[J-72-2022 and J-73-2022] [MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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	:	

CONCURRING OPINION

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

Based on the judicial expressions in *In re Cohen for Office of Council-at-Large*, 225 A.3d 1083 (Pa. 2020), I support the present Majority Opinion to the extent it determines that a majority of this Court understands the Election Code's sore-loser provision, *see* 25 P.S. § 2936(e), as being applicable to candidates whose primary-election nomination petitions were withdrawn by court order upon petition, *see* 25 P.S. § 2938.4, rather than through the voluntary administrative process for self-withdrawal. *See* 25 P.S. § 2874. Where I differ with the majority is in its description that such alignment

in *Cohen* had a "precedential impact." Majority Op. at 20. The majority reaches this conclusion by reference to the rule of *Marks v. United States*, 430 U.S. 188 (1977), which states that when a fragmented court decides a case and no single legal rationale explaining the results garners a majority, "the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgment[]* on the narrowest grounds." *Id*. at 193 (emphasis added); *see Commonwealth v. Yohe*, 79 A.3d 520, 536 (Pa. 2013). The majority indicates this Court has applied *Marks* in discerning "binding holdings" in cases such as *In re T.S.*, 192 A.3d 1080 (Pa. 2018), where this Court extracted a four-Justice point of law from a concurrence and a dissent in *In re Adoption of L.B.M.*, 161 A.3d 172 (2017). *See* Majority Op. at 20.

I would note, though, that the *Marks* rule by its terms only applies to opinions which supported the judgment, and not to dissenting opinions. This seems appropriate because, by straightforward logic, only opinions which support the judgment can contribute to a holding which is binding in future cases.[1] And indeed this is borne out, not only in the way *Marks* is worded (as indicated by the emphasized language above) but in the specific description used in *T.S.*, which did not suggest the *L.B.M*. concurring and dissenting opinions established a rule which then affirmatively bound the Court. Rather,

[1] This Court has applied *Marks* in the ordinary way for purposes of vertical *stare decisis*, that is, to discern United States Supreme Court holdings binding upon this Court, *see, e.g.*, *Haller v. Dep't of Revenue*, 728 A.2d 351, 354 (Pa. 1999) (acknowledging a majority holding derived from a United States Supreme Court plurality opinion combined with a concurring opinion), as well as horizontal *stare decisis*, *i.e.*, to ascertain this Court's own expressions which are binding as a matter of *stare decisis*, *see, e.g.*, *Commonwealth v. McClelland*, 233 A.3d 717, 732-33 (Pa. 2020) (recognizing a holding from a Pennsylvania Supreme Court plurality opinion combined with a concurring opinion). In cases of horizontal *stare decisis*, moreover, this Court remains free to refine its own precedents as new fact patterns reveal complexities the earlier decision did not anticipate when it formulated the holding in question. *See, e.g.*, *McMahon v. Shea*, 688 A.2d 1179 (Pa. 1997) (limiting the holding of *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Glutnick*, 587 A.2d 1346 (1991)).

T.S. was careful merely to "reaffirm certain principles agreed upon by a majority of Justices in *L.B.M.*," *T.S.*, 192 A.3d at 1092, and those reaffirmed principles became holdings of the Court for the first time in *T.S.* Notably, *L.B.M.* did not "hold" that an attorney-guardian-ad-litem can simultaneously represent the non-conflicting legal and best interests of a child in a contested termination-of-parental-rights hearing, but *T.S.* did so hold because four Justices in *L.B.M.* expressed that opinion.

Returning to the case *sub judice*, the "narrowest grounds" in *Cohen*, the position taken by Chief Justice Saylor, joined by Justice Dougherty, did not support "the judgment" in that case, *i.e.*, leaving *Cohen* on the ballot. Rather, because of the unusual circumstances in *Cohen*, the narrowest grounds to sustain a majority position supported the opposite of the judgment because the majority position and the judgment were opposite to each other. As such, the present majority finds "precedential impact" by looking *exclusively to dissenting opinions* in *Cohen*. Majority Op. at 20. While I have no issue with establishing a holding in the present dispute based on a determination that a particular viewpoint endorsed by at least four Justices in *Cohen* was correct, I do not favor extending *Marks* in the sense of thereby discerning a holding that affirmatively binds this Court in the present matter. *See id*. (referring to the present rule as a "binding holding" of *Cohen*). When four Justices in a responsive posture in a prior case agree on a particular legal principle, a Court majority in the present matter should remain free to reject that proposition without having to justify such rejection by reference to an exception to the rule of *stare decisis*.

To my mind this is more than merely a technical distinction because I do not believe it wise from a jurisprudential standpoint to leave open the possibility the present decision will be seen as having created a new extension of the *Marks* rule whereby any principle endorsed by four Justices in responsive opinions in a prior matter constitutes a *binding*

holding of that case relative to the present and future litigation. Justices writing from a responsive posture have a certain freedom in their expressiveness that eludes lead-opinion authors who often tend to write more narrowly so as to retain majority or plurality support. When a fractured decision results in a holding based on the expressions of Justices who support the judgment, a narrowing process is naturally put into effect, thereby cabining the holding to some extent. *See generally United States v. Duvall*, 740 F.3d 604, 605 (D.C. Cir. 2013) (Rogers, J., concurring) (recognizing "*Marks* applies when the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position") (emphasis, internal quotation marks, and citation omitted). This type of restraint in turn tends toward a more methodical and orderly development of the decisional law. It is not clear to me that the same can be said of majority positions derived exclusively from responsive opinions.

In all events, I believe the decision favored by the majority in the present case can be reached by following the example of *T.S.* and without extending the *Marks* rule into new territory. Accordingly, I respectfully concur in the result.