[J-72-2022 and J-73-2022]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

IN RE: NOMINATION PAPER OF CAROLINE AVERY FOR REPRESENTATIVE IN CONGRESS FROM THE 1ST CONGRESSIONAL DISTRICT	:	No. 91 MAP 2022
	:	Appeal from the Order of the Commonwealth at No. 392 MD 2022, dated August 23, 2022
OBJECTION OF: DAVID R. BREIDINGER, ELLEN COX, AND DIANE DOWLER	:	SUBMITTED: September 15, 2022
APPEAL OF: CAROLINE AVERY	:	
IN RE: NOMINATION PAPER OF BRITTANY KOSIN FOR REPRESENTATIVE IN THE GENERAL ASSEMBLY FROM THE 178TH LEGISLATIVE DISTRICT	:	No. 92 MAP 2022
	:	Appeal from the Order of the Commonwealth Court at No. 393 MD 2022 dated August 23, 2022.
OBJECTION OF: MARY RODERICK, JOHN COPPENS, AND ANDREW GANNON	:	SUBMITTED: September 16, 2022
APPEAL OF: BRITTANY KOSIN	:	

OPINION

DECIDED: September 22, 2022
JUSTICE DONOHUE **OPINION FILED: January 19, 2023**

I. Introduction

In these unconsolidated, direct appeals, Caroline Avery ("Avery") filed nomination petitions to run as a Republican candidate for Representative of the First Congressional District in the May 2022 primary election, and Brittany Kosin ("Kosin") filed nomination petitions to run as a candidate in the same primary election as a Republican for the Pennsylvania General Assembly seat representing the 178th District. However, both

candidates withdrew their primary election nomination petitions by way of Commonwealth Court orders, as explained in more detail below. Avery and Kosin subsequently submitted nomination papers seeking to run as third-party candidates in the November 2022 general election for the same offices that they initially sought to fill as Republican candidates in the 2022 primary election.

Various citizens petitioned to set aside these nomination petitions, primarily on the grounds that the candidates were barred from appearing on the general election ballot by the Election Code,[1] specifically Subsection 976(e) of the Code, 25 P.S. § 2936(e).[2] In response, both potential candidates argued that they were entitled to participate in the 2022 general election based upon this Court's opinion in *Packrall v. Quail*, 192 A.2d 704 (Pa. 1963), and our decision in *In re Cohen for Office of Philadelphia City Council-at-Large*, 225 A.3d 1083 (Pa. 2020) ("*Cohen*").

In *Packrall*, this Court held that candidates who voluntarily and timely withdraw their primary election nomination petitions pursuant to Section 914 of the Election Code,

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[1] Act of 1937, June 3, P.L. 1333, as amended by 25 P.S. §§ 2601-3391.

[2] This statutory subsection is commonly referred to as a "sore loser provision." *In re Cohen for Office of Philadelphia City Council-at-Large*, 225 A.3d 1083 (Pa. 2020). It provides as follows:

> When any nomination petition, nomination certificate or 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 petition, nomination paper or nomination certificate shall be permitted to be filed[,] … in the case of nomination papers, 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).

25 P.S. § 2874,[3] are permitted to file nomination papers in the corresponding general election. Although neither Avery nor Kosin withdrew their primary election nomination petitions pursuant to Section 914, they argued that, in *Cohen*, this Court extended *Packrall* to allow a candidate to run in a general election in the circumstances presented in their cases. The Commonwealth Court rejected this argument, concluding that, in *Cohen*, a majority of Justices held that this Court's decision in *Packrall* is limited to the particular circumstances of that case and does not apply to the present matters. *In re Avery*, 281 A.3d 1124 (Pa. Commw. 2022); *In re Kosin*, 281 A.3d 1118 (Pa. Commw. 2022).

Avery and Kosin filed separate appeals in this Court, and the principal issue in both appeals is identical: What is the precedential impact of this Court's decision in *Cohen*? On September 22, 2022, we issued orders affirming the Commonwealth Court's orders. *In re Avery*, 282 A.3d 1131 (Pa. 2022); *In re: Kosin*, 282 A.3d 1132 (Pa. 2022). This opinion explains our reasoning for issuing those orders.

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[3] This provision states as follows:

> Any of the candidates for nomination or election at any primary may withdraw his name as a candidate by a request in writing, signed by him and acknowledged before an officer empowered to administer oaths, and filed in the office in which his nomination petition was filed. Such withdrawals, to be effective, must be received in the office of the Secretary of the Commonwealth not later than 5 o'clock P.M. on the fifteenth day next succeeding the last day for filing nomination petitions in said office, and in the office of any county board of elections, not later than the ordinary closing hour of said office on the fifteenth day next succeeding the last day for filing nomination petitions in said office. No name so withdrawn shall be printed on the ballot or ballot labels. No candidate may withdraw any withdrawal notice already received and filed, and thereby reinstate his nomination petition.

25 P.S. § 2874.

II. *In re Avery*

A. Background

On March 15, 2022, Avery filed nomination petitions to run as a Republican candidate for Representative of the First Congressional District in the May 2022 primary election. Her petitions allegedly contained the signatures of 1300 registered Republicans from the district. On March 22, 2022, Michael Zolfo filed a petition to set aside Avery's nomination petitions on the grounds that 480 of the 1300 signatures were defective and, therefore, the nomination petitions contained fewer than the 1000 signatures that a potential candidate for the Office of Representative in Congress is required to obtain to participate in a primary election pursuant to Section 412.1 of the Election Code, 25 P.S. § 2872.1(12).

The Commonwealth Court held a hearing on March 29, 2022 to address Zolfo's petition to set aside. During that hearing, Avery decided to withdraw her nomination petitions and asked the court to issue an order removing her name from the ballot pursuant to Section 978.4 of the Election Code, 25 P.S. § 2938.4.[4] The Commonwealth Court granted Avery's request. *In Re: Nomination Petitions of Caroline Avery as Avery for Representative in Cong. for the First Cong. Dist*, 114 M.D. 2022 (Pa. Commw. Mar. 29, 2022).

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[4] This statute states as follows:

> Upon petition to the court of common pleas, or the Commonwealth Court, when a court of common pleas is without jurisdiction, by a candidate for nomination or election, or, in the case of the death of such candidate by the treasurer of his political committee, the court shall order the withdrawal of said candidate's name for nomination or election, except upon a showing of special circumstances.

25 P.S. § 2938.4.

On August 1, 2022, Avery submitted nomination papers seeking certification as the Libertarian Party candidate in the 2022 general election for Representative in Congress for the First District. On August 8, 2022, David R. Breidinger, Ellen Cox, and Diane Dowler ("Avery Objectors") filed in the Commonwealth Court a petition to set aside Avery's nomination papers on the basis that she is barred from appearing on the general election ballot by Subsection 976(e) of the Election Code, 25 P.S. § 2936(e), i.e., the "sore loser provision." This provision disallows a potential candidate from filing nomination papers for a general election if that person earlier filed nomination petitions in the related primary election.

On August 16, 2022, Judge Ceisler of the Commonwealth Court held a hearing to address Avery Objectors' petition. According to Judge Ceisler, Avery testified at the hearing that, before the March 29th hearing on Zolfo's petition to set aside, she decided to voluntarily withdraw her nomination petitions for the Republican Party before Zolfo's petition to set aside was adjudicated fully. In arguing that her voluntary withdrawal of her initial nomination petitions allowed her to run in the general election as a Libertarian candidate, Avery relied upon *Packrall*. As noted above, the *Packrall* Court held that candidates who voluntarily and timely withdraw their primary election nomination petitions pursuant to Section 914 of the Election Code, 25 P.S. § 2874, are permitted to file nomination papers in the corresponding general election. Avery further contended that this Court's recent decision in *Cohen* essentially extended *Packrall* by allowing a candidate to run in a general election when a court previously issued an order withdrawing the candidate's primary election nomination petitions pursuant to Section 978.4 of the Election Code, 25 P.S. § 2938.4.

In response, Avery Objectors argued that Subsection 976(e) of the Election Code unambiguously prohibited Avery from filing her general election nomination papers. They

took the position that Avery's reliance on *Packrall* was misguided because, unlike the candidate in *Packrall*, Avery did not voluntarily withdraw her original nomination petitions pursuant to Section 914 of the Election Code. Instead, the Commonwealth Court issued an order withdrawing her petitions pursuant to Section 978.4 of the Election Code. Consistent with this position, Avery Objectors contended that Avery misinterpreted *Cohen*, as a majority of the Justices in that appeal held that a potential candidate who withdrew from a primary election pursuant to Section 978.4 was barred by Subsection 976(e) from participating in the general election.

B. Commonwealth Court's opinion

In a single-judge, published opinion and order, Judge Ceisler granted Avery Objectors' petition to set aside. *In re Avery*, 281 A.3d 1124 (Pa. Commw. 2022). Most relevant to the instant matters, Judge Ceisler agreed with Avery Objectors' view of the precedential value of *Cohen*, which we will briefly summarize at this point.

In *Cohen*, Sherrie Cohen initially filed nomination petitions to appear on the May 21, 2019 Democratic primary election for an at-large seat on Philadelphia's City Council. However, she eventually obtained a court order withdrawing her petitions pursuant to Section 978.4 of the Election Code. Cohen subsequently presented nomination papers to appear on the November 5, 2019 general election ballot as a third-party candidate. Two qualified electors filed petitions to set aside Cohen's nomination papers on the grounds that she was barred from participating in the general election by Subsection 976(e) of the Election Code, the "sore loser provision." The trial court granted the petitions to set aside Cohen's nomination papers, and the Commonwealth Court affirmed. This Court granted Cohen's petition for allowance of appeal.

On October 3, 2019, in a per curiam order, this Court reversed the order of the Commonwealth Court and directed that Cohen's name be placed on the November 5,

2019 ballot as an independent candidate for Philadelphia City Council-at-Large. *In re Cohen*, 218 A.3d 387 (Pa. 2019).[5] "Because the Board of Elections only had until the close of business on October 4, 2019 to add Cohen's name to the ballot, we issued our order noting that an opinion would follow." *Cohen*, 225 A.3d at 1084. The decision that followed was fragmented.

Justice Mundy authored the Opinion Following the Judgment of the Court ("OFJC"). The OFJC concluded that the *Packrall* exception to Subsection 976(e)'s "sore loser provision" should extend to candidates that withdraw their nomination petitions by way of court orders pursuant to Section 978.4 of the Election Code. In so doing, the OFJC stated that there was "no principled reason to distinguish between the voluntariness of a withdrawal under Section 914 or Section 978.4[.]" *Id.* at 1090. Then-Justice Baer joined the OFJC.

Then-Chief Justice Saylor dissented. Although Chief Justice Saylor stated that he would not overrule *Packrall*,[6] he observed that "its approach remains 'arguably in tension with the plain language of the statute.'" *Id.* at 1091 (Saylor, C.J., dissenting) (quoting *In re Benkoski*, 943 A.2d 212, 216 (Pa. 2007)). Thus, Chief Justice Saylor expressed "that *Packrall*'s effect should be confined to the scenario in which it arose, i.e., a voluntary withdrawal of a nomination petition within the statutory grace period [outlined in Section 914 of the Election Code]." *Id.* Justice Dougherty joined Chief Justice Saylor's dissent.

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[5] Justices Dougherty and Wecht noted their dissents to the order.

[6] In stating that he would not overrule *Packrall*, Chief Justice Saylor noted that this "Court has explained: 'whenever our Court has interpreted the language of a statute, and the General Assembly subsequently amends or reenacts that statute without changing that language, it must be presumed that the General Assembly intends that our Court's interpretation become part of the subsequent legislative enactment.'" *Cohen*, 225 A.3d at 1091 n.1 (Saylor, C.J., dissenting) (quoting *Verizon Pa., Inc. v. Commonwealth*, 127 A.3d 745, 757 (Pa. 2015)). The Chief Justice then observed that "Section 976 has been amended several times since *Packrall*'s issuance more than 50 years ago, but the Legislature has not altered the material language of the statute." *Id.*

Justice Wecht offered a separate Dissenting Opinion. Therein, Justice Wecht not only disagreed with the OFJC that *Packrall* should be extended, but he also expressed his view that *Packrall* was wrongly decided and should be overruled. In support of this position, Justice Wecht, inter alia, quoted Subsection 976(e) of the Election Code and explained that 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." *Id.* at 1092 (Wecht, J., dissenting) (emphasis in original).

The author of this Opinion penned a Concurring Opinion in *Cohen*, which then-Justice Todd joined, explaining that she joined the per curiam order placing Cohen on the ballot when the case was presented to the Court on an expedited basis. However, persuaded by the analysis of Justice Wecht's Dissenting Opinion, the Concurring Opinion expressed the view that it should be the prevailing interpretation of Section 976(e) of the Election Code, 25 P.S. § 2936(e), in future cases. *Id.* at 1090 (Donohue, J., concurring).

In discerning the precedential value of *Cohen*, Judge Ceisler highlighted the following passage from this Court's decision in *Pap's A.M. v. City of Erie*, 719 A.2d 273, 278 (Pa. 1998), *reversed on other grounds*, 529 U.S. 277 (2000):

> [I]t is possible to cobble together a holding out of a fragmented decision. Yet, in order to do so, a majority of the Court must be in agreement on the concept which is to be deemed the holding. It is certainly permissible to find that a Justice's opinion which stands for the "narrowest grounds" is precedential, but only where those "narrowest grounds" are a sub-set of ideas *expressed by a majority of other members of the Court*."

In re Avery, 281 A.3d at 1128-29 (emphasis in original).

Judge Ceisler also found guidance from this Court's recent decisions in *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017), and *In re T.S.*, 192 A.3d 1080 (Pa. 2018) explaining that:

> In *L.B.M.*, the [Supreme] Court issued a decision which yielded a lead opinion, a concurring opinion, and two dissents. Not one of the four opinions was joined in full by more than two other justices. In *T.S.*, an appellant argued that the three-justice plurality opinion in *L.B.M.* was binding precedent, as though it were the Court's majority holding.
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> The Supreme Court in *T.S.* concluded that it was not bound by the *L.B.M.* lead opinion. It explained that an issue agreed upon by four justices in *L.B.M.* constituted the decision's majority holding, even though all four expressed their agreement in a concurring or dissenting [opinion].

In re Avery, 281 A.3d at 1129 (citations omitted).

Judge Ceisler concluded that, because "a five-Justice majority in *In re Cohen* opposed extending the *Packrall* exception to any future candidates who withdrew pursuant to Section 978.4, this [c]ourt disagrees that it is precedentially bound to grant Avery that relief." *Id.* Judge Ceisler, therefore, held that Subsection 976(e) of the Election Code barred Avery from filing nomination papers for the 2022 general election. Judge Ceisler entered an order granting Avery Objectors' petition to set aside Avery's nomination papers and directing the Secretary of the Commonwealth to remove her name from the 2022 general election ballot. Avery appealed the Commonwealth Court's order to this Court, and as noted above, we affirmed the Commonwealth Court's order.

C. Parties' arguments to this Court[7]

1. Avery's argument

[7] In presenting the various parties' arguments to this Court, we only will summarize the portions of their arguments that are relevant to the central issue in this case concerning the precedential value of *Cohen*.

Avery presents the Court with one verbose issue that spans over three pages of her brief. Avery's Brief at 4-7. Addressing that issue, Avery suggests that her case "is almost on all fours" with this Court's decision in *Cohen* insomuch as both she and Cohen: (1) voluntarily withdrew their primary election nomination papers by way of a court order pursuant to Section 978.4 of the Election Code; (2) sought to participate in a general election; and (3) had their general election nomination papers challenged based upon the "sore loser provision." *Id.* at 32. Avery notes that this Court issued an order in *Cohen* that rejected the sore-loser challenge.

Focusing on the fragmented nature of the decision issued by this Court following that order, Avery posits that *Cohen* left unresolved whether the *Packrall* exception extends to a candidate's withdrawal of a nomination petition for a primary election by way of a court order. *Id.* at 35. Avery challenges Judge Ceisler's contrary conclusion.

In this regard, although insinuating that *Cohen* lacks precedential value, Avery criticizes Judge Ceisler for failing to recognize that our decision in *Cohen* allowed that candidate to remain on the general election ballot. *Id.* at 35-36. Despite the contrary positions articulated in the various *Cohen* opinions, Avery insists that she had the right to rely on *Cohen* for this proposition. *See id.* at 35 ("On the other hand, Judge Ceisler, in rejecting Ms. Avery's Nominating Papers, did not give *Cohen* any precedential value. The problem with that is that *Cohen* did reinstate Ms. Cohen's Nominating Papers, for doing the same thing that Ms. Avery did, i.e., withdraw with Court Order. Clearly, Ms. Avery and others had a right to rely on *Cohen*."). In Avery's view, this result is consistent with the principle that courts are to interpret the Election Code liberally.[8] *Id.* at 36-38.

[8] Throughout her brief, Avery asserts that the concept of interpreting election laws liberally was borne out of the principles underlying the First Amendment of the United States Constitution.

After endorsing the logic of the two-Justice OFJC in *Cohen*, Avery takes aim at Justice Wecht's Dissenting Opinion. According to Avery, *Packrall* is a vital part of election law and, contrary to Justice Wecht's view, should remain good law. Avery submits that "*Packrall* recognized the reality of elections, i.e., candidates change their minds and need a procedure to withdraw so the candidate can run as an Independent." *Id.* at 44. Avery insists that the *Packrall* exception to the "sore loser provision" should be extended to include voluntary withdrawals via court orders, as her case illustrates that there is no good reason to differentiate the withdrawal processes of Sections 914 and 978.4 of the Election Code. *Id.* at 47-49.

Next, Avery purports to provide a history of the "sore loser provision." The history is a meandering discussion of various cases and legal concepts, the sum of which, Avery argues, support her belief that, so long as a candidate voluntarily withdraws from a primary election, she should be permitted to run as an independent candidate in the general election. *Id.* at 49-65. For these reasons, Avery asks the Court to reverse the Commonwealth Court's order and reinstate her nomination papers to allow her to run as a candidate for Congress in the 2022 general election.

2. Avery Objectors' argument

Avery Objectors contend that Judge Ceisler properly interpreted and applied this Court's decision in *Cohen*. In support of this position, Avery Objectors reject the argument that this Court's per curiam order allowing *Cohen* to participate in the 2018 general election should control the outcome in this case. Rather, Avery Objectors submit that, Judge Ceisler correctly concluded that the result in this matter is controlled by the various opinions in support of that order, which collectively held that "a candidate who files a nomination petition—but then withdraws under Section 978.4—should be prohibited from

submitting a nomination paper for the following general election." Avery Objectors' Brief at 18.

After providing a summary of *Cohen*, Avery Objectors suggest that a close reading of the various opinions in *Cohen* makes the following points clear: (1) "only one [J]ustice joined the OFJC's decision to extend *Packrall*'s exception beyond Section 914 withdrawals[;]" (2) "five Justices were in full accord that *Packrall* should be limited to the context in which it arose—that is, Section 914 withdrawals[;]" and (3) Justice Wecht's dissent, which was endorsed by Justice Todd and this author, "advocated for overruling *Packrall*, or at the very least, limiting its application to administrative withdrawals pursuant to Section 914 context." *Id.* at 24. "Accordingly," Avery Objectors argue, "precedent regarding the interpretation of plurality opinions instructs that this common area of agreement among these five justices in *In re Cohen* constitutes the holding of that case." *Id.* at 25 (citing, inter alia, *In re T.S.*, 192 A.3d at 1088).

Assuming arguendo that this Court refuses to glean a controlling legal principle from *Cohen*, Avery Objectors contend that we nevertheless should affirm the Commonwealth Court's order. They provide three arguments in support of this position: (1) "the overwhelming weight of authority, as well as the undergirding rationale of Section 976(e)'s proscription, militates in favor of setting aside Avery's nomination paper[;]" (2) "whatever grounds may exist for *Packrall*'s exception, they do not apply here[,]" as this case does not involve the administrative withdrawal of nomination petitions under Section 914 of the Election Code; and (3) "reasons of judicial economy weigh against expanding *Packrall*" because "permitting candidates to avert the preclusive effect of Section 976(e) by obtaining a court-ordered withdrawal when they are on the precipice of having a challenge to their nomination petition sustained will result in unnecessary litigation and strain judicial resources." *Id.* at 29, 30-38.

Avery Objectors dedicate the remainder of their brief to their alternative argument that this Court should overrule *Packrall*. *Id.* at 38-57. They suggest that, "[t]o the extent this Court does not agree that [*Cohen*] is binding precedent, it should follow the blueprint of Justice Wecht's dissenting opinion [in *Cohen*] and abandon [] *Packrall's* ill-conceived rule." *Id.* at 38-39.

III. *In re Kosin*

A. Background

On March 28, 2022, Kosin filed nomination petitions to run as a candidate in the 2022 Republican primary for the Pennsylvania General Assembly seat representing the 178th District. The nomination petitions purported to include 337 signatures of registered Republican voters in the district.[9] On April 4, 2022, several persons filed in the Commonwealth Court a petition to set aside Kosin's nomination petitions, alleging that 98 of Kosin's 337 signatures were invalid.

After meeting privately, the parties reached an agreement and stipulated that: (1) Kosin's nomination petitions did not contain the requisite number of signatures; and (2) Kosin would withdraw her nomination petitions. The parties submitted the stipulations to the Commonwealth Court. The court subsequently entered an order granting the petition to set aside Kosin's nomination petitions and removing her name from the primary ballot. *In Re: Petition to Set Aside Nomination Petitions of Brittany Kosin as Republican Candidate for State Representative in the 178th Legis. Dist.*, 178 M.D. 2022 (Pa. Commw. Apr. 6, 2022). Kosin never sought to withdraw her primary election nomination petitions pursuant to Section 914 of the Election Code.

[9] Section 912.1(14) of the Election Code requires potential candidates for this office to present a minimum of 300 valid signatures of registered and enrolled electors of the political party of the candidate. 25 P.S. § 2872.1(14).

On August 1, 2022, Kosin filed nomination papers to be certified as the Libertarian candidate in the 2022 general election for the same General Assembly seat. On August 8, 2022, Mary Roderick, John Coppens, and Andrew Gannon ("Kosin Objectors") filed a petition to set aside Kosin's nomination papers on the grounds that the "sore loser provision" barred Kosin from participating in the 2022 general election.

On August 16, 2022, Judge Ceisler held a hearing on Kosin Objectors' petition. Kosin offered a substantially similar argument as Avery presented to Judge Ceisler: Her nomination petitions met the exception to Subsection 976(e)'s bar as allegedly outlined by the *Cohen* Court's extension of the *Packrall* exception because, although she did not withdraw her primary election nomination petitions pursuant to Section 914 of the Election Code, she nonetheless voluntarily withdrew from that election. Kosin Objectors countered that Kosin misinterpreted the precedential impact of *Cohen*.

B. Commonwealth Court's opinion

In a single-judge, published opinion and order, Judge Ceisler granted Kosin Objectors' petition to set aside and directed the Secretary of the Commonwealth to remove Kosin's name from the 2022 general election ballot. *In re Kosin*, 281 A.3d 1118 (Pa. Commw. 2022). In granting this petition, Judge Ceisler employed substantially similar reasoning that she expressed in granting the petition to set aside Avery's nomination papers, i.e., she relied upon the narrowest point of agreement among a majority of Justices in *Cohen* to hold that Subsection 976(e) of the Election Code barred Kosin from filing nomination papers for the 2022 general election.[10] Kosin appealed the

[10] Although irrelevant to the current appeals, we observe that Judge Ceisler further found that even if she assumed arguendo that Kosin's interpretation of *Cohen* was correct, Kosin still was barred from running in the general election pursuant to this Court's decision in *In re Benkoski*, 943 A.2d 212 (Pa. 2007) ("*Benkoski*"), wherein we held that the *Packrall* exception does not extend to candidates whose names are stricken from primary ballots due to defects in their primary election nomination petitions. In this regard, Judge Ceisler (continued…)

Commonwealth Court's order to this Court, and we entered an order affirming the Commonwealth Court.

C. Parties' arguments to this Court

1. Kosin's argument

Kosin presents a multi-pronged challenge to the Commonwealth Court's opinion and order. First, she contends that, in *Cohen*, a majority of this Court concluded that candidates that voluntarily withdraw their primary election nomination petitions within the fifteen-day statutory period provided by Section 914 of the Election Code can file nomination papers for the subsequent general election without regard to the procedural mechanism for the withdrawal. According to Kosin, "in *Cohen*, a clear majority of the [J]ustices of this Court did not agree that whether a candidate who previously filed nomination petitions could later file nomination papers depends on Section 914 specifically." Kosin's Brief at 15.

Kosin avers that, when all the opinions in *Cohen* are closely examined, this Court's narrowest holding was not limited to permitting candidates who withdraw primary election nomination petitions to file general election nomination papers as long as they withdraw their nomination petitions pursuant to Section 914. Kosin explains her position as follows:

> Better understood, in *Cohen*, at most—combining the views of four justices, Justice Mundy and now-Chief Justice Baer in the OFJC and Justice Saylor joined by Justice Dougherty in dissent—a majority of this Court concluded that candidates who voluntarily withdrew their nomination petitions within the fifteen-day statutory period provided in Section 914 may file nomination papers.

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recognized that language in the parties' stipulations concerning the challenge to Kosin's primary election nomination petitions implied that Kosin voluntarily withdrew those petitions, but the Judge stated, "[T]hat language does not change the fact that Kosin's primary candidacy ended when this Court granted the objectors' petition to set aside" because the stipulation also acknowledged that her primary election nomination petitions were defective. *Kosin*, 281 A.3d at 1123-24.

Kosin's Brief at 17.

In reaching this conclusion, Kosin concedes that, in *Cohen*, Chief Justice Saylor stated that *Packrall* should be limited to its facts. However, Kosin insists that "his opinion [did] not rest on a particular section of the Election Code. Instead, [Chief] Justice Saylor expressed concern with timing. For [Chief] Justice Saylor, 'the concern about candidates being empowered—contrary to the plain language of Section 976(e)—to make strategic decisions to shift tracks after having proceeded deep into the primary process is particularly well founded.'" *Id.* at 16 (quoting *Cohen*, 225 A.3d at 1091 (Saylor, C.J., dissenting)).

Building on this premise, Kosin argues that she timely withdrew her primary election nomination petitions such that she should be permitted to participate as a candidate in the general election. In this regard, Kosin highlights that, by way of a stipulation, she voluntarily withdrew her primary election nomination petitions on April 6, 2022, which allegedly was six days before the deadline to withdraw pursuant to Section 914. In Kosin's view, she should benefit from the *Packrall* exception to the "sore loser provision" because, while she did not withdraw her nomination petitions pursuant to Section 914, she nonetheless voluntarily withdrew her petitions within the Section 914 timeframe. She asserts that "the best understanding of this Court's opinions in *Cohen* is that a majority of the Court agreed that a candidate could file nomination papers as long as that candidate voluntarily agreed to withdraw her nomination petition within the deadline specified in Section 914, no matter the section under which they withdrew their nomination petitions." *Id.* at 20. Lastly, Kosin submits that any change in law that this Court might make in this case should be applied prospectively.

2. Kosin Objectors' argument

Kosin Objectors present several arguments in support of their position that the Commonwealth Court properly decided this case. Relevant to this appeal, they contend that, even if Kosin's removal from the 2022 primary election ballot can be characterized as a voluntary withdrawal, her candidacy is nevertheless barred by this Court's decision in *Cohen*. In support of this position, Kosin Objectors submit that Judge Ceisler accurately expressed the precedential impact of *Cohen*. *See* Kosin Objectors' Brief at 23 ("The Commonwealth Court correctly concluded that a five-justice majority of this Court in *In re Cohen* found that Section 976(e) prohibits a candidate who withdraws pursuant to court order from submitting a nomination paper and, [on] that basis, Kosin's nomination paper must be set aside.").

Kosin Objectors further aver that "Kosin's argument that her nomination paper should not have been set aside because she attempted to 'withdraw' within fifteen days of filing her nomination petition utterly misconstrues [*Cohen*]." *Id.* at 30. According to Kosin Objectors, contrary to Kosin's representations, she withdrew her primary nomination petitions six days after the Section 914 deadline. In addition, Kosin Objectors assert that Kosin fails to appreciate the differences between administrative and court-ordered withdrawals, as, inter alia, a court has no discretion to allow or disallow a candidate to remove herself from an election pursuant to Section 914, i.e., the administrative withdrawal statute, but does have such discretion if asked to otherwise remove a candidate from a ballot.

Under their penultimate argument, Kosin Objectors challenge Kosin's position that this Court must prospectively apply any legal conclusions it reaches in this case. In this regard, Kosin Objectors argue that: (1) "a conclusion that Section 978.4 withdrawals are not subject to *Packrall*'s exception does not overrule existing law nor [] is it an issue of first impression not previously foreshadowed[,]" *id.* at 40; and (2) even if the Court

overrules *Packrall*, prospective application of that ruling would be unwarranted because the validity of that decision has long been questioned. Lastly, like Avery Objectors, Kosin Objectors offer an alternative argument that this Court should overrule *Packrall*. *Id.* ("In the unlikely event that this Court finds [that Kosin] is able to overcome the preclusive effect of [*Cohen*], it should follow the blueprint of Justice Wecht's dissenting opinion in [*Cohen*] and abandon *Packrall*'s ill-conceived rule.").

IV. Analysis and Conclusions

As noted above, the primary issue in this case is whether Judge Ceisler accurately assessed the precedential impact of this Court's decision in *Cohen*. This issue presents a question of law. Accordingly, our scope of review is plenary, and our standard of review is de novo. *In re Grand Jury Investigation No. 18*, 224 A.3d 326, 332 (Pa. 2020).

Our October 3, 2019 per curiam order allowed Cohen to appear on the November 2019 general election ballot and arguably signaled, at least to the parties, that the Court was poised to extend the *Packrall* exception to circumstances where a candidate of a major party withdraws her primary election nomination petitions pursuant to Section 978.4 of the Election Code and then seeks to participate in the related general election as a third-party candidate. Yet, an examination of the various opinions in *Cohen* establishes that, while a majority of the Court supported the result accomplished by our per curiam order, the application of *Packrall* to a Section 978.4 withdrawal was limited solely to Cohen's case.

As previously explained, Justice Mundy, joined by then-Justice Baer, authored the OFJC, which, consistent with the Court's per curiam order, permitted Cohen to participate in the 2019 general election by concluding that the *Packrall* exception to Subsection 976(e)'s "sore loser provision" should extend to candidates that withdraw their nomination petitions by way of court orders pursuant to Section 978.4 of the Election Code.

Then-Chief Justice Saylor, joined by Justice Dougherty, disagreed with the OFJC. These two Justices expressed that they would not overrule *Packrall*; however, they explicitly stated that the *Packrall* exception should be cabined to the narrow circumstances within which it arose - the voluntary withdrawal of nomination petitions pursuant to Section 914 of the Election Code. Justice Wecht also disagreed with the OFJC that *Packrall* should be extended and further opined that *Packrall* should be overruled because its holding runs contrary to the clear and unambiguous language of the Election Code. This author and Justice Todd agreed with Justice Wecht's analysis but expressly stated that his analysis should apply only to future cases. Thus, four Justices (Justices Baer, Todd, Donohue, and Mundy) wrote to support the October 3, 2019 order.[11]

Consequently, the *Cohen* litigation resulted in a per curiam order placing Cohen on the 2019 general election ballot and a fragmented decision supporting that result with the outcome limited to its facts. Interpreting the impact of *Cohen*, we begin by highlighting the well-settled, general principle that this Court's per curiam orders carry no precedential value. *See*, *e.g.*, *Commonwealth v. Thompson*, 985 A.2d 928, 937 (Pa. 2009) ("This Court has made it clear that per curiam orders have no stare decisis effect.") (collecting cases). As we explained in *Thompson*, "[t]he rationale for declining to deem per curiam decisions precedential is both simple and compelling. Such orders do not set out the facts and procedure of the case nor do they afford the bench and bar the benefit of the Court's rationale." *Id.* at 937-38. Accordingly, the Court's order in *Cohen* offers no support to the position that the Commonwealth Court was required to allow Avery and Kosin to participate in the 2022 general election. However, for the following

[11] The Commonwealth Court's opinion in this matter did not expressly acknowledge this aspect of the various opinions in *Cohen*.

reasons, we conclude that a distinct legal precedent can be distilled from the various opinions in *Cohen*.

As Judge Ceisler accurately observed, this Court has expressed "that it is possible to cobble together a holding out of a fragmented decision." *Pap's A.M.*, 719 A.2d at 278. We have instructed that, for this to occur, "a majority of the Court must be in agreement on the concept which is to be deemed the holding." *Id*. Stated differently, "[w]hen a fragmented Court decides a case and no single legal rationale explaining the results garners a majority, then 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Commonwealth v. Yohe*, 79 A.3d 520, 536 (Pa. 2013) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). This Court has employed this method in discerning binding holdings in decisions that facially may appear to be non-precedential. *See*, *e.g.*, *In re T.S.*, 192 A.3d 1080 (Pa. 2018) (examining the various opinions in *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017), and concluding that a majority of the Court held, inter alia, that an attorney-GAL can represent both the legal and best interests of a child in termination proceedings as long as there is no conflict between those interests); *Commonwealth v. McClelland*, 233 A.3d 717, 733 (Pa. 2020) (concluding "that although [this Court's decision in *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172 (Pa. 1990)] is nominally a plurality decision, it is clear that a five-member majority of the Court held hearsay alone is insufficient to establish a prima facie case at a preliminary hearing because to do so violates principles of fundamental due process").

Regarding the instant matter, Judge Ceisler correctly expressed the precedential impact of *Cohen*. As the Judge concluded, in *Cohen*, five of seven Justices (Chief Justice Saylor and Justices Todd, Donohue, Dougherty, and Wecht), albeit in three separate responsive opinions, at the very least agreed that the *Packrall* exception to the "sore loser

provision" should not be extended to circumstances past those outlined in *Packrall*, i.e., cases where potential candidates withdraw their primary election nomination petitions pursuant to Section 914 of the Election Code. Thus, this position of a majority of the *Cohen* Court constitutes the narrowest grounds of their agreement and, therefore, enjoys precedential value, regardless of whether our non-precedential per curiam order in *Cohen* allowed Cohen to appear on the 2019 general election ballot, as that order merely set the law of the case in that appeal and had no stare decisis effect.[12] *See Thompson*, 985 A.2d at 937 (explaining that per curiam decisions are "limited to setting out the law of the case" and that "per curiam orders have no stare decisis effect").

Accordingly, per *Cohen*, *Packrall* is limited to its circumstances and thus, the *Packrall* exception does not apply in circumstances where a candidate obtains a court order withdrawing her primary election nomination petitions pursuant to Section 978.4 of the Election Code, as in Avery's case, or where a court enters an order granting a petition to set aside primary election nomination petitions due to stipulated defects, as in Kosin's case.[13] For these reasons, we affirmed the orders of the Commonwealth Court in our orders dated September 22, 2022.

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[12] We acknowledge Justice Mundy's concern that the proposition of law announced in *Marks* is not on all fours with the circumstances presented in this case, as we glean a holding in *Cohen* from, inter alia, dissenting opinions, i.e., not solely from Justices' opinions that concurred in the ultimate judgment of the Court. To be clear, we are not attempting to expand *Marks* in any fashion. The circumstances of the *Cohen* judgment and opinions are sui generis. Adopting, in part, language from Justice Mundy's Concurring Opinion: "[B]ecause of the unusual circumstances in *Cohen*," we are applying the principles underlying *Marks* to discern a holding from the *Cohen* opinions, where "the narrowest grounds to sustain a majority position and the judgment were opposite to each other." Concurring Opinion at 3. By doing so, we duly recognize the expressed view of a majority of the Court and apply it in this instance.

[13] Given these conclusions, we need not reach the Avery and Kosin Objectors' alternative argument that this Court should overrule *Packrall*. We, however, note that, because we now reaffirm the *Cohen* Majority's conclusion that the *Packrall* exception is limited to circumstances where potential candidates withdraw their primary election nomination (continued…)

Chief Justice Todd and Justices Dougherty, Wecht and Brobson join the opinion.

Justice Wecht files a concurring opinion.

Justice Mundy files a concurring opinion.

petitions pursuant to Section 914 of the Election Code, any future consideration of *Packrall*'s vitality will occur within the confines of an appeal concerning such a withdrawal. Even though the validity of *Packrall* has been questioned, the continued application of its longstanding exception to the sore loser rule is best addressed by this Court based on developed arguments from all parties and opinions from the lower courts.