**No. 2022AP91**

# In the Supreme Court of Wisconsin

RICHARD TEIGEN and RICHARD THOM,
PLAINTIFFS-RESPONDENTS-PETITIONERS,

*v.*

WISCONSIN ELECTIONS COMMISSION,
DEFENDANT CO-APPELLANT,

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE
INTERVENOR-DEFENDANT-CO-APPELLANT

DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE, and LEAGUE OF WOMEN VOTERS OF WISCONSIN,
INTERVENORS-DEFENDANTS-APPELLANTS

On Appeal from the Waukesha County Circuit Court,
The Honorable Michael O. Bohren, Presiding,
Case No. 21cv958



## PLAINTIFFS-RESPONDENTS-PETITIONERS' OPPOSITION TO MOTION TO RECONSIDER

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## ARGUMENT

Intervenor-Defendants' motion to reconsider does not identify any ground for reconsideration that meets this Court's criteria—they do not point to any "controlling legal precedent or important policy considerations" that this Court overlooked or any "significant facts" that this Court "overlooked or misconstrued." IOP at 24. They argue that this Court misconstrued *Sommerfeld* and overlooked certain statutory history, but every premise of their argument is incorrect. This Court should deny their motion.

Their main premise is that this Court misunderstood the holdings in *Sommerfeld*, but it is they who misread that decision. They argue that *Sommerfeld* had two, alternative holdings: that the absentee-ballot procedures were "directory," but also that, even if they were mandatory, substantial compliance would be sufficient. Mot. 10–12. They rely most heavily on a quote from a Nebraska case and a single sentence in the *Sommerfeld* opinion about that case, but they significantly over-read that part of the opinion—this was not a holding of the Court, but simply a response to one of the attorney's arguments in the case. Just before quoting the Nebraska case, the Court stated, "As an example of strict construction, Sommerfeld's attorney calls attention to the case of *McMaster v. Wilkinson*, 145 Neb. 39, 15 N.W.2d 348, 353, 155 A.L.R. 667, but in that case it was stated: [quote from case]." *Sommerfeld*, 269 Wis. 299, 302 (1955). Then, right after quoting the case, the Court commented, "*Apparently* even in those states which have adopted a rule of strict construction they state that a substantial compliance therewith is all that is required." *Id*. at 303.

Intervenor-Defendants leave out the word "apparently"—which indicates skepticism from the Court about that proposition—and then treat the rest of that sentence as a holding in *Sommerfeld*. But aside from noting briefly what one other state had "apparently" done, the Court did not in any way endorse that view, much less adopt it as a holding. Indeed,

the Court immediately moved on to quote the "rule" from a treatise that "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." *Id.*

Then, at the end of the opinion, the Court clearly applied the "substantial compliance" test *because* it viewed the statute as "directory," not as an alternative holding about the test that would apply to mandatory statutes. Its concluding sentence is as follows: "We conclude, therefore, that in order to fulfill the spirit of our election laws the last sentence of section 11.59 is directory only, and that a delivery of ballots by agent is a substantial compliance therewith." *Id.* at 304. In other words, the Court associated the "substantial compliance" test with directory statutes, not mandatory statutes. Intervenors-Defendants heavily emphasize the "and" in this sentence, Mot. 18, as though it suggests two alternative rulings, but the far more straightforward reading is that the Court was simply applying the test for directory statutes after it concluded that the statute was directory.



Indeed, another case Intervenor-Defendants rely on, from just a few years later, characterized *Sommerfeld* exactly this way: "The provisions of secs. 11.58 and 11.59, Stats., *are deemed to be directory* and not mandatory. … *Nevertheless, there must be substantial compliance* with the statute." *Schmidt v. City of W. Bend Bd. of Canvassers*, 18 Wis. 2d 316, 323, 118 N.W.2d 154 (1962) (citing *Sommerfeld*, among other cases). In other words, the "substantial compliance" test is the test for *directory* statutes, not mandatory statutes. If "substantial compliance" were also sufficient for mandatory statutes, then the distinction between directory and mandatory statutes would be meaningless.

Since *Sommerfeld*, many cases in Wisconsin have associated the "substantial compliance" test with directory statutes, not mandatory statutes. Here are a few: *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶ 27, 247 Wis. 2d 708, 634 N.W.2d 882 ("Whereas

noncompliance with a mandatory provision renders a ballot void, failure to comply with a directory provision will not invalidate the vote so long as there is 'substantial compliance' with the statute"); *Combined Investigative Servs., Inc. v. Scottsdale Ins. Co.*, 165 Wis. 2d 262, 273, 477 N.W.2d 82 (Ct. App. 1991) ("If the statute is merely directory in nature, rather than mandatory, as the trial court's determination suggests, substantial compliance with its terms would be sufficient."); *In Int. of F.T.*, 150 Wis. 2d 216, 221, 441 N.W.2d 322 (Ct. App. 1989) ("If, as the state contends, the statutes are not mandatory, but merely directory in nature, substantial compliance with their terms would be sufficient."); *Matter of Recall of Redner*, 153 Wis. 2d 383, 390–91, 450 N.W.2d 808 (Ct. App. 1989) ("The statutory requirements for preparation, signing, and execution of petitions are directory rather than mandatory. … However, substantial compliance with the recall procedure is necessary.").

Petitioners also rely heavily on *Lanser v. Koconis*, 62 Wis. 2d 86, 214 N.W.2d 425 (1974), as an example of a case applying the "substantial compliance" test to a mandatory statute, but they misread that opinion as well. The Court of Appeals in that case did not hold that the provisions it interpreted were mandatory, but instead concluded that they were directory—relying heavily on *Sommerfeld* and Wis. Stat. § 5.01—and *because they were directory* applied the "substantial compliance" test. The Court even noted the importance of the distinction early on, explaining that while "there was substantial compliance," *"if* we were to consider the provisions of sec. 6.87(3), Stats., mandatory, and *thus* invalidate the 33 absentee ballots … ." But the Court then cited *Sommerfeld* and other cases for the proposition that "[i]n keeping with sec. 5.011, Stats., this court has quite consistently construed the provisions of election statutes as directory rather than mandatory so as to preserve the will of the elector." *Id.* at 91–92. Likewise, with respect to the certification issue in the case, *id.* at 94–98, the Court cited *Schmidt* and *Sommerfeld* for the proposition that the relevant provisions "are deemed to be directory and not mandatory," notwithstanding Wis. Stat.

§ 6.88(3)(b). *Id.* at 96–97. Proving the point, one of the cases quoted above cited *Lanser* for the proposition that "noncompliance with a mandatory provision renders a ballot void, [whereas] failure to comply with a directory provision will not invalidate the vote so long as there is 'substantial compliance' with the statute." *Roth*, 2001 WI App. 221, ¶ 27.

Even if Intervenor-Defendants' reading of *Lanser* were correct, that case, like *Sommerfeld*, was decided *before* the Legislature adopted § 6.84, the change that Plaintiffs argued, and this Court agreed, abrogated *Sommerfeld*. Intervenor-Defendants attempt to get around this inconvenient fact by arguing that the real change in the absentee-ballot procedures from directory to mandatory did not occur in 1986, when § 6.84 was adopted, but instead much earlier, in 1966, when the Legislature reorganized some of the voting statutes. Mot. 13–14.

This premise of Intervenor-Defendants' argument is also incorrect. Whether to characterize the election statutes as directory or mandatory did not, as they argue, derive primarily from "the interpretative gloss the Legislature provided in Wis. Stat. § 6.87(6)," Mot. 14, but instead from the explicit rule of construction in Wis. Stat. § 5.01(1), entitled "Construction of Title II," which provides that "Title II shall give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to comply with some of its provisions." That section remained substantially unchanged after the consolidation in 1966. *Compare* Wis. Stat. § 5.011 (1965) *with* Wis. Stat. § 5.01(1) (1967). Indeed, § 5.01(1) is what *Lanser* primarily relied on (in addition to *Sommerfeld*) to conclude that the provisions it interpreted were directory, notwithstanding § 6.88: "Considering all the facts of this case, we are of the opinion that the mandate of sec. 5.01, Stats., requires the conclusion that these absentee voters' ballots be counted." *Lanser*, 62 Wis. 2d at 94.

In 1986, when the Legislature adopted Wis. Stat. § 6.84, it could not have been more clear that it was abrogating this line of cases,

providing explicitly that, "*[n]otwithstanding s. 5.01 (1)*, with respect to matters relating to the absentee ballot process, ss . 6.86, 6.87 (3) to (7), and 9.01 (1) (b) 2 and 4 shall be construed as mandatory." 1985 Wis. Act 304, § 68n (adopting Wis. Stat. § 6.84(2)). If that wasn't clear enough, in the very first section of the same Act the Legislature also amended Wis. Stat. § 5.01(1), adding the qualifier, "*Except as otherwise provided*, chs. 5 to 12 shall be construed ..." *Id.* § 1.

Finally, even if Intervenor-Defendants' interpretation of *Sommerfeld*, *Lanser*, and the intervening statutory history were correct, such that "substantial compliance" is all that is required even for *mandatory* statutes, this still wouldn't warrant reconsideration because drop boxes and third-party-ballot return *don't* substantially comply with a requirement that absentee ballots "shall be mailed by the elector, or delivered in person, to the municipal clerk." Wis. Stat. § 6.87(4)(b)1, for all of the reasons this Court explained, and Plaintiffs argued, which they won't repeat in detail here.



## CONCLUSION

This Court should deny the motion to reconsider.

Dated: August 8, 2022.

Respectfully submitted,

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