Supreme Court of Wisconsin

No. 2024AP164
Appeal from Dane County Circuit Court, No. 2023CV1900,
The Honorable Ann Peacock, Presiding

PRIORITIES USA;
WISCONSIN ALLIANCE FOR RETIRED AMERICANS;
AND WILLIAM FRANKS, JR.,
PLAINTIFFS-APPELLANTS-PETITIONERS,

v.

THE WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-APPELLEE-RESPONDENT,

THE WISCONSIN STATE LEGISLATURE,
INTERVENOR-DEFENDANT-APPELLEE-RESPONDENT.

PLAINTIFFS-APPELLANTS-PETITIONERS' REPLY BRIEF

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INTRODUCTION

Section 6.87(4)(b)1 requires only that absentee ballots be returned "to the municipal clerk" and nowhere demands that they be returned to the municipal clerk's *office* specifically. In holding otherwise, the *Teigen* decision wrote words into the statute that simply are not there and took it upon itself to prohibit the use of ballot drop boxes, a secure and efficient election practice that is entirely consistent with Wisconsin law. *Teigen*'s insistence on express statutory authorization for a particular means by which clerks accept delivery of absentee ballots cannot be justified by Section 6.84, which addresses only the consequences of a statutory *violation* and says nothing about statutory silence, and it is inconsistent with municipal clerks' broad authority over election mechanics under Wisconsin law.

The Legislature has no answer to these fundamental problems with the decision in *Teigen*. The Court should overrule *Teigen* because in addition to being wrong, it is unsound in principle and unworkable in practice—two well-recognized special justifications for overruling precedent. *Teigen* is unsound in principle because it departs from Wisconsin's settled textualist methodology for statutory construction. And *Teigen* is unworkable in practice because it relies on conflicting and unclear rationales that provide no workable guidance as to what municipal clerks may and may not do in accepting absentee ballots and conducting other aspects of Wisconsin elections. That *Teigen* is a statutory decision does not insulate it from challenge, because no one has or possibly could have relied to their detriment on a decision that merely eliminated one possible means of returning an absentee ballot.

The Court should overrule *Teigen*'s holding that Wisconsin law prohibits the use of absentee ballot drop boxes and allow municipal clerks to decide for themselves how and where to accept the return of absentee ballots.

ARGUMENT

I. The Legislature offers no support for *Teigen*'s atextual reading of Section 6.87.

The Legislature offers no justification for *Teigen*'s imposition of a prohibition on drop boxes that is entirely ungrounded in the statutory text. Municipal clerks' use of drop boxes to accept absentee ballots is consistent with the plain meaning of Section 6.87 and the surrounding statutory context. The Legislature's contrary argument, like *Teigen* itself, adds words to the statute that are not there. And Section 6.84 does not require or support any particular construction of Section 6.87's ballot-return requirements, but merely explains the consequence if those requirements are violated.

A. Section 6.87 does not require delivery of absentee ballots to the municipal clerk "at her office."

The *Teigen* majority alternated between two different accounts of why drop boxes were inconsistent with Section 6.87(4)(b)1, arguing sometimes that the statute requires delivery to *a person* rather than to "[a]n inanimate object," and other times that it requires delivery *at the clerk's office* rather than at some other location. *See Teigen v. Wis. Elections Comm'n*, 2022 WI 64 ¶¶ 55, 62, 403 Wis. 2d. 607, 976 N.W.2d 519. In defending *Teigen*, however, the Legislature defends only the location argument, arguing repeatedly that delivery must occur at the clerk's office,

while assuring the Court that *Teigen* cannot possibly have meant what it said about inanimate objects. Leg. Br. 46–47, 49–50.

In an amicus brief, the RNC, the Republican Party of Wisconsin, and a right-wing PAC make the opposite choice, defending *Teigen* exclusively based on the "inanimate object" argument: that Section 6.87(4)(b)1 "requires voters to hand their ballots to a *person*." RNC Br. 4 (emphasis in original). That argument leads to absurd results—it would seem to invalidate ballots placed on a counter or receptacle in the clerk's office—and contradicts ordinary usage, under which millions of items are "delivered to" recipients every day by placing them, for example, in the recipient's mailbox. *See* Pets.' Br. 15, 29–30. It is also irreconcilable with the judgment in *Teigen* itself, which affirmed a circuit court ruling allowing staffed drop boxes in clerks' offices. *Teigen*, 2022 WI 64, ¶ 3.

Thus, the Legislature's unwillingness to defend *Teigen*'s inanimate-object argument is understandable. But the location argument has a serious problem of its own: it reads in Section 6.87(4)(b)1 a reference to "*the office of* the municipal clerk"—words that do not appear in Section 6.87(4)(b)1 but are *explicit* in multiple other election statutes. *See, e.g.*, Wis. Stat. §§ 6.18, 6.28, 6.29, 6.50, 6.87(3)(a). Most notably, Section 6.87(3)(a)—the subsection immediately preceding 6.87(4)—directs municipal clerks to either mail an absentee ballot to the voter's residence or to "deliver it to the elector personally at the clerk's office or at an alternate site under s. 6.855." The legislature clearly understands how to require delivery at the clerk's office (or a specific site). Under longstanding rules of statutory interpretation, the lack of such language in Section 6.87(4) cannot be disregarded: "[i]f a word or words are used in one subsection but are not used in another

subsection, [the Court] must conclude that the legislature specifically intended a different meaning." *Responsible Use of Rural & Agr. Land v. Pub. Serv. Comm'n of Wis.*, 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888 ("*RURAL*").

The Legislature has no answer to this argument. It does not cite *RURAL* or discuss most of the statutory provisions referring specifically to the clerk's office. It offers no explanation—none—of how the Court could possibly construe Section 6.87(4)(b)1's bare reference to the municipal clerk as implicitly specifying *only* her physical office when the plain text of that statute contains no reference to that physical office, despite so many other election provisions—including other parts of that same section—referring specifically to that location when they mean that location.

The Legislature tries instead to rely on dictionary definitions of "deliver" and "in person." Leg. Br. 41–42. But the definitions the Legislature cites only undermine its position. "Deliver," the Legislature says, means to convey, hand over, or take something to "a specified *recipient or address*." *Id.* at 41 (quoting *Deliver*, Oxford English Dictionary Online (Mar. 2024)) (emphasis added). Section 6.87(4)(b)1 specifies a "recipient" (the clerk), not an address (such as the clerk's office), so that definition does nothing to suggest that that ballots must be delivered to clerks at any particular place. And while delivery "in person" requires delivery "with or by one's *own* action or physical presence," *id.* (quoting *In Person*, Oxford English Dictionary Online (Feb. 2024)) (emphasis added), that definition, too, does not specify *where* delivery must occur.

Section 6.87(4)(b)1 thus requires only delivery to the municipal clerk, not delivery to any particular location. As a matter of both ordinary and legal usage, it is commonplace to

deliver an item to a recipient by leaving it at a place designated by the recipient for that purpose. Contract cases going back nearly to the Civil War confirm that usage. *See, e.g.*, *Morrow v. Campbell*, 30 Wis. 90, 93 (1872) (holding that "delivery" of logs to buyer occurred when they were left "at the designated place" specified by the parties' contract). And when a voter deposits a ballot in a drop box that a municipal clerk designated for the return of ballots, she delivers the ballot in person to the municipal clerk by leaving it at the clerk's designated location for such delivery, just as Section 6.87(4)(b)1 authorizes.

The Legislature's reliance on Sections 6.855 and 7.41 does not change this conclusion. Section 6.855 governs locations where "electors of the municipality *may request and vote absentee ballots* and to which voted absentee ballots shall be returned by electors for any election." Wis. Stat. § 6.855(1) (emphasis added). It thereby authorizes alternate locations for activities—requesting and voting absentee ballots in person—that Wisconsin law otherwise specifically requires be conducted at the clerk's office. *See id.* § 6.86(1)(a) (voters may request an absentee ballot "by mail" or "[i]n person at the office of the municipal clerk or at an alternate site under s. 6.855, if applicable"); *id.* § 6.87(3)(a) ("If the ballot is delivered to the elector at the clerk's office, or an alternate site under s. 6.855, the ballot shall be voted at the office or alternate site and may not be removed by the elector therefrom."). As just explained, no similar restriction applies to the mere return of absentee ballots. And Section 7.41 simply authorizes public observation of in-person absentee voting—the "cast[ing]" of absentee ballots—at those sites. Wis. Stat. § 7.41. It does not address the return of mailed absentee ballots.

B. Section 6.84 does not change the analysis.

Seemingly recognizing the weakness of its construction of Section 6.87(4)(b)1, the Legislature leans heavily on Section 6.84's supposed requirement that absentee voting provisions be strictly construed. Leg. Br. 43–44. But Section 6.84 says nothing of the sort. It says instead that the specified provisions must be "construed *as mandatory*" such that "[b]allots cast in contravention of the procedures specified in those provisions may not be counted." Wis. Stat. § 6.84(2) (emphasis added). That language addresses only the consequences of a *violation* of the provisions in question; it says nothing about what the provisions themselves require.

Nor does Section 6.84 adopt a rule requiring express statutory authorization for particular voting procedures. As previously explained, and the Legislature does not deny, "contravention" requires conflict with the statute, not mere statutory silence. Pets.' Br. 24–25. Wisconsin has a "highly decentralized system for election administration" that "places significant responsibility on a small army of local election officials." *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208 (citation omitted). Wisconsin law empowers municipal clerks to perform not only their enumerated duties, but also "any others which may be necessary to properly conduct elections." Wis. Stat. § 7.15(1). Municipal clerks therefore have far greater authority than the judges of the Children's Court at issue in *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974), who were subject to a "comprehensive legislative plan" that fully detailed their "enumerated powers."

Municipal clerks thus have discretion to choose from among a range of options to implement Wisconsin elections statutes, so long as those options do not violate (i.e., "contravene") any statutory requirements. And the Legislature identifies, at most, statutory *silence* over drop boxes, not any violation or contravention.

II. *Stare decisis* does not require adherence to *Teigen*.

The Legislature wrongly argues that the Court may overrule a prior decision only if there has been an intervening change in law or facts. Leg. Br. 22. But the governing standard is more flexible than that and does not demand blind adherence to *Teigen*'s erroneous reasoning. Considered under the proper standard, *Teigen* should be overruled.

A. That *Teigen* is a statutory decision does not save it in the absence of reliance interests.

The fact that *Teigen* was a statutory decision does not require the Court to uphold it. This Court has rightly been skeptical of arguments based on legislative acquiescence—the principle that underlies the argument for stronger *stare decisis* in the statutory context. "[A]s a principle, it is subsidiary to a more important principle—that the goal of statutory interpretation is to ascertain and give effect to the statute's intended purpose." *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 32, 274 Wis. 2d 220, 682 N.W.2d 405. "Numerous variables, unrelated to conscious endorsement of a statutory interpretation, may explain or cause legislative inaction." *Id.* ¶ 33.

The cases the Legislature cites in arguing for a "superpowered form of *stare decisis*," Leg. Br. 25–27, each involved substantial reliance interests in the statutory precedent being

questioned. The U.S. Supreme Court's decision in *Kimble v. Marvel Entertainment, LLC*, involved precedent lying "at the intersection of two areas of law: property (patents) and contracts (licensing agreements)" where "parties are especially likely to rely on such precedents when ordering their affairs." 576 U.S. 446, 457 (2015). And this Court's decision in *Progressive Northern Insurance Co. v. Romanshek* involved the construction of a statute governing insurance contracts that "[i]nsurers . . . ha[d] no doubt relied on" in structuring their policies. 2005 WI 67, ¶ 46–47, 281 Wis. 2d 300, 697 N.W.2d 417. In contrast, this Court has overturned statutory interpretation holdings where, as here, the original decision was unsound, and no reliance interests were implicated. *See, e.g.*, *Bartholomew v. Wis. Patients Compensation Fund*, 2006 WI 91, ¶ 16, 293 Wis. 2d 38, 717 N.W.2d 216 (overturning two-year-old interpretation of Wisconsin's wrongful death statute).[1]

There are no relevant reliance interests here. As the amicus brief from ten Wisconsin election officials emphasizes, *Teigen* made municipal clerks' jobs harder by prohibiting the use of a secure and convenient tool accepting delivery of absentee ballots. *See* Br. of Wis. Election Officials 9–18. Overruling *Teigen* would restore that option, while leaving voters and clerks who prefer not to use drop boxes free to eschew them. It thus could not possibly impose any "additional burdens on" municipal clerks, as the Legislature argues. Leg. Br. 37. And although the Legislature professes concern about harm to "the rule of law," *id.*, the Court "do[es] more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning

[1] Justice Ann Walsh Bradley's discussion of *stare decisis* in *State v. Lindell* was a minority view—the Court overruled statutory precedent in that case, too. *See* 2001 WI 108, ¶ 131, 245 Wis. 2d 689, 629 N.W.2d 223.

an erroneous decision." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶¶ 96, 100, 264 Wis. 2d 60, 665 N.W.2d 257.

B. The lack of changed circumstances is not dispositive because there are other special justifications for overruling *Teigen*.

The Legislature argues that nothing has changed since *Teigen*, Leg. Br. 27, but intervening changes in fact or law are only two of the five separate "special justifications" this Court has recognized for overturning its precedent. *State v. Johnson*, 2023 WI 39, ¶ 20, 407 Wis. 2d 195, 990 N.W.2d 174. "Any one of these special justifications is sufficient to justify overruling precedent." *Id.* Here, the other three special justifications are all present: *Teigen* is "unsound in principle," it is "unworkable in practice," and it is "detrimental to coherence and consistency in the law." *Id.* *Stare decisis* therefore does not require upholding *Teigen*'s construction of Section 6.87(4)(b)1.

First, *Teigen* is unsound in principle because it abandons plain-text statutory interpretation and the settled requirement to give effect to different statutory language in related provisions in favor of a policy-driven approach; it introduces a new judge-made requirement that all election practices that are not specifically authorized are prohibited; and it fails to give any consideration to the right to vote under the Wisconsin Constitution. *See* Pets.' Br. 22–29; *see also supra* Part I.

Second, *Teigen* is unworkable in practice because it offers no way for municipal clerks to determine what is permissible, while providing that votes must be discarded if municipal clerks guess wrong. Pets.' Br. 29–30. The Legislature cavalierly suggests that the unanswered questions Priorities identifies—such as whether

in-office drop boxes are allowed—are unimportant. Leg. Br. 35. But given the possibility that voters will be disenfranchised if a court decides that a clerk got it wrong, the lack of a clear framework and the potential for confusion is an urgent problem, not something to be worked out over time through future cases. *Teigen*'s undifferentiated embrace of two distinct rationales—a requirement that ballots be returned to a person rather than an object, and a requirement that ballots be returned at the clerk's office—leaves no clear way for clerks to anticipate how these questions will be resolved. Indeed, even the defenders of *Teigen* cannot agree which rationale controls. *Compare* Leg. Br. 49 (criticizing "feigned concern" over legality of absentee ballots "placed in a secured designated inanimate receptacle in the municipal clerk's office"), *with* RNC Br. 4 (claiming that "the law's command . . . requires voters to hand their ballot to *a person*"). And that is not to mention the serious practical difficulties that *Teigen*'s drop box prohibition imposes on municipal clerks. *See* Br. of Wis. Election Officials 9–18.

Third, *Teigen* undermines coherence and consistency in the law. By rejecting the plain text of the relevant statutes and the clear significance of the surrounding context in favor of an atextual insistence on making absentee voting as difficult as possible, *Teigen* has introduced deep uncertainty in the administration of elections by suggesting that express statutory authorization is required for every administrative choice clerks make involving absentee voting. Pets.' Br. 25. The Racine County Circuit Court, for example, recently explained that *Teigen* "was influential in" its decision that a municipality's use of a mobile van as an in-person absentee voting site was unlawful due to the lack of express authorization for such use. App. 7 (Decision & Order 4 n.2, *Brown v. Wis. Elections Comm'n*, No. 22-CV-1324 (Wis. Cir. Ct. Racine

Cnty. Apr. 1, 2024), *bypass granted*, No. 2024AP232 (Wis. May 3, 2024)). And that is just the first of what are sure to be many challenges to election practices if *Teigen*'s atextual approach is preserved.

The Legislature complains that these justifications implicate the merits of *Teigen*'s reasoning, but there is nothing surprising or improper about that. The Court has explained that "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." *Johnson Controls*, 2003 WI 108, ¶ 99. Here, as explained, *Teigen* was not correctly decided. And the Legislature concedes that *Teigen* has not produced a settled body of law. Leg. Br. 39.

Teigen has been in place for only two years. It has produced no reliance interests, and it has never been reaffirmed by this Court. It is a recent and poorly reasoned opinion that ignores the statutory text, creates unnecessary confusion, and makes it unnecessarily difficult for Wisconsin election officials to do their jobs. The Court should overrule it.

CONCLUSION

The Court should overrule the statutory holding of *Teigen*.

Dated: May 6, 2024. Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes Sections 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,997 words, exclusive of the appendix.

Dated: May 6, 2024.

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