[J-113A-2019 and J-113B-2019] [OFJC: Mundy, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN RE: NOMINATION PAPERS OF SHERRIE COHEN AS CANDIDATE FOR THE OFFICE OF PHILADELPHIA CITY COUNCIL-AT-LARGE APPEAL OF: SHERRIE COHEN	:	No. 31 EAP 2019 : Appeal from the Order of Commonwealth Court entered on September 5, 2019 at No. 1157 CD 2019 affirming the Order entered on August 16, 2019 in the Court of Common Pleas, Philadelphia County, Civil Division at No. 701 August Term 2019. : SUBMITTED: September 30, 2019
IN RE: NOMINATION PAPERS OF SHERRIE COHEN AS CANDIDATE FOR THE OFFICE OF PHILADELPHIA CITY COUNCIL-AT-LARGE APPEAL OF: SHERRIE COHEN	:	No. 32 EAP 2019 : Appeal from the Order of Commonwealth Court entered on September 5, 2019 at No. 1158 CD 2019 affirming the Order entered on August 16, 2019 in the Court of Common Pleas, Philadelphia County, Civil Division at No. 703 August Term 2019. : SUBMITTED: September 30, 2019

DISSENTING OPINION

JUSTICE WECHT **FILED: February 19, 2020**

The Lead Opinion contends that "there is no principled reason" to refrain from extending this Court's decision in *Packrall v. Quail*, 192 A.2d 704 (Pa. 1963), to the circumstances of this case. Opinion Following the Judgment of the Court ("OFJC") at 11. I disagree. *Packrall* directly conflicts with the text of the Election Code's "sore loser"

provision. Vindicating the statute's plain language by overruling that plainly erroneous decision would be the principled reason for denying relief here.

In *Packrall*, this Court first considered the effect of Section 976(e) of the Election Code,[1] which provides:

> When any . . . nomination paper is presented in the office of the Secretary of the Commonwealth or of any county board of elections for filing within the period limited by this act, it shall be the duty of the said officer or board to examine the same. *No . . . nomination paper . . . shall be permitted to be filed . . . if the candidate named therein has filed a nomination petition for any public office for the ensuing primary* or has been nominated for any such office by nomination papers previously filed . . . .

25 P.S. § 2936(e) (emphasis added). At issue in *Packrall* were nomination papers filed by two candidates who earlier had filed nomination petitions to join the Democratic Party's primary for Washington County commissioner and treasurer, but then later withdrew those filings "[w]ithin the period permitted." *Packrall*, 192 A.2d at 705; *see id.* at 705 n.1 (citing the then-prevailing law providing for the withdrawal as of right of nomination petitions "any time within seven days after the last day for filing the same"). In reversing the lower court's order setting aside the candidates' nomination papers, this Court "conclude[d] that the court below attributed the wrong purpose to section 976," and opined that the provision "requires only that the person seeking nomination not be the candidate of another political group *at the time the nomination paper is filed*." *Id.* at 706 (emphasis in original).

This Court last reviewed *Packrall*'s impact vis-à-vis Section 976(e) in *In re Benkoski*, 943 A.2d 212 (Pa. 2007). In that case, nomination petitions for several Democratic candidates had been stricken for non-compliance with the Ethics Act for

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[1] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

failure to file timely statements of financial interests. *See* 65 Pa.C.S. § 1104(b)(2). The candidates thereafter filed nomination papers to appear as independent candidates on the November 2007 general election ballot. The court of common pleas struck the candidates pursuant to Section 976(e) due to their non-conforming nomination petitions. The Commonwealth Court reversed, reasoning that the striking of the nomination petitions undid their initial filing *ab initio*, and thus did not preclude the candidates from being placed on the general election ballot by way of new or second nomination papers. *Benkoski*, 943 A.2d at 213-14.

We reversed. We held that, "where a candidate has filed a defective nomination petition to appear on the primary election ballot, Section 976(e) precludes that candidate from thereafter filing nomination papers to appear on the general election ballot for the same position." *Id.* at 216. In rejecting the candidates' request to extend *Packrall* to situations where nomination petitions are stricken for failure to comply with filing requirements, we noted that the plain language of Section 976(e) "warrants the conclusion that *the filing* of a nomination petition for any public office for a primary election precludes the individual from thereafter submitting nomination papers to appear on the ballot for the general election for the same office." *Id.* at 215-16 (emphasis added). Though we strained to adhere to precedent, we expressly cautioned that *Packrall* was "arguably in tension with the plain language of the statute," *id.* at 216, thus calling its continuing validity into question.

Packrall was wrongly decided, and it should be overruled. The Election Code clearly and unambiguously bars the Secretary of the Commonwealth and the county boards of elections from permitting nomination papers to be filed "if the candidate named

therein *has filed a nomination petition for any public office*" in the same election cycle. *See* 25 P.S. § 2936(e). The General Assembly chose to mandate that a candidate who signals his or her intent to seek a political party's nomination by filing a nomination petition may not subsequently file nomination papers to be a political body's candidate for any public office to be voted on in the general election. In eschewing the plain language of Section 976(e) in favor of its hidden (alleged) "purpose," the *Packrall* court distorted the scope of the trial courts' inquiry. Instead of asking simply whether a candidate previously "has filed a nomination petition for any public office," *id.*, *Packrall* introduced a new (and wholly non-statutory) qualification that the filer merely not be an active candidate for a political party's nomination at the time that nomination papers are filed. This was pure judicial invention. By its own terms, Section 976(e) makes no exception for candidates who previously filed nomination petitions but whose names did not ultimately appear on the primary ballot, whether due to withdrawal or filing defects requiring the petitions to be set aside or stricken. *See Baronett v. Tucker*, 365 A.2d 179, 181 (Pa. Cmwlth. 1976) ("We believe . . . that Section 976 of the Code . . . requires the Secretary to reject the nomination papers of any candidate who has filed a petition for, or who has actually participated in, that primary immediately preceding the general election in which he seeks a ballot position."). Many might view the statute as harsh. Many might think it unwise. But it is not subject to judicial reformation. And that is the fatal flaw both of *Packrall* and of today's Lead Opinion.

Moreover, the *Packrall* Court in any event likely misidentified the original purpose of Section 976. "[F]irst enacted by section 8 of the Act of 1913, P.L. 719, . . . [t]he provisions in the acts against *filing* nominating petitions of more than one political party

for the same office [was] popularly known as 'Anti-Party Raiding Legislation'." *Appeal of Magazzu*, 49 A.2d 411, 412 (Pa. 1946) (emphasis added); *see generally Working Families Party v. Commonwealth*, 209 A.3d 270, 292-94, 293 n.13 (Pa. 2019) (Wecht, J., concurring and dissenting) (tracing the history of anti-fusion laws in the twentieth century). "The obvious purpose was to avoid the practice of one political faction dominating both political parties in the primaries. What the statute forbids is for a candidate to file petitions of more than one political party for the same office and the printing of the name of a candidate of more than one political party." *Magazzu*, 49 A.2d at 412. That purpose was accomplished by "requiring a candidate to make affidavit of facts pertinent to his candidacy." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914); *see also id.* ("No man need be a candidate for office unless he chooses to be.").

Two decades later, the General Assembly reaffirmed the legislation's exclusionary aim by adopting the Party Raiding Act, which "requir[ed] each candidate" for political office "to include in the affidavit filed with his nomination petition a statement that he is not a candidate for nomination for the same office of any party other than the one designated in such petition." *Wilson v. Phila. Cty.*, 179 A. 553, 553 (Pa. 1935) (*per curiam*). These provisions, including Section 976, were later subsumed by the Election Code of 1937 and extended to cover nomination papers. *See In re Street*, 451 A.2d 427, 430 (Pa. 1982) ("[N]o candidate may *seek* the nominations of both a political party and a political body." (citing Sections 976(e) (affidavits accompanying nomination petitions) and 979(e) (affidavits accompanying nomination papers)) (emphasis added); *In re Substitute Nomination Certification of Moran*, 739 A.2d 1168, 1170-72 (Pa. Cmwlth. 1999) (concluding that Section 980 of the Election Code, 25 P.S. § 2940, prohibits a political

body from filling a vacancy by nominating "any person who was a candidate for nomination by any political party for any office"). As this Court's pre-*Packrall* precedents demonstrate, it was long understood that the initial filing of a nomination petition, without more, triggered the preclusive effects contemplated here.

Those federal courts which have examined the Election Code's "sore loser" provisions also have understood them to bar candidates who previously had filed nomination petitions from subsequently filing nomination papers in the same election cycle. In *Reform Party of Allegheny County v. Allegheny County Department of Elections*, 174 F.3d 305 (3d Cir. 1999) (*en banc*), the court observed that Section 976 "bar[red] a third party from nominating a candidate" who had filed nomination petitions for both the Democratic and Republican Party primaries, "even though she did not lose either primary race and was thus not a sore loser." *Id.* at 317.[2] Accordingly, the court affirmed the district court's order enjoining the Secretary of the Commonwealth "from enforcing the provisions of Sections 2911(e)(5) and 29[36](e) of the Code to prevent a minor political party from nominating a candidate for any office referred to in Section 2870(f) of the Code *because that candidate files a petition for a major party nomination to that office*." *Id.* at 318 n.13 (emphasis added); *see also Williams v. Tucker*, 382 F.Supp. 381, 386 (M.D. Pa. 1974) ("Sections 2913(b) and (c) and Section 2911(e)(5) taken together require a candidate to choose between the primary route and the nomination paper route to the

[2] Because the statute's prohibition on the filing of nomination papers does not necessarily turn on the results of a primary election, calling Section 976(e) a "sore loser" provision is a misnomer. Indeed, the statute also bars political bodies from nominating the "happy winners" of a party's primary. *Cf. In re Zulick*, 832 A.2d 572, 583 n.13 (Pa. Cmwlth. 2003), *aff'd*, 834 A.2d 1126 (Pa. 2003) (*per curiam*) (declining "to address whether a minor party can nominate a 'happy winner' of a major party primary where cross-filing is permitted").

general election ballot. These sections prevent a candidate who has filed nomination papers from running in the primary and prevent a candidate who has lost in the primary from filing nomination papers.").

Likewise, in rejecting a constitutional challenge to a California election statute similar to the "sore loser" provision here, the High Court in *Storer v. Brown*, 415 U.S. 724 (1974), noted that the challenged language not only prohibited "a candidate who has been defeated in a party primary" from being "nominated as an independent" candidate in the general election, but also barred any person from "fil[ing] nomination papers for a party nomination and an independent nomination for the same office," irrespective of the results of a primary election. *Id.* at 733, 749 (citing Cal. Elec. Code § 6402 (1974)). In overlooking the foregoing authority, the Lead Opinion's rationale relies exclusively upon a principle derived from a judicial carve-out unsupported by the text of the Election Code. But if the General Assembly had intended to permit political bodies to nominate candidates who previously had filed and withdrawn nomination petitions in the same election cycle, it could have done so clearly in the Code. As the legislature made no such provision, neither may we do so by judicial fiat. *See In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) ("[T]he judiciary should act with restraint, in the election arena, subordinate to express statutory directives.").

When *Packrall* was decided, the filing deadline for nomination papers fell only three weeks later in the election calendar than the deadline for nomination petitions. *Compare* 25 P.S. § 2873(d) ("All nomination petitions shall be filed on or before the tenth Tuesday prior to the primary."), *with Salera v. Tucker*, 399 F.Supp. 1258, 1264 (E.D. Pa. 1975), *aff'd mem.*, 424 U.S. 959 (1976) (citing Act of June 3, 1937, P.L. 1333, § 913, *as*

amended, Act of March 6, 1951, P.L. 3 § 9, requiring nomination papers to be filed on or before the seventh Wednesday prior to the primary). While this condensed timeframe for circulating petitions and papers for signatures might have had the practical effect of forcing candidates to choose one of the two paths to the general election ballot, the General Assembly also opted expressly to preclude candidates from filing nomination papers where they previously had filed nomination petitions, and vice-versa. *See* 25 P.S. § 2911(e)(5) ("There shall be appended to each nomination paper offered for filing an affidavit of each candidate nominated therein, stating . . . that his name has not been presented as a candidate by nomination petitions for any public office to be voted for at the ensuing primary election."); *Brown v. Finnegan*, 133 A.2d 809, 811, 813 (Pa. 1957) (affirming the rejection of nomination papers where the plaintiffs filed non-conforming affidavits after their names "had been presented" as candidates by nomination petitions).

Moreover, *Packrall* at least purported to distinguish the case circumstances from the explicit statutory disqualification; the instant Petitioner's attempt to liken her situation to the facts of *Packrall* is in any event inapt. Packrall withdrew his nomination petitions within the then-prevailing seven-day period to do so by right.[3] Here, by contrast, Petitioner exceeded the fifteen-day safe harbor withdrawal period by nearly three weeks, thus necessitating leave of court for withdrawal. As the record indicates, Petitioner's change of heart came after more than a month of active campaigning for the Democratic

[3] *See In re Challenge to Objection to Nominating Petitions of Evans*, 458 A.2d 1056, 1057 n.2 (Pa. Cmwlth. 1983) ("Section 914 of the Election Code, 25 P.S. § 2874, was amended in 1980 by Section 3 of the Act of July 11, 1980, P.L. 591, to allow fifteen days subsequent to the last day for filing nomination petitions to withdraw as a candidate. . . . The previous provisions of the Election Code allowed only seven days to withdraw.").

Party's nomination, and appears to have had as much to do with unfavorable ballot position as it did with the loss of endorsements and bad press stemming from the lingering controversy involving Objector Alvarez.[4] *See* Notes of Testimony, 8/12/2019, at 44-56, 60-63. But even the *Lachina* Court's decision, on which Petitioner and the Lead Opinion principally rely, understood *Packrall*'s limited holding to apply only to voluntary withdrawals executed "*within the time for filing*." *Lachina v. Berks Cty. Bd. of Elections*, 887 A.2d 326, 329 (Pa. Cmwlth. 2005) (emphasis added). In placing the burden on Appellees to explain why Section 976's specific language should not be read more expansively, OFJC at 11, the Lead Opinion goes beyond even *Packrall*'s approach, short shriving *Packrall*'s limiting principle in the process.

Therefore, while I concur in the Lead Opinion's conclusion that a candidate's withdrawal from a party primary via court order pursuant to Section 978.4 of the Code, 25 P.S. § 2938.4, is no less "voluntary" than a withdrawal in writing within the fifteen-day safe harbor period, I believe, consistent with the plain language of the Election Code, that Petitioner's path to the general election ballot was statutorily foreclosed by her earlier decision to file a nomination petition for the Democratic Party's primary. This is no mere exercise in semantics. Although we must construe our election laws liberally "so as not to deprive an individual of his right to run for office, or the voters of their right to elect a

[4] Nor was Petitioner's belated withdrawal without consequence. By remaining in the race until after the ballot order was set, Petitioner denied seventeen other candidates a more favorable position. *See* Julie Terruso & Chris Brennan, *From a Horn & Hardart Can, democratic socialist and transgender candidate draw top Council ballot spots*, Phila. Inquirer (Mar. 20, 2019), https://www.inquirer.com/news/ballot-position-philadelphia-primary-municipal-at-large-politics-20190320.html (identifying Petitioner as having drawn the seventeenth ballot position among a field of thirty-four Democratic primary candidates vying for five at-large seats on the Philadelphia City Council).

candidate of their choice," *In re Ross*, 190 A.2d 719, 720 (Pa. 1963), that rule of construction does not grant this Court license to act as a super-legislature, free to rewrite provisions we deem unfair to candidates for political office. *In re Cianfrani*, 359 A.2d 383, 384 (Pa. 1976) ("[T]he policy of the liberal reading of the Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process."). That is particularly true when the judicial tinkering being contemplated appears to be in derogation of the statute's express provisions. Any unfairness arising from the peculiar circumstances now before us must be remedied by the General Assembly, not by this Court. *See Commonwealth ex rel. Fox v. Swing*, 186 A.2d 24, 27 (Pa. 1962) ("It is not for us to legislate or by interpretation to add to legislation matters which the legislature saw fit not to include.").

Nor should we feel compelled to perpetuate (much less extend) a questionable precedent merely by virtue of its purported "central[ity] to our election jurisprudence for more than half a century." OFJC at 11. "[T]he doctrine of *stare decisis* was never intended to be used as a principle to perpetuate erroneous rules of law." *In re Paulmier*, 937 A.2d 364, 371 (Pa. 2007). *Packrall* was wrong when it was decided in 1963, and it is wrong today. It staggers fitfully forward, cited inconsistently but often uncritically. And so the flawed precedent creeps on. Today's decision likely will encourage candidates like Petitioner to "play fast and loose with our election processes and make a mockery of them," *In re Mayor of Altoona*, 196 A.2d 371, 376 (Pa. 1964) (Cohen, J., dissenting), by sanctioning the electoral gamesmanship that the framers of our Election Code sought to avoid. I respectfully dissent.