchange between the voter and the clerk or clerk's authorized representative at either the clerk's office or a designated alternate site."

Teigen, 2022 WI 64, ¶ 148 (Hagedorn, J., concurring); *id.*, ¶¶ 55–63 (majority op. with respect to these conclusions, which are reiterated in those paragraphs). Petitioner Parties obviously disagree with this holding, but their disagreement does not mean that *Teigen* was wrongly decided.

This Court is not a super-legislature. Therefore, it "must apply the statute as written, not interpret it as [it] think[s] it should have been written." *Columbus Housing Corp. v. City of Kenosha*, 2003 WI 143, ¶ 34, 267 Wis. 2d 59, 671 N.W.2d 633; *see also Flynn v. Dep't of Admin.,* 216 Wis. 2d 521, 528–29, 576 N.W.2d 245 (1998); *Teigen*, 2022 WI 64, ¶ 52 n. 25. Time and again, this Court has declined to read exceptions into statutes that are not present in the text, and it should decline to do so here. *See e.g., Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶ 19, 410 Wis. 2d 1, 998 N.W.2d 370 ("We decline to read a political contiguity exception into Article IV's contiguity requirements. The text contains no such exception."); *Dawson v. Town of Jackson*, 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316 ("We decline to read into the statute words the legislature did not see fit to write.") (citing *Cnty of Dane v. Labor and Industry Review Comm'n*, 2009 WI 9, ¶ 33, 315 Wis. 2d 293, 759 N.W.2d 571).

Petitioners erroneously argue that, from a statutory interpretation perspective, the *Teigen* court took up the "legislative pen" when concluding that absentee ballots must be returned by mail or by in person delivery to the clerk at the clerk's office or an alternate site. Petr's 4/1/24 Br. at 13; *see Teigen*, 2022 WI 64, ¶ 62. WEC and the Governor argue similarly. Governor's 4/1/24 Br. at 13–15; WEC Br. at 25. But this

argument is demonstrably false and, instead, reflects exactly what the Petitioner Parties have asked *this Court* to do.

A fundamental tenet of statutory interpretation is that statutes must be read within the context of their statutory scheme which, as the *Teigen* Court correctly concluded, contemplates the return of absentee ballots through the mail or by in person delivery at *either* the clerk's office or designated alternate sites.[2] *See Kalal*, 2004 WI 58, ¶ 46 ("… statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole;"); *Teigen*, 2022 WI 64, ¶¶ 56–63.

For example, Wis. Stat. § 6.855 unquestionably applies to the in-person return of absentee ballots because it authorizes municipalities "to designate a site *other than the office of the municipal clerk*" for *both* in person absentee voting (where the elector requests, fills out, and returns the ballot at the same time) and the in-person return of already-voted ballots received by mail. *Compare* § 6.855(1) *with* Petr's 4/1/24 Br. at 18–19, Governor's 4/1/24 Br. at 12–13, WEC Br. at 26. And when § 6.87(4)(b)1. is read in the context of § 6.855(1) (as statutory interpretation principles require), the necessary implication is that "the office of the municipal clerk" is the only place "to which absentee ballots shall be returned" absent an appropriately designated alternate site.

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[2] This statutory interpretation principle also cautions against relying on statutes and decisions from other states, as WEC and the Governor suggest. WEC Br. at 28–29; Governor's Br. at 13, n.4. In addition, WEC and the Governor make no showing that the statutory context, principles of statutory interpretation, or legislative policies underlying the statutes in those cases are like those here.

If this Court decides to read the use of drop boxes into the text, it will do precisely what the Petitioner Parties have accused the *Teigen* court of doing—take up the "legislative pen"—and create an exception to the two methods of absentee ballot return that § 6.87(4)(b)1. explicitly establishes. Indeed, in holding that drop boxes are permitted, this Court will act as a super-legislature and declare that absentee ballots may only be returned by mail or by in person delivery at the clerk's office or an alternate site, *unless* a municipal clerk prefers to receive absentee ballots at a drop box (or in any other manner they choose, for that matter). That is not the role of this Court.

Petitioner Parties' statutory interpretation arguments are wrong on the merits and this Court should not be persuaded by them.

II. There are no standards governing the use of drop boxes, and no one but the Legislature has authority to impose them.

Petitioner Parties' proposal that this Court take up the "legislative pen" is even more problematic due to the fact that nothing in the statutes, administrative code, or other proper source of law provides rules and procedures to ensure that drop boxes would be used in a safe and uniform way on a statewide basis. Indeed, there are no statutes in place determining how many drop boxes a clerk can use or authorize, where they may or may not be located, how they must be secured (locked, lighted, video, etc.), whether they must be staffed or unstaffed, how the ballots can be removed from the drop boxes and by whom, or how the ballots put into a drop box are stored or delivered to the clerk's office.

Under Petitioner Parties' view, this is not a problem and municipal clerks may simply accept absentee ballots wherever and in whatever

manner they see fit. *See* Petr's 4/1/24 Br. at 14–15; Governor's 4/1/24 Br. at 17–19; WEC Br. at 17–19. This view is deeply concerning and blatantly contradicts not only the mandatory construction of Section 6.87(4)(b)1. and the legislature's policy that absentee voting be "carefully regulated," § 6.84(1)–(2), but also the very core of administrative law.

Contrary to Petitioner Parties' claims, Wisconsin's election laws do *not* just leave it up to municipal clerks to figure out how to conduct an election. Rather, there are very detailed and specific processes to protect the integrity of the system. Those processes are contained in Chapters 5-10 and 12 of the Wisconsin Statutes and in the "EL" section of the Administrative Rules, and not one sentence in those statues or rules governs drop boxes.

Furthermore, administrative agencies, like WEC, are "creatures of the legislature" that have "only those powers expressly conferred or necessarily implied by the statutory provisions under which it operates." *Myers v. Wis. Dep't of Natural Resources,* 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47. And according to the doctrine of "expression unius est exclusion alterius," "if 'the legislature did not specifically confer a power,' the exercise of that power is not authorized." *James v. Heinrich*, 2021 WI 58, ¶ 18, 397 Wis. 2d 517, 960 N.W.2d 35 (citations omitted).

Petitioners concede that drop boxes are not "expressly" permitted under Wisconsin law. Petr's 4/1/24 Br. at 26. Given § 6.84's command that absentee ballot procedures are to be "carefully regulated" and strictly construed, that concession alone should resolve this case. Even setting § 6.84 aside, administrative agencies (and their agents, such as municipal clerks) are generally not allowed to take action that is not

explicitly authorized. *Id; see also Wis. Legislature v. Palm*, 2020 WI 42, ¶ 51, 391 Wis. 2d 497, 942 N.W.2d 900 (quoting Kirsten Koschnick, Comment, *Making "Explicit Authority" Explicit Deciphering Wis. Act 21's Prescriptions for Agency Rulemaking Authority*, 2019 Wis. L. Rev. 993, 997 (2019) ("[U]nder 2011 Wis. Act 21, the Legislature significantly altered [this Court's] administrative law jurisprudence by imposing an 'explicit authority requirement' on [this Court's] interpretations of agency powers.")). Petitioner Parties cannot overcome the fact that statutory silence does not default to statutory authorization.

Because not one sentence in the statutes explicitly authorizes drop boxes, they are *not* permitted, and neither WEC, nor this Court, has the authority to act as a super-legislature by authorizing and implementing them anyway. If drop boxes are to be permitted, it is up to the Legislature to say so and to promulgate (or expressly authorize WEC to promulgate) the rules and procedures governing their use. Anything else will effectively redefine fundamental tenets of administrative law.

III. The absence of drop boxes does not create a constitutional problem.

Petitioners and the Governor also suggest that this Court should legalize drop boxes to avoid a constitutional problem, which they seem to believe exists (or may develop) if the status quo is left unchanged. *See* Petr's 4/1/24 Br. at 27–29; Governor's 4/1/24 Br. at 19 & n.10. More specifically, the Governor claims that *Teigen* "relegated" absentee voters to "second class status," Governor's 4/1/24 Br. at 19, n.10, while the Petitioners argue that *Teigen* was wrongly decided because it caused

absentee voting to "fall[ ] outside of constitutional protection." Petr's 4/1/24 Br. at 28. There is no merit to these arguments whatsoever.

In Wisconsin, qualified electors have a constitutional right to vote in person, at an appropriate polling place, on election day. Wis. Const. art. III § 1; Wis. Stat. § 6.84(1). They do *not* have a constitutional right to vote wherever and in whatever manner they see fit. Wis. Const. art. III § 2; Wis. Stat. § 6.84(1). However, this does not mean that absentee ballots appropriately cast through the absentee voting process are not themselves valid and entitled to constitutional protection. Nor does it mean that Wisconsinites who vote absentee have been "relegated" to "second class status." Governor's 4/1/24 Br. at 19, n.10.

Both the Wisconsin and U.S. Supreme Courts have long upheld the right of legislatures to dictate the terms of absentee voting, as well as other voting requirements, consistent with their interest in preventing election fraud—the risk of which can be greater with absentee voting. *See e.g., League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶¶ 19–21, 24, 357 Wis. 2d 360, 851 N.W.2d 302 (citing cases); *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2346–48 (2021); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008). And notwithstanding its right to carefully regulate absentee voting, *see* Wis. Const. art. III § 2, the Wisconsin Legislature has chosen to enact laws that make it incredibly easy to vote by absentee ballot. *See Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020); *See also* Dkt. 60:3–6 (explaining the history of absentee voting in Wisconsin and demonstrating that absentee voting is easier and more available than ever before).

Indeed, Wisconsin is a "no-excuse" absentee voting state, which means that any qualified Wisconsin elector may choose to vote by absentee ballot, for any reason. Wis. Stat. §§ 6.20; 6.85; 6.86(1)(a). An absentee voter can request their ballot in a variety of ways, § 6.86(1)(a)(1)–(6), and, again, may return a ballot they received through the mail by simply mailing it back or by delivering it *in person* to their municipal clerk at the clerk's office or an appropriately designated alternate site. *See* Wis. Stat. §§ 6.855, 6.87(4)(b)1. Those who need assistance with marking, mailing or delivering their ballot (for reasons specified under the Voting Rights Act (VRA)) may receive such assistance from a person of their choice, subject to limited exceptions. *See Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1032–33 (W.D. Wis. 2022); Wis. Stat. § 6.87(5).

Furthermore, if an absentee voter wishes to deliver their ballot to the clerk's office or an alternate site, there is ample time to do so. Many jurisdictions offer extended early voting hours prior to election day.[3] And on election day itself, all polling locations are open from 7am to 8pm. Wis. Stat. § 6.78(1m). State law requires employers to provide employees with up to three hours of time off work (while the polls are open) to vote on election day. *Id*. § 6.76. And any voter who is still in line to vote when the polls close has the right to vote in that election. *Id*. § 6.78(4).

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[3] *See, e.g.*., Hope Karnopp, *Early voting starts today in Wisconsin. Here's how to find locations, dates, and times,* Milwaukee Journal Sentinel (March 19, 2024). Available at https://www.jsonline.com/story/news/politics/elections/2024/03/19/early-voting-in-milwaukee-and-wisconsin-locations-dates-times/73026676007/

Given the ease and widespread availability of absentee voting, including the option to return a mail-in ballot to the clerk at her office or an alternate site until the polls close on election day, it can hardly be said that the absence of drop boxes is an unconstitutional burden on the right to vote. Inconveniences that might be incurred if an absentee voter chooses to personally deliver a mail-in ballot (or needs to do so because the election is too close in time to guarantee delivery by mail) do not amount to a constitutional violation.

Again, whether drop boxes are a permissible method of returning absentee ballots is a policy choice for the Legislature, not this Court. Wis. Const. art. III § 2. And there is no basis for reinterpreting § 6.87(4)(b)1. under the guise of avoiding a constitutional issue that does not exist. Absentee voting is easy in Wisconsin, and conducting that process without drop boxes does not create a constitutional problem.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court uphold *Teigen*'s interpretation of Wis. Stat. § 6.87(4)(b)1.

Dated: May 6, 2024.

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Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c). The length of this brief is 2,984 words as calculated by Microsoft Word.

Dated: May 6, 2024.

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