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OF WISCONSIN

Supreme Court of Wisconsin
No. 2022AP91

Richard Teigen and Richard Thom,
Plaintiffs-Respondents-Petitioners,

v.

Wisconsin Elections Commission,
Defendant-Co-Appellant,

Democratic Senate Campaign Committee,
Intervenor-Defendant-Co-Appellant,

Disability Rights Wisconsin,
Wisconsin Faith Voices for Justice and
League of Women Voters of Wisconsin,
Intervenors-Defendants-Appellants.

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Appeal from Waukesha County Circuit Court
The Honorable Michael O. Bohren, Presiding
Circuit Court Case No. 2021CV0958

MOTION FOR RECONSIDERATION BY INTERVENORS-DEFENDANTS-APPELLANTS DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE & LEAGUE OF WOMEN VOTERS OF WISCONSIN

Jeffrey A. Mandell, SBN 1100406
Douglas M. Poland, SBN 1055189
Rachel E. Snyder, SBN 1090427
Carly Gerads, SBN 1106808
David P. Hollander, SBN 1107233
STAFFORD ROSENBAUM LLP
222 W. Washington Ave., ste. 900
Madison, WI 53703
608.256.0226
jmandell@staffordlaw.com

Scott B. Thompson, SBN 1098161
Mel Barnes, SBN 1096012
LAW FORWARD, INC.
222 W. Washington Ave., ste. 250
Madison, WI 53703
414.241.3827
sthompson@lawforward.org

Attorneys for Intervenors-Defendants-Appellants

Please take notice that pursuant to Wis. Stat. § (Rule) 908.64 and Section III.J of the Court's Internal Operating Procedures, Disability Rights Wisconsin, the League of Women Voters of Wisconsin, and Wisconsin Faith Voices for Justice (collectively "DRW"), by their undersigned counsel, hereby move the Court to reconsider its July 8, 2022 decision.

DRW seeks an order holding that the use of secure absentee-ballot drop boxes substantially complies with Wis. Stat. § 6.87(4)(b)1. and is therefore legally permissible. If the Court does not reverse its mandate, at minimum, the Court should issue a correcting memorandum explaining: (1) that *Sommerfeld v. Board of Canvassers of the City of St. Francis*, 269 Wis. 299, 69 N.W.2d 235 (1955), has been abrogated only to the extent that it held the predecessor provision to the absentee-ballot return sentence in Wis. Stat. § 6.87(4)(b)1. is directory; (2) that substantial compliance remains sufficient to satisfy mandatory statutes; and (3) the evidentiary basis on which it concludes that secure absentee-ballot drop boxes do not constitute sufficient compliance with § 6.87(4)(b)1.

This motion is supported by the Memorandum filed herewith and by the Joint Appendix previously submitted to the Court.

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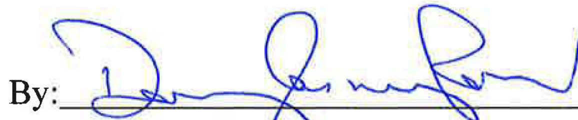
By: 

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Carly Gerads, SBN 1106808
David P. Hollander, SBN 1107233
STAFFORD ROSENBAUM LLP
222 W. Washington Ave., ste. 900
Madison, WI 53703
608.256.0226
jmandell@staffordlaw.com
dpoland@staffordlaw.com
rsnyder@staffordlaw.com
cgerads@staffordlaw.com
dhollander@staffordlaw.com

Scott B. Thompson, SBN 1098161
Mel Barnes, SBN 1096012
LAW FORWARD, INC.
222 W. Washington Ave., ste. 250
Madison, WI 53703-0326
414.241.3827
sthompson@lawforward.org
mbarnes@lawforward.org

Attorneys for Intervenor-Defendants-Appellants

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION BY INTERVENORS-DEFENDANTS-APPELLANTS DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE & LEAGUE OF WOMEN VOTERS OF WISCONSIN

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David P. Hollander, SBN 1107233
STAFFORD ROSENBAUM LLP
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608.256.0226
jmandell@staffordlaw.com

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Mel Barnes, SBN 1096012
LAW FORWARD, INC.
222 W. Washington Ave., ste. 250
Madison, WI 53703
414.241.3827
sthompson@lawforward.org

Attorneys for Intervenors-Defendants-Appellants

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INTRODUCTION

DRW recognizes this motion requests extraordinary relief: reconsideration of this Court's July 8 decision. Yet, reconsideration is imperative because a majority of the Court misconstrued statutory history and overruled longstanding Wisconsin precedent without following the Court's own requirement that "[a]ny departure from the doctrine of *stare decisis* demands special justification." *State v. Roberson*, 2019 WI 102, ¶49, 389 Wis. 2d 190, 935 N.W.2d 813 (internal quotations omitted). That requirement is particularly compelling where, as here, the right at stake is the most "precious in a free country"—"that of having a voice in the election of those who make laws under which, as good citizens, we must live." *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶31, __ Wis. 2d __, 976 N.W.2d 519 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

The Court's July 8 decision decreed that one of the Court's important and oft-cited voting precedents—*Sommerfeld v. Board of Canvassers of the City of St. Francis*, 269 Wis. 299, 69 N.W.2d 235 (1955)—is now a "nullity." *Teigen*, 2022 WI 64, ¶80 (majority support). In so doing, the Court erroneously conflated two independent bases upon which *Sommerfeld* stands and also made a fundamental error of statutory and decisional history. These errors demand reconsideration.

A more complete evaluation of relevant law compels the conclusion that the use of secure absentee-ballot drop boxes substantially complies with Wisconsin statutes. Even if the Court does not change its ultimate conclusion, the "people of Wisconsin deserve confidence that our elections are free and fair and conducted in compliance with the law." *Trump v. Biden*, 2020 WI 91, ¶58, 394 Wis. 2d 629, 951 N.W.2d 568, *cert. denied,* 141 S. Ct. 1387 (2021) (Hagedorn, J, concurring). Such confidence requires that courts reviewing contested questions of election law explain their rulings in clear, complete, cogent analyses.

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APPLICABLE LEGAL STANDARDS

A. Reconsideration

This motion seeks reconsideration under Wis. Stat. § (Rule) 809.64. The Court's Internal Operating Procedures provide that the Court will grant such a motion only where it "has overlooked controlling legal precedent or important policy considerations or has overlooked or misconstrued a controlling or significant fact appearing in the record." IOP § III.J. In the alternative, the Court may issue "a corrective or explanatory memorandum to its opinion without changing the original mandate." *Id.*

B. Reversing Precedent

"Any time this court is asked to overturn a prior case, [it] must thoroughly consider the doctrine of stare decisis." *Hennessy v. Wells Fargo Bank, N.A.*, 2022 WI 2, ¶27, 400 Wis. 2d 50, 968 N.W.2d 684 (internal quotation marks omitted). Our legal tradition values stare decisis because "[f]idelity to precedent ensures that existing law will not be abandoned lightly." *Id.* The danger of abandoning stare decisis is that, "deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results." *Id.* (internal quotation marks omitted). For that reason, this Court has repeatedly affirmed that "any departure from stare decisis requires special justification." *Id.* (internal quotation marks omitted); *accord Roberson*, 2019 WI 102, ¶49.

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When asked to overturn precedent, the Court considers whether:

> (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.

Hennessy, 2022 WI 2, ¶28 (quoting *Roberson*, 2019 WI 102, ¶49). This Court also "frequently review[s] whether reliance interests are implicated and whether the decision has produced a settled body of law." *Id.* (cleaned up).

ARGUMENT

The *Teigen* decision contains inaccurate and ahistorical analyses of both Wisconsin statutes and this Court's precedents. This problem is not restricted to minority opinions but also appears in paragraphs of the lead opinion that garnered majority support. The errors are significant and affect both the development and the present state of Wisconsin law.

The Court's analysis relies upon a simple syllogism, comprising two premises and a conclusion:

> **Premise 1:** *Sommerfeld* turned on interpreting as directory, rather than mandatory, the statute in force at the time that governed the return of absentee ballots.
>
> **Premise 2:** Wisconsin Stat. § 6.84 changed Wisconsin law by instructing this Court to interpret as mandatory, rather than directory, the provision governing absentee-ballot return.
>
> **Conclusion:** *Sommerfeld* was, therefore, abrogated by the adoption of § 6.84 and is no longer good law.

A majority of the Court held to this syllogism:

> [T]he legislature superseded *Sommerfeld*'s conclusion in 1986 by adopting Wis. Stat. § 6.84. 1985 Wis. Act 304, § 68n. Section 6.84(2) provides that "with respect to matters relating to the absentee ballot process," several statutes, including § 6.87(4), "shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election." The adoption of § 6.84 renders *Sommerfeld* a nullity.

Teigen, 2022 WI 64, ¶80 (majority support). So too did two separate concurring opinions:

> *Sommerfeld* pre-dates Wis. Stat. § 6.84. Its conclusion, that absentee voting procedures were directory, contradicts § 6.84, which requires that absentee voting procedures are "mandatory[,]" *i.e.*, they must be followed. Accordingly, to the extent that it described voting procedures as directory and substantial compliance being sufficient to satisfy § 6.84, *Sommerfeld* is no longer good law.

Id., ¶108 (Roggensack, J, concurring) (internal footnotes omitted).

> *Sommerfeld*'s holding that the in-person delivery requirement is directory has since been abrogated. Section 6.84(2) now provides that the requirement "shall be construed as mandatory."

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Id., ¶176 (Hagedorn, J., concurring).

But both premises in this syllogism are historically inaccurate and therefore flawed. The evolution of the relevant case law and statutes is far more complex than the syllogism acknowledges, and that complexity matters. Reconsideration is appropriate here because the Court (1) "has overlooked controlling legal precedent" in the form of *Lanser v. Koconis*, 62 Wis. 2d 86, 214 N.W.2d 425 (1974), and (2) "has misconstrued a controlling or significant fact" in the form of the statutory history, which is significantly more complex than the Court acknowledged. IOP § III.J.

I. The *Teigen* decision misreads *Sommerfeld* and the subsequent development of Wisconsin law.

In *Sommerfeld*, this Court held that substantial compliance satisfies mandatory election statutes. This holding has been repeatedly applied over the years, even as the Legislature has modified the applicable statutes. A careful and methodical review of the relevant statutory development and interpretation over time reveals why the simplistic syllogism described above yields an inaccurate statutory interpretation.

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A. *Sommerfeld* held that substantial compliance satisfies mandatory election statutes.

The *Sommerfeld* case was rooted in the statutory scheme that existed in 1955. At that time, return of absentee ballots was governed by Wis. Stat. § 11.59, which stated in relevant part that a completed absentee ballot, in a sealed envelope, "shall be mailed by such voter, postage prepaid, to the officer issuing the ballot, or if more convenient it may be delivered in person." *Sommerfeld*, 269 Wis. at 300 (quoting Wis. Stat. § 11.59). No provision of our election code at the time made § 11.59 mandatory. This contrasted with, for example, § 11.57, which governed how municipal clerks delivered blank absentee ballots to voters who requested them and contained the following language: "Any such ballot not mailed or delivered personally

as herein stated shall not be counted." *Olson v. Lindberg*, 2 Wis. 2d 229, 230, 85 N.W.2d 775 (1957) (quoting Wis. Stat. § 11.57).

The *Sommerfeld* Court focused on the distinction between mandatory and directory provisions of election law. It adopted a test, taken from *Corpus Juris Secundum*:

> The difference between mandatory and directory provisions of election statutes lies in the consequence of nonobservance: An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid. Deviations from directory provisions of election statutes are usually termed 'irregularities,' [and] do not vitiate an election.

Sommerfeld, 269 Wis. at 303 (quoting 29 C.J.S., Elections § 214).[1] Based on the absence of mandatory-consequences language in Wis. Stat. § 11.59 and the overriding policy (then contained in Wis. Stat. § 5.011) that non-mandatory provisions were to be understood as directory, the *Sommerfeld* Court construed § 11.59 as a directory statute. 269 Wis. at 302.

But the *Sommerfeld* Court did not stop there. It reached a second, independent holding that substantial compliance is sufficient to meet the requirements of a mandatory statute: "even in those states which have adopted a rule of strict construction … substantial compliance therewith is all that is required." *Id.* at 303. Accordingly, the Court held that, "while the technical requirements set forth in the absentee voting law are mandatory, yet in meeting these requirements laws are construed so that a substantial compliance therewith is all that is required." *Id.* (quoting *McMaster v. Wilkinson*, 15 N.W.2d 348, 353 (Neb. 1944), *overruled on unrelated grounds by State ex rel. Brogan v. Boehner*, 119 N.W.2d 147 (Neb. 1963)). This Court reaffirmed that holding, and its basis, years later. *Schmidt v. W. Bend Bd. of Canvassers*, 18 Wis. 2d 316, 324, 118 N.W.2d 154 (1962) (again quoting

[1] In adopting the C.J.S. test to distinguish between "mandatory" and "directory" statutes, the Court's approach did not turn on whether a statute includes the word "shall" or "may." *See State v. R.R.E.*, 162 Wis. 2d 698, 707, 470 N.W.2d 283 (1991) ("'Shall' will be construed as directory if necessary to carry out the intent of the legislature.").

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McMaster for the proposition that "substantial compliance" with mandatory election statute "is all that is required").

To be sure, *Sommerfeld* quotes C.J.S. for the proposition that "an act done in violation of a mandatory provision is void[.]" 269 Wis. at 303 (quoting 29 C.J.S., Elections § 214). But if a statute is mandatory, ***then*** the next question is whether an "act was done in violation of" the mandatory provision and is therefore "void." *Sommerfeld* held that, where there is substantial compliance, the act is not "done in violation of" the statute. *Id.* at 304. The same section of C.J.S. this Court adopted in *Sommerfeld* sharpens this point further in its current iteration. (*See* Section II.A, *infra*.)

B. While the statutory scheme governing absentee voting remained unchanged, this Court repeatedly applied *Sommerfeld*'s holding on substantial compliance for mandatory provisions within that scheme.

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This Court confirmed DRW's reading of *Sommerfeld* in *Kaufmann v. La Crosse City Bd. of Canvassers*, 8 Wis. 2d 182, 98 N.W.2d 422 (1959). *Kaufmann* involved several voters who returned their completed absentee ballots without signing the required affidavit. The Court concluded that the ballots should have been marked "'Rejected' for the reason that the affidavits were insufficient and were not in fact affidavits at all[.]" *Id.* at 185. The Court noted that "[f]ailure to follow the information supplied means that there has been no substantial compliance with the provisions of sec. 11.59, Stats." *Id.* The Court invalidated the unsigned ballots, explaining: "The distinction between the *Sommerfeld* case and the present case is clear. There was a substantial compliance in the *Sommerfeld* case while in the present case there was not." *Id.* at 186.

Kaufmann was far from the only case that applied *Sommerfeld*'s holding on substantial compliance. In *Schmidt*, 18 Wis. 2d at 316, the Court distinguished *Kaufmann* to find substantial compliance with Wis. Stat. § 11.57 where absentee-ballot affidavits were completed, but not in the

presence of the actual municipal clerk. And in *Gradinjan v. Boho*, 29 Wis. 2d 674, 682, 139 N.W.2d 557 (1966), the Court applied *Sommerfeld* to determine that Wis. Stat. § 11.62 was a mandatory statute and discounted absentee ballots cast without substantial compliance with the requirement that the clerk's name or initials appear on each absentee ballot.

None of these cases questioned, much less overturned, *Sommerfeld*'s holding that substantial compliance meets the requirements of a mandatory election statute.

C. In the mid-1960s, the Legislature adopted new statutory language that converted more provisions governing absentee ballots, including the provision construed in *Sommerfeld*, into mandatory statutes.

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Sommerfeld and the cases that followed over the next decade highlighted that some provisions regarding absentee ballots were mandatory, while others were directory. To give one example, *Anderson v. Budzien*, 12 Wis. 2d 530, 535, 107 N.W.2d 496 (1961), narrowly applied the mandatory language in Wis. Stat. § 11.57 such that some portions of § 11.57 were understood as directory and therefore consistent with Wis. Stat. § 11.55, which lacked any consequences language that would make that provision mandatory.

The Legislature overhauled the election statutes in 1966. Indeed, at oral argument, Teigen's counsel cited this as the key historical change. Wisconsin Eye at 1:39:00-1:39:15.[2] And for good reason. The Legislature consolidated numerous provisions governing absentee-voting procedures—including the instructions for clerks sending out absentee ballots, which moved from Wis. Stat. § 11.57 to Wis. Stat. § 6.87(3), and the instructions for voters returning absentee ballots, which moved from Wis. Stat. § 11.59 to § 6.87(4). *See* 1965 c. 666.

[2] *See* https://wiseye.org/2022/04/13/wisconsin-supreme-court-oral-arguments-richard-teigen-v-wisconsin-elections-commission/ (last accessed July 27, 2022).

As a result of this reorganization, both Wis. Stat. §§ 11.57 and 11.59—the two provisions contrasted in *Sommerfeld*—were subject to the interpretive gloss the Legislature provided in Wis. Stat. § 6.87(6): "Any ballot not mailed or delivered as provided in this section shall not be counted." Under the test adopted in *Sommerfeld*, § 6.87(6) clearly expressed the Legislature's intent that all provisions of § 6.87 should be construed and applied as mandatory.

D. Even after the mid-1960s statutory changes, this Court continued to hold that substantial compliance satisfied mandatory absentee-voting provisions.

In 1974, this Court decided *Lanser v. Koconis*, which resolved a challenge to 33 absentee ballots cast by nursing-home residents. Rather than mailing an absentee ballot to each resident who applied for one, the clerk had an employee of the Wauwatosa Police Department deliver the ballots to the nursing home. 62 Wis. 2d at 95. Moreover, some of the residents did not fully complete the certification required for an absentee ballot to be counted. *Id.*

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The plaintiff filed suit, asserting violations of Wis. Stat. § 6.87(3) and (4). *Id.* at 90, 94. Both provisions were rendered mandatory by § 6.87(6), quoted above, and the mandatory nature of the certification requirement was reinforced by a separate provision's assertion that, "[w]hen the affidavit or certification is found to be insufficient, ... the vote shall not be accepted or counted." *Id.* at 96 (quoting Wis. Stat. § 6.88(3)(b)).

Nonetheless, the unanimous *Lanser* Court reached the same conclusion that *Sommerfeld* had endorsed nearly twenty years earlier. The *Lanser* Court held that "there was substantial compliance with the absentee voting procedure in all respects and full compliance in so far as the electors are concerned." *Id.* at 90. Accordingly, the Court concluded that the challenged absentee ballots "were properly counted." *Id.* at 96.

Lanser thus reaffirms—even after the Legislature's express action to move the absentee-ballot provision construed in *Sommerfeld* as a directory statute and, in the process, convert it into a mandatory statute—that interpreting an election statute as mandatory is not dispositive and marks the beginning, rather than the end, of judicial consideration. Under *Lanser*, just as under *Sommerfeld*, once a court determines a statute is mandatory, it must then determine whether there has been substantial compliance. And, if there has been substantial compliance, that meets the mandatory statute's command. The court of appeals has perpetuated *Lanser*'s approach. *Matter of Hayden* explained that, pursuant to *Lanser*, "[a]bsent connivance, fraud or undue influence, substantial compliance with the statutory voting procedures is sufficient." 105 Wis. 2d 468, 479, 313 N.W.2d 869 (Ct. App. 1981).[3]

E. The Legislature again revamped absentee-voting statutes in 1986, adopting Wis. Stat. § 6.84.

Almost twenty years after the 1966 reorganization and nearly a dozen years after this Court decided *Lanser*, the Legislature again altered the

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[3] Teigen may contend that DRW forfeited the right to rely on *Lanser*. Not so. DRW argued that *Sommerfeld* "has been the law in Wisconsin for almost 70 years," Opening Br. at 40, and at argument, counsel for DRW argued that *Sommerfeld* held that a "mandatory statute is satisfied by substantial compliance [and] that a directory statute doesn't even need that." Wisconsin Eye at 19:40-21:40. Counsel continued, saying that "subsequent cases applying *Sommerfeld* confirm that reading" and urging the Court to look carefully at *Sommerfeld*'s progeny, which includes *Lanser*. *Id.* Even though subsequent questions on other topics precluded counsel from fully developing this argument, the Court should consider it nonetheless because reversing precedent requires "special justification," *Roberson*, 2019 WI 102, ¶49, and this appeal involves voting rights fundamental to our system of government. *See D.L. Anderson's Lakeside Leisure Co. v. Anderson*, 2008 WI 126, ¶41, 314 Wis. 2d 560, 757 N.W.2d 803 ("[W]e exercise our discretion to review the waived [issue because] involves important issues that we wish to address."); *Gumz v. N. States Power Co.*, 2007 WI 135, ¶73, 305 Wis. 2d 263, 742 N.W.2d 271 ("This court has the discretion to review an issue that has been waived when it involves a question of law, has been briefed by the opposing parties, and is of sufficient public interest to merit a decision.").

Even if the Court were to conclude that the argument was forfeited, it should nonetheless consider the relevance of *Lanser* to ensure—if it is going to reverse *Sommerfeld* and *Lanser*—that it does do explicitly, transparently, and with the benefit of thorough, adversarial briefing.

statutory provisions governing absentee voting. One change was the creation of Wis. Stat. § 6.84. Subsection (1) of that new statute contains a legislative policy based on the finding that absentee voting is a privilege rather than a right. Subsection (2) picks up the theme previously scattered throughout various absentee-voting statutes, declaring that specific provisions "relating to the absentee ballot process ... shall be construed as mandatory" such that absentee ballots "cast in contravention of the procedures specified in those provisions may not be counted."

Wisconsin Stat. § 6.84 rendered Wis. Stat. § 6.86 and specified provisions in Wis. Stat. § 9.01 mandatory for the first time. With respect to Wis. Stat. § 6.87(3)-(7)—including the specific provision in § 6.87(4)(b)1. that is at issue here—§ 6.84 simply perpetuated the substantive law interpreted in *Lanser*. *See* Wis. Stat. § 990.001(7) ("A revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction").[4] Nothing added in § 6.84 is so clear. The approach to mandatory statutes that this Court first adopted in *Sommerfeld* and reaffirmed in *Lanser* (and that lower courts in Wisconsin have applied ever since) is entirely consistent with § 6.84(2). In harmony with *Sommerfeld* and *Lanser*'s "substantial compliance" rule, the statutory text proscribes only that which

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[4] Indeed, by amending the statutes relating to absentee voting, but failing to expressly overrule the Court's longstanding substantial-compliance rule, the Legislature acquiesced to the continuing application of *Sommerfeld*, *Lanser*, and their progeny. The Legislature is presumed to act with knowledge of existing case law. *See Reiter v. Dyken*, 95 Wis. 2d 461, 471, 290 N.W.2d 510 (1980) (quoting *Zimmerman v. Wis. Electric Power Co.*, 38 Wis. 2d 626, 633-34, 157 N.W.2d 648 (1968)) ("Where a law passed by the legislature has been construed by the courts, legislative acquiescence in or refusal to pass a measure that would defeat the courts' construction is not an equivocal act. The legislature is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged."). Had the Legislature wished to displace this Court's holding that substantial compliance satisfies a mandatory statute, it could have written into Wis. Stat. § 6.84 (or Wis. Stat. § 6.87(6) before that) words to the effect that substantial compliance would not suffice to meet the requirements of any election statute specified as mandatory. The Legislature did not do so.

is done in "contravention" of a mandatory statute. Conduct that substantially complies was left untouched by § 6.84(2), which did not effect any substantive change. *Lanser* remains the precedential interpretation of the current statutory regime.

F. This Court's *Teigen* decision ignores most of this history, leapfrogging from *Sommerfeld* directly to Wis. Stat. § 6.84.

This Court's discussion of *Sommerfeld* in the *Teigen* decision ignores the treatment and development of Wisconsin's absentee-ballot statutes during the three decades between 1955 and 1986, including the 1960s overhaul of the election code and *Lanser*'s construction of the substantially indistinguishable provision then found in Wis. Stat. § 6.87(6). The Court's failure to consider the development of Wisconsin's absentee-ballot laws during that critical 30-year period renders both premises of the syllogism repeatedly cited in *Teigen* fatally flawed. The first premise misconstrues the holding in *Sommerfeld* and gives no consideration to how this Court has developed that holding in subsequent cases. The second premise inaccurately ascribes novelty to Wis. Stat. § 6.84, ignoring the fact that the Legislature's 1966 reorganization of Wisconsin's absentee-voting statutes made most provisions governing absentee ballots mandatory two decades before § 6.84 became law. This treatment of § 6.84 also ignores the Court's holding in *Lanser* that the designation of those provisions as mandatory did not change the substantial-compliance test.

To overcome the history, precedent, and text, the *Teigen* majority rewrote § 6.84(2). Although the statutory text, like the *Sommerfeld* and *Lanser* holdings, prohibits only "ballots cast *in contravention of* the procedures specified," Wis. Stat. § 6.84(2) (emphasis added), drop boxes were rendered illegal because the Court could not find express statutory authorization for them. *Teigen*, 2022 WI 64, ¶54 (supplanting § 6.84's "contravention" with "authorizing" and "comport with"). *But see, e.g.*, *State*

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v. Neill, 2020 WI 15, ¶23, 390 Wis. 2d 248, 938 N.W.2d 521 ("One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." (quoted source omitted)). Because the *Teigen* majority's most basic conclusion is grounded in a false syllogism, reconsideration of the *Teigen* analysis is necessary.

II. Faithfully applying *Sommerfeld* and *Lanser* here yields the conclusion that absentee-ballot drop boxes substantially comply with Wisconsin's election code.

Drop boxes are safe, secure, convenient mechanisms designated by municipal clerks to facilitate voters returning completed absentee ballots. Though return to a drop box is not precisely a return to the municipal clerk's office, it comes close enough to satisfy the substantial-compliance test this Court prescribed in *Sommerfeld* and reiterated in *Lanser*. The *Teigen* Court reached the opposite outcome primarily because it misconstrued *Sommerfeld* and failed even to acknowledge *Lanser*.

Specifically, the *Teigen* majority held that *Sommerfeld* "deemed the in person delivery requirement 'directory only,' ***so*** it reasoned 'a delivery of ballots by agent is a substantial compliance' permitting the counting of the ballots." *Teigen*, 2022 WI 64, ¶81 (majority support) (quoting *Sommerfeld*, 269 Wis. at 302) (emphasis added). But the causal link represented by the "so" embedded between two quotes from *Sommerfeld* does not exist in that decision, which held the provision at issue was "directory only, ***and*** that a delivery of ballots by agent is a substantial compliance therewith." *Sommerfeld*, 269 Wis. at 304 (emphasis added). In other words, while *Sommerfeld* reached two independent conclusions, *Teigen* misleadingly presented them as a causal chain.

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A. *Sommerfeld* and its progeny stand on a strong foundation in holding that substantial compliance satisfies mandatory statutes.

Under a faithful reading of *Sommerfeld,* the Court first evaluates whether a statutory provision is mandatory or directory, and then separately determines whether substantial compliance meets the statute's requirements. This reading of *Sommerfeld* is buttressed by three other sources. The first, discussed above, is this Court's unanimous decision in *Lanser* that "there was substantial compliance with the absentee voting procedure," even where the applicable statute was plainly mandatory. 62 Wis. 2d at 90.

The second is *Corpus Juris Secundum*, a legal encyclopedia that "summarizes the uniform tenor of holdings throughout the United States." *Schuster v. St. Vincent Hosp. of Hosp. Sisters of Third Ord. of St. Francis Sisters*, 45 Wis. 2d 135, 142, 172 N.W.2d 421 (1969). C.J.S. explains that "[a]n absentee ballot will not be invalidated where noncompliance with the statute relates to matters merely directory in nature ***or*** where there is a substantial compliance with the statute." 29 C.J.S., Elections § 214 (internal quotations omitted) (emphasis added). This is particularly meaningful here because this Court has so often relied not just on C.J.S., but on this particular section.

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This Court initially adopted section 214 of C.J.S. in *Sommerfeld* to distinguish between mandatory and directory statutes. 269 Wis. at 303. It has repeatedly relied on the same section over the years. *See, e.g.*, *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 593, 263 N.W.2d 152 (1978); *Lanser*, 62 Wis. 2d at 91; *Gradinjan*, 29 Wis. 2d at 681; *Kaufmann*, 8 Wis. 2d at 184; *Olson*, 2 Wis. 2d at 235. C.J.S. makes clear that ***either*** substantial compliance with a mandatory statute ***or*** a finding that the statute is directory necessitates finding the voting practice lawful. *See, e.g.*, *State v.*

Braunschweig, 2018 WI 113, ¶24, 384 Wis. 2d 742, 921 N.W.2d 199 (use of the disjunctive word "or" creates "two alternative, independent options.").

The third is other, persuasive authority holding that substantial compliance meets the requirements of mandatory statutes in other contexts. Consider, for example, a case holding that, in the absence of prejudice, substantial compliance satisfies a mandatory statute governing OSHA's inspection of a construction site. *Chicago Bridge & Iron Co. v. Occupational Safety & Health Rev. Comm'n*, 535 F.2d 371, 375 (7th Cir. 1976). OSHA conducted a "walkaround" inspection of a construction site without the prime contractor's employee present. *See id.* at 372. When OSHA issued citations for violations discovered in the inspection, the contractor objected the citations were void because Section 8(e) of the Occupational Safety and Health Act required its employee be present for the inspection. *Id.* at 372-73 (citing 29 U.S.C. § 657(e)). The contractor argued "that the terms of the statute are mandatory[.]" *Id.* The Seventh Circuit agreed that the statute was mandatory but denied that could "dispose of the matter before us." *Id.* at 375-76. Instead, the court accepted OSHA's position that substantial compliance and the lack of prejudice sufficed to satisfy the mandatory statute. *Id.* at 377.[5]

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B. Absentee-ballot drop boxes substantially comply with the requirements of Wis. Stat. § 6.87(4)(b)1.

Applying the substantial-compliance test adopted in *Sommerfeld* and extended in *Lanser* to the allegations here reveals that secure drop boxes satisfy Wisconsin law. Under this Court's precedent, "substantial compliance will suffice if it is actual compliance in respect to the substance essential to every reasonable objective of the statute." *State v. Piddington*, 2001 WI 24,

[5] The Eighth, Ninth, and Tenth Circuits, as well as Kentucky's Court of Appeals have followed the Seventh Circuit's holding that substantial compliance with the mandatory statute is sufficient. *See Marshall v. W. Waterproofing Co.*, 560 F.2d 947, 952 (8th Cir. 1977); *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071, 1073 (9th Cir. 1976); *Marshall v. C. F. & I. Steel Corp.*, 576 F.2d 809, 814 (10th Cir. 1978); *Dep't of Labor v. Hayes Drilling, Inc.*, 354 S.W.3d 131, 136 (Ky. Ct. App. 2011).

¶33, 241 Wis. 2d 754, 623 N.W.2d 528 (internal quotations omitted); *accord Washburn Cnty. v. Smith*, 2008 WI 23, ¶62, n.52, 308 Wis. 2d 65, 746 N.W.2d 243. There is no meaningful distinction between in-person return to the municipal clerk's staff directly and in-person return to a secure drop box that the municipal clerk has designated for that purpose. The statute simply requires electors to deliver their absentee ballots to the municipal clerk.

As Justice Hagedorn has recognized, "the only reasonable reading of the law would allow those acting on a clerk's behalf to receive absentee ballots." *Trump v. Biden*, 2020 WI 91, ¶54, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring). This compelled the conclusion that "voters who returned ballots to city election inspectors at the direction of the clerk returned their absentee ballots 'in person, to the municipal clerk' as required by § 6.87(4)(b)1." *Id.* By the same logic, absentee ballots placed into a secure drop box designated by the municipal clerk satisfy Wis. Stat. § 6.87(4)(b)1., as long as the ballots are retrieved by someone "acting on [the] clerk's behalf."

Moreover, the concept of *in*substantial compliance turns largely on a showing of prejudice. *See, e.g.*, *Washburn Cnty.*, 2008 WI 23, ¶62 n.52 (holding that there is "substantial compliance unless the overstatement has a prejudicial effect on the driver"); *Joint Sch. Dist. No. 1 of City of Watertown v. Joint Cnty. Sch. Comm. of Jefferson, Dodge & Waukesha Cntys.*, 26 Wis. 2d 580, 585, 133 N.W.2d 317 (1965) ("[S]ubstantial compliance with these requirements is established so long as the record shows that no one was prejudiced by any lack of notice."); *Chicago Bridge & Iron Co.*, 535 F.2d at 377 ("[W]hen as here there has been substantial compliance [...] and the employer is unable to demonstrate that prejudice resulted [...] citations issued as a result of the inspection are valid.").

This is best illustrated by *Lanser*, where the Court focused on the fact that there was no credible claim of fraud or undue influence:

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> If the record in this case indicated the slightest evidence of any fraud, connivance or attempted undue influence, we would have no hesitancy in declaring the absentee voters' ballots invalid. [...] There is absolutely no evidence from which it could be inferred that the method of delivery by the municipal clerk in any way affected their vote.

62 Wis. 2d at 90. Teigen, like the plaintiff in *Lanser*, has not produced—nor even made any attempt to allege, much less provide—any evidence of prejudice, fraud, or undue influence. And the circuit court granted summary judgment to Teigen without making a single factual finding, even though several key allegations in the complaint were disputed. (J. App. 555-571)

The lack of an evidentiary record here is not surprising. No evidence undermining the security of drop boxes in Wisconsin exists. That is why former Wisconsin Solicitor General Misha Tseytlin wrote a letter setting forth the position of Assembly Speaker Robin Vos and then-Senate Majority Leader Scott Fitzgerald, wherein he expressed their "wholehearted[] support" for secure drop boxes as a "convenient, secure, and expressly authorized absentee-ballot-return method[]." (J. App. 233-235) One month later, the U.S. Supreme Court agreed:

> Returning an absentee ballot in Wisconsin is also easy. ... [A]bsentee voters who do not want to rely on the mail have several other options. ... [T]hey may place their absentee ballots in a secure absentee ballot drop box. Some absentee ballot drop boxes are located outdoors, either for drive-through or walk-up access, and some are indoors at a location like a municipal clerk's office.

Democratic Natl'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 36 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *id.* at 29 ("[V]oters may return their ballots [to] various "no touch" drop boxes staged locally.") (Gorsuch, J., concurring).

There is simply no colorable claim that secure drop boxes facilitate fraud, undue influence, or prejudice. Thus, under this Court's own binding precedents, return of a completed, sealed absentee ballot to a secure drop box designated by the municipal clerk for that purpose is compliance "in respect

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to the substance essential to every reasonable objective of" the election code. *Piddington*, 2001 WI 24, ¶33.

To say otherwise would require this Court to go further than the *Teigen* majority did in ahistorically asserting that Wis. Stat. § 6.84 abrogated *Sommerfeld*. Instead, a majority of the Court would need to address *Lanser*'s extension of *Sommerfeld*—an extension made even after the 1966 statutory changes clearly established that the relevant provisions governing absentee ballots were mandatory. *Lanser* nonetheless unanimously held that substantial compliance was sufficient to meet the statute's requirements.

This Court should reconsider its *Teigen* decision to account for this precedent and should hold that faithful application of those authorities demonstrates the use of secure absentee-ballot drop boxes substantially complies with Wis. Stat. § 6.87(4)(b)1.

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III. Even if the Court insists upon rewriting the statutes to forbid drop boxes, it should address the full statutory history and address *Lanser*'s precedential value.

A majority of the Court may persist in ruling—precedent, statutory history, and plain text notwithstanding—that municipal clerks cannot lawfully designate secure drop boxes as a means for voters to return completed absentee ballots. But such an outcome requires overruling *Lanser* and addressing the statutory history ignored in the *Teigen* decision.

To be sure, this Court has the power to overrule *Lanser* and its progeny. But the Court should do so expressly, transparently, and based upon an explained "special justification" for its "departure from the doctrine of stare decisis." *Roberson*, 2019 WI 102, ¶49. It is simply not true, as the syllogism underlying the *Teigen* decision oversimplifies matters, that Wis. Stat. § 6.84 trumped *Sommerfeld*. This Court cannot and should not hide behind the Legislature's adoption of § 6.84, which made no substantive alteration in the applicable law. This Court is "respectful of the doctrine of

stare decisis" because it "ensures that existing law will not be abandoned lightly." *Id.* (internal quotations omitted). Therefore, "this court has held that any departure from the doctrine of stare decisis demands special justification." *Id.* (internal quotations omitted). If this Court wants to abandon settled law, it should say so and explain its rationale.

Sommerfeld is an important precedent. Time and time again this Court has cited its holding favorably, even while occasionally distinguishing its outcome for factual reasons. *See Lanser*, 62 Wis. 2d at 91; *Gradinjan*, 29 Wis. 2d at 681; *Schmidt*, 18 Wis. 2d at 323; *Anderson*, 12 Wis. 2d at 533; *Kaufmann*, 8 Wis. 2d at 184; *Olson*, 2 Wis. 2d at 235. Yet, the majority in *Teigen* held that the adoption of Wis. Stat. § 6.84—a statute that was promulgated more than thirty years after the *Sommerfeld* decision and that made no substantive change to the law governing how voters return completed absentee ballots—"render[ed] *Sommerfeld* a nullity." *Teigen*, 2022 WI 64, ¶80. Two concurring Justices expressed their views that *Sommerfeld* is no longer good law. *Id.*, ¶108 ("[T]o the extent that it described voting procedures as directory and substantial compliance being sufficient to satisfy § 6.84, *Sommerfeld* is no longer good law.") (Roggensack, J., concurring); *id.*, ¶176 ("*Sommerfeld*'s holding that the in-person delivery requirement is directory has since been abrogated.") (Hagedorn, J., concurring).

The Court should not so "lightly" set aside *Sommerfeld* in its entirety. *Roberson*, 2019 WI 102, ¶49. As explained above, *Sommerfeld* is not a "nullity." It is the source of the prevailing test for how Wisconsin distinguishes between mandatory and directory statutes. And it provides the basis for the rule, reiterated in a series of opinions by this Court and the court of appeals, that substantial performance meets the requirements of a mandatory statute. That rule is central to *Lanser*, which unanimously held

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that substantial compliance satisfied multiple provisions of absentee-voting law.

If the Court does not reverse its mandate, it should, at minimum, issue a corrective memorandum explaining: (1) that *Sommerfeld* has been abrogated only to the extent that it held the predecessor provision to the absentee-ballot return sentence in Wis. Stat. § 6.87(4)(b)1. is directory; (2) that substantial compliance remains sufficient to satisfy mandatory statutes; and (3) the evidentiary basis on which it concludes that secure absentee-ballot drop boxes do not constitute sufficient compliance with § 6.87(4)(b)1.

CONCLUSION

For the foregoing reasons, the Court should grant this motion for reconsideration and reverse its decision in *Teigen* or, in the alternative, issue a memorandum that fully and forthrightly addresses the statutory history and precedential decisions omitted from the *Teigen* opinions.

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Dated: July 28, 2022 By:

Jeffrey A. Mandell, SBN 1100406
Douglas M. Poland, SBN 1055189
Rachel E. Snyder, SBN 1090427
Carly Gerads, SBN 1106808
David P. Hollander, SBN 1107233
STAFFORD ROSENBAUM LLP
222 W. Washington Ave., ste. 900
Madison, WI 53703
608.256.0226
jmandell@staffordlaw.com
dpoland@staffordlaw.com
rsnyder@staffordlaw.com
cgerads@staffordlaw.com
dhollander@staffordlaw.com

Scott B. Thompson, SBN 1098161
Mel Barnes, SBN 1096012
LAW FORWARD, INC.
222 W. Washington Ave., ste. 250
Madison, WI 53703-0326
414.241.3827
sthompson@lawforward.org
mbarnes@lawforward.org

Attorneys for Intervenor-Defendants-Appellants

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OF WISCONSIN

Supreme Court of Wisconsin
No. 2022AP91

Richard Teigen and Richard Thom,
Plaintiffs-Respondents-Petitioners,

v.

Wisconsin Elections Commission,
Defendant-Co-Appellant,

Democratic Senate Campaign Committee,
Intervenor-Defendant-Co-Appellant,

Disability Rights Wisconsin,
Wisconsin Faith Voices for Justice and
League of Women Voters of Wisconsin,
Intervenors-Defendants-Appellants.

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Appeal from Waukesha County Circuit Court
The Honorable Michael O. Bohren, Presiding
Circuit Court Case No. 2021CV0958

CERTIFICATE OF FILING & SERVICE BY INTERVENORS-DEFENDANTS-APPELLANTS DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE & LEAGUE OF WOMEN VOTERS OF WISCONSIN

Jeffrey A. Mandell, SBN 1100406
Douglas M. Poland, SBN 1055189
Rachel E. Snyder, SBN 1090427
Carly Gerads, SBN 1106808
David P. Hollander, SBN 1107233
STAFFORD ROSENBAUM LLP
222 W. Washington Ave., ste. 900
Madison, WI 53703
608.256.0226
jmandell@staffordlaw.com

Scott B. Thompson, SBN 1098161
Mel Barnes, SBN 1096012
LAW FORWARD, INC.
222 W. Washington Ave., ste. 250
Madison, WI 53703
414.241.3827
sthompson@lawforward.org

Attorneys for Intervenors-Defendants-Appellants

I hereby certify that I caused to be filed, via hand delivery on July 28, 2022, the following:

1. The original plus 22 copies of the Motion for Reconsideration by Intervenors-Defendants-Appellants Disability Rights Wisconsin, Wisconsin Faith Voices for Justice & League of Women Voters of Wisconsin.

2. The original plus 22 copies of the Memorandum of Law in Support of Motion for Reconsideration by Intervenors-Defendants-Appellants Disability Rights Wisconsin, Wisconsin Faith Voices for Justice & League of Women Voters of Wisconsin.

3. One copy of this certificate of filing and service.

I further certify that I caused to be served one copy of each of the foregoing documents via mail on all counsel included on the attached service list.

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Dated: July 28, 2022 By:____________________

Douglas M. Poland, SBN 1055189

STAFFORD ROSENBAUM LLP
222 W. Washington Ave., ste. 900
Madison, WI 53703

SERVICE LIST

Richard M. Esenberg
Brian W. McGrath
Katherine D. Spitz
Luke N. Berg
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202-3141
Email: rick@will-law.org
bmcgrath1914@gmail.com
kate@will-law.org
luke@will-law.org

Attorneys for Richard Teigen
& Richard Thom

Wisconsin Department of Justice
Thomas C. Bellavia
Steven C. Kilpatrick
P.O. Box 7857
Madison, WI 53707-7857
Email: bellaviatc@doj.state.wi.us
kilpatricksc@doj.state.wi.us

Attorneys for Wisconsin Elections Commission

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Joseph W. Voiland
519 Green Bay Road
Cedarburg, WI 53012
Email: joseph.voiland@veteranslibertylaw.us

Troupis Law Office
James R. Troupis
4126 Timber Lane
Cross Plains, WI 53528
Email: judgetroupis@gmail.com

Attorneys for Ron Johnson

Perkins Coie LLP
Charles G. Curtis
Michelle Marie Umberger Kemp
William M. Conley
33 East Main Street, Suite 201
Madison, WI 53703-5411
Email: ccurtis@perkinscoie.com
mkemp@perkinscoie.com
wconley@perkinscoie.com

Perkins Coie LLP
John Devaney
700 North Thirteen Street NW, Suite 600
Washington, DC 20005
Email: jdevaney@perkinscoie.com

Elias Law Group LLP
Elisabeth C. Frost
10 G Street NE, Suite 600
Washington, DC 20002
Email: efrost@elias.law

Attorneys for Democratic Senatorial Campaign Committee

Cramer, Multhauf & Hammes LLP
Matthew M. Fernholz
1601 East Racine Avenue, Suite 200
P.O. Box 558
Waukesha, WI 53187
Email: mmf@cmhlaw.com

Attorney for Honest Elections Project

Michael D. Dean LLC
Michael D. Dean
P.O. Box 2545
Brookfield, WI 53008
Email: miked@michaelddeanllc.com

Attorney for True the Vote, Inc.

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Conway, Olejniczak & Jerry SC
Kurt A. Goehre
P.O. Box 23200
Green Bay, WI 54305-3200
Email: kag@lcojlaw.com

Attorney for Republican National Committee,
National Republican Senatorial Committee,
Republican Party of Wisconsin

Claire M. Silverman
P.O. Box 6358
Monona, WI 53716
Email: cms@lwm-info.org

Attorney for League of Wisconsin
Municipalities

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