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Supreme Court of Wisconsin

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March 12, 2024

To:

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Circuit Court Judge
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Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
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Justin Baxenberg
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You are hereby notified that the Court has entered the following order:

No. 2024AP164 Priorities USA v. Wisconsin Elections Commission, L.C.#2023CV1900

The court having considered the petition to bypass the court of appeals submitted on behalf of plaintiffs-appellants, Priorities USA et al., as well as the separate responses to the petition filed by defendant-respondent, the Wisconsin Elections Commission, and intervenor-respondent, the Wisconsin State Legislature;

IT IS ORDERED that the petition to bypass is granted and the appeal is accepted for consideration in this court. The court, however, will consider only the following issue, and the plaintiffs-appellants may not raise or argue issues not set forth in this order:

> Whether to overrule the Court's holding in Teigen v. Wisconsin Elections Commission, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks; and

IT IS FURTHER ORDERED that all other issues in the appeal are held in abeyance pending further order of the court; and

IT IS FURTHER ORDERED that, within 20 days of the date of this order, the plaintiffs-appellants must file a brief in this court; within 20 days of filing, defendant-respondent and intervenor-respondent must file response briefs; and within 10 days of filing of the response briefs, the plaintiffs-appellants must file either a single reply brief or a statement that no reply brief will be filed; and

IT IS FURTHER ORDERED that oral argument in this matter will take place on May 13, 2024, at 9:45 a.m.

REBECCA GRASSL BRADLEY, J. (*dissenting*). In Clarke v. Wisconsin Elections Commission, the majority issued its "first opinion as an openly progressive faction,"[1] rebalancing the political power in this state by tossing out the maps adopted by this court in Johnson v. Wisconsin Elections Commission.[2] By granting this petition to bypass, the majority again aims to increase the electoral prospects of its preferred political party. Less than two years ago, in Teigen v. Wisconsin Elections Commission, this court determined that "ballot drop boxes are illegal under Wisconsin statutes[,] [and] [a]n absentee ballot must be returned by mail or the voter must personally deliver it to the municipal clerk at the clerk's office or a designated alternate site."[3] Finding the decision politically inconvenient, and emboldened by a new makeup of the court, this new majority embraces the opportunity to overturn Teigen. The majority's decision to do so will upset the status quo of election administration mere months before a presidential election and lead to chaos and confusion for Wisconsin voters and election officials.

This petition should obviously be denied because petitioners offer no reason why Teigen should be reconsidered. Petitioners contend this court has previously overruled decisions "when it became evident on a subsequent appeal that, by reason of other provisions or crucial matters not presented or considered theretofore, the prior ruling was clearly wrong."[4] Although petitioners declare Teigen "is exactly such a case," they fail to identify any "provisions or crucial matters not presented or considered" by the court in Teigen. Instead, petitioners regurgitate the arguments made in Justice Ann Walsh Bradley's dissent. To state the obvious, this court was aware of the dissent's arguments before it issued its decision in Teigen but found the dissent's arguments unconvincing. Petitioners also allege that Wis. Stat. § 6.87 is ambiguous on the question of drop boxes. If § 6.87, on the petitioners' own reading, "is susceptible of two or more 'equally sensible

[1] 2023 WI 79, ¶185, 410 Wis. 2d 1, 998 N.W.2d 370 (Rebecca Grassl Bradley, J., dissenting).

[2] 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559.

[3] 2022 WI 64, ¶4, 403 Wis. 2d 607, 976 N.W.2d 519.

[4] State v. Hackbarth, 228 Wis. 108, 115, 279 N.W. 687 (1938) (citations omitted).

interpretations'"[5] as to whether it authorizes the use of drop boxes, the decision cannot be described as "grievously or egregiously wrong,"[6] "objectively erroneous,"[7] or "unsound in principle."[8] This petition should be denied because it neglects to offer any reason to reconsider this court's decision in Teigen.

By granting this baseless petition, the majority signals its intent to overrule Teigen—a decision issued by this court less than two years ago. "The legal doctrine of stare decisis derives from the Latin maxim 'stare decisis et non quieta movere,' which means to stand by the thing decided and not disturb the calm."[9] As this court has articulated many times, this court adheres to the doctrine of stare decisis "scrupulously" because "respect for prior decisions is fundamental to the rule of law."[10] "The doctrine 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.'"[11] Deciding cases cannot "become[] a mere exercise of judicial will . . . ."[12] This court should never depart from precedent "casually"[13] because "[o]verruling precedent is never a small matter."[14] The majority further

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[5] Bruno v. Milwaukee Cnty., 2003 WI 28, ¶21, 260 Wis. 2d 633, 660 N.W.2d 656 (quoting State ex rel. Angela M.W. v. Kruzicki, 209 Wis. 2d 112, 122, 561 N.W.2d 729 (1997)).

[6] Ramos v. Louisiana, 590 U.S. ___, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

[7] State v. Johnson, 2023 WI 39, ¶49, 407 Wis. 2d 195, 990 N.W.2d 174 (Rebecca Grassl Bradley, J., concurring) (citing Friends of Frame Park, U.A. v. City of Waukesha, 2022 WI 57, ¶42, 403 Wis. 2d 1, 976 N.W.2d 263 (Rebecca Grassl Bradley, J., concurring)).

[8] Johnson Controls, Inc. v. Emps. Ins. of Wausau, 2003 WI 108, ¶99, 264 Wis. 2d 60, 665 N.W.2d 257.

[9] Ramos, 140 S. Ct. at 1411 (Kavanaugh, J., concurring in part) (underlining in original).

[10] Johnson Controls, 264 Wis. 2d 60, ¶94.

[11] Ramos, 140 S. Ct. at 1411 (Kavanaugh, J., concurring in part) (quoting Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986)).

[12] State v. Outagamie Cnty. Bd. of Adjustment, 2001 WI 78, ¶29, 244 Wis. 2d 613, 628 N.W.2d 376 (internal quotation marks omitted) (quoting Citizens Util. Bd. v. Klauser, 194 Wis. 2d 484, 513, 534 N.W.2d 608 (1995) (Abrahamson, J., dissenting)).

[13] Johnson Controls, 264 Wis. 2d 60, ¶94 (internal quotation marks omitted) (quoting State v. Stevens, 181 Wis. 2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring)).

[14] Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015).

erodes the legitimacy of this court by "frequent[ly] and careless[ly]"[15] departing from precedent, as the current majority has done[16] and is poised to do again in this case.

A "special justification" is needed to overrule a prior decision.[17] As explained by Justice Rebecca Dallet when she ostensibly valued the doctrine of stare decisis, "[t]he outcome of a case should not turn on whether the current members of the court find one legal argument more persuasive but, rather, on whether today's majority has come forward with the type of extraordinary showing that this court has historically demanded before overruling one of its precedents."[18] For most courts, stare decisis is "comparatively strict" when the prior precedent interpreted a statute, as in Teigen.[19] Customarily, we consider five primary factors when asked to overturn precedent:

> (1) Changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is "unsound in principle;" or (5) the prior decision is "unworkable in practice."[20]

Petitioners do not address any of these well-established criteria in their petition. The petitioners fail to identify a single reason to overturn Teigen. The majority nevertheless grants this petition because the court's membership changed, presenting the opportunity to overturn a decision the majority dislikes. As Justice Shirley Abrahamson explained, however, "[n]o change in the law is

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[15] Johnson Controls, 264 Wis. 2d 60, ¶95 (citing State v. Lindell, 2001 WI 108, ¶169, 245 Wis. 2d 689, 629 N.W.2d 223 (Abrahamson, C.J., dissenting)).

[16] Clarke, 410 Wis. 2d 1, ¶79 (Ziegler, C.J., dissenting) ("The court of four takes a wrecking ball to the law, making no room, nor having any need for longstanding practices, procedures, traditions, the law, or even their co-equal fellow branches of government. Their activism damages the judiciary as a whole.").

[17] E.g., Johnson Controls, 264 Wis. 2d 60, ¶96 (citations omitted).

[18] State v. Roberson, 2019 WI 102, ¶97, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting) (cleaned up and citation omitted).

[19] Ramos, 140 S. Ct. at 1413 (Kavanaugh, J., concurring in part); Kimble, 576 U.S. at 456; Progressive N. Ins. Co. v. Romanshek, 2005 WI 67, ¶45, 281 Wis. 2d 300, 697 N.W.2d 417 (citing Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991)) ("[S]tare decisis concerns are paramount where a court has authoritatively interpreted a statute because the legislature remains free to alter its construction.").

[20] Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp., 2006 WI 91, ¶33, 293 Wis. 2d 38, 717 N.W.2d 216 (citations omitted).

justified by 'a change in the membership of the court or a case with more egregious facts.'"[21] Justice Ann Walsh Bradley once agreed: "A change in membership of the court does not justify a departure from precedent."[22] So did Justice Rebecca Dallet.[23] Their former "principles" having become obstacles to the majority's improper political agenda, the majority promptly forsakes them.

As in Clarke, the outcome of this case is predetermined.[24] The majority grants this petition to overturn Teigen and decree that drop boxes are lawful in another shameless effort by the majority to readjust the balance of political power in Wisconsin. The majority again wields political power the people of Wisconsin never gave it. This court does not have any authority to decide how elections are to be run; only the legislature does: "Establishing rules governing the casting of ballots outside of election day rests solely within the power of the people's representatives . . . . [T]he decision to devise solutions to make voting easier belongs to the legislature, not [the Wisconsin Elections Commission] and certainly not the judiciary."[25] This court is not "a super-legislature[,] [and] [i]t poses a grave threat to democracy to mislead the people into believing we are one."[26] Overturning Teigen, a mere two years after its issuance, is nothing but a partisan maneuver designed to give the majority's preferred political party an electoral advantage. This is not neutral judging.[27]

Teigen provided clarity to elections; the majority's decision to overturn it will court chaos in our upcoming elections. The rules governing the use of drop boxes will be up in the air, and overruling Teigen may lead to the invention of even more extra-legal absentee voting

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[21] Stevens, 181 Wis. 2d at 442 (Abrahamson, J., concurring) (quoting Welch v. State Farm Mut. Auto Ins. Co., 122 Wis. 2d 172, 182, 361 N.W.2d 680 (1985) (Steinmetz, J., dissenting)).

[22] St. Croix Cnty. Dep't of Health & Hum. Servs. v. Michael D., 2016 WI 35, ¶93, 368 Wis. 2d 170, 880 N.W.2d 107 (Abrahamson & Ann Walsh Bradley, JJ., dissenting).

[23] See Roberson, 389 Wis. 2d 190, ¶98 (Dallet, J., dissenting).

[24] Clarke, 410 Wis. 2d 1, ¶127 (Ziegler, C.J., dissenting) ("These four members of the court fundamentally undermine [stare decisis] in their quest to deliver a predetermined outcome to their constituents.").

[25] Teigen, 403 Wis. 2d 607, ¶52 n.25.

[26] Id.

[27] Cf. Clarke, 410 Wis. 2d 1, ¶302 (Hagedorn, J., dissenting) ("At the end of the day, the majority acts not to vindicate some legal principle, but to achieve a long sought-after goal: the redistribution of political power in the Wisconsin legislature. Rather than start with the law and see it through to the end, the court starts with the goal and works backwards to justify it. This is not faithful judging, and I will have no part of it.").

mechanisms.[28] With a decision from this court likely coming in late June, overturning Teigen will likely trigger a slew of litigation and destabilize our election laws on the eve of the November elections.

Our country is saturated with intense partisan politics and disagreement. Citizens increasingly question the legitimacy of elections with each election cycle. This court should not add fuel to the fires of suspicion engulfing our state and nation. The new majority, however, again succumbs to the siren song of its preferred political party and its crusade to overturn every decision it perceives to be an obstacle to victory. This is supposed to be a court of law, not power politics. I dissent.

I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

Samuel A. Christensen
Clerk of Supreme Court

[28] See Teigen, 403 Wis. 2d 607, ¶58 ("[T]he details of the drop box scheme are found nowhere in the statutes, but only in memos prepared by [Wisconsin Election Commission] staff, who did not cite any statutes whatsoever to support their invention.").

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