

EXECUTIVE COMMITTEE MINUTES  
LIBERTARIAN NATIONAL COMMITTEE  
August 25, 2022  
VIA ZOOM



CURRENT STATUS:

**FINAL**

PREPARED BY **CARYN ANN HARLOS**, LNC SECRETARY

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**LEGEND:** *text to be inserted*, ~~text to be deleted~~, unchanged existing text, *substantive final main motions*.

All main substantive motions will be set off by *bold and italics in green font* (with related subsidiary and incidental motions *set off by highlighted italics*) and will be assigned a motion number comprising the date and a sequential number to be recorded in the Secretary's Main Motion/Ballot Tally record located at <https://tinyurl.com/lncvotes2022>

Points of Order and substantive objections will be indicated in **BOLD RED TEXT**.

All vote results, challenges, and rulings will be set off by **BOLD ITALICS**.

The Secretary produces an electronic One Note notebook for each meeting that contains all reports submitted as well as supplementary information. The notebook for this meeting can be found at: <https://tinyurl.com/AugEC2022Meeting>

The LPedia article for this meeting can be found at:  
[https://lpedia.org/wiki/LNC Executive Committee Meeting 25 August 2022](https://lpedia.org/wiki/LNC_Executive_Committee_Meeting_25_August_2022)

Recordings for this meeting can be found at the LPedia link.

The QR codes lead to the video portion of the video being discussed.

## OPENING CEREMONY

### CALL TO ORDER

Chair Angela McArdle called the meeting to order at 8:39 p.m.. (all times Eastern).

## HOUSEKEEPING

### EXECUTIVE COMMITTEE MEMBER ATTENDANCE

The following were in attendance:<sup>1</sup>

**Officers:** Angela McArdle (Chair), Joshua Smith (Vice-Chair), Caryn Ann Harlos (Secretary), Todd Hagopian (Treasurer)

**Non-Officers:** Rich Bowen (At-Large), Bryan Elliott (At-Large), Steven Nekhaila (At-Large)

### REMAINING LNC MEMBER ATTENDANCE

**At-Large Representatives:** Dustin Blankenship

**Regional Representatives:** Miguel Duque (Region 1), Dustin Nanna (Region 3), Carrie Eiler (Region 4), Andrew Watkins (Region 5), Linnea Gabbard (Region 7), Pat Ford (Region 8)

**Regional Alternates:** Kathy Yeniscavich (Region 1), Martin Cowen (Region 2), Connor Nepomuceno (Region 3), Donovan Pantke (Region 7)

**Absent:** Dave Benner (Region 2 Representative), Joshua Clark (Region 4 Alternate), Otto Dassing (Region 5 Alternate), Joseph Ecklund (Region 6 Representative), Robley Hall (Region 8 Alternate), Mike Rufo (At-Large Representatives), Mark Tuniewicz (Region 6 Alternate)

**Staff:** None

**Ballot Access Committee:** Rich Bowen, Caryn Ann Harlos, Helen Gilson, Travis Irvine, Ken Moellman, Dustin Nanna, Bill Redpath, Richard Winger

The gallery contained many attendees as noted in the Registration Roster attached hereto as **Appendix 1** comprising person who registered in advance, though not all of the registrants attended.

### OPPORTUNITY FOR PUBLIC COMMENT

<sup>1</sup> Vice-Chair Smith arrived after the initial attendance roll call.

The following persons spoke during public comment:

- Justin Carmen (NY)
- Rob Cowburn (PA)
- Pat Ford (RI - LNC)
- Pietro Geraci (NY)
- Caryn Ann Harlos (with LNC administrative note)
- Andy Jacobs (PA)
- TJ Kosin (PA)
- Bill Redpath (IL)

### PURPOSE OF EXECUTIVE COMMITTEE MEETING

The meeting was called to consider issues involving New York ballot access, challenges to Pennsylvania candidates, and the Libertarian Party of New Mexico dispute.

### NEW BUSINESS WITH PREVIOUS NOTICE

#### NEW YORK BALLOT ACCESS



Representatives from the Libertarian Party of New York were given fifteen (15) minutes to address the LNC. Larry Sharpe and his attorney Gary Donoyan gave a summary of the issues surrounding Mr. Sharpe's petition signature efforts. **See Appendices B and C** for relevant documents relating to this issue.

Chair McArdle passed the gavel to Secretary Harlos.

***Mr. Elliott moved that the LNC approve the distribution of \$15,000 from the ballot access budget line to support the Larry Sharpe ballot access effort. (20220825-01)***

A roll call vote was conducted with the following results:

Member	Yes	No	Abstain
Bowen	X		
Elliot	X		
Hagopian	X		
Harlos	X		
Nekhaila	X		
Smith	X		
McArdle			X
<b>TOTALS</b>	<b>6</b>	<b>0</b>	<b>1</b>

***This motion PASSED with a roll call vote of 6-0-1. [20220825-01]***

Chair McArdle resumed the gavel.

## PENNSYLVANIA CANDIDATE CHALLENGES



Representative from the Libertarian Party of Pennsylvania were given fifteen (15) minutes to address the LNC. Richard Schwarz, T.J. Kosin, and Alison Graham gave a summary of the issues surrounding the challenges to Brittney Kosin and Caroline Avery. **See Appendices D, E, and F** for relevant documents relating to this issue.

*Treasurer Hagopian moved to expend \$5,000 to support Brittney Kosin from the candidate support budget line. (20220825-02)*

A roll call vote was conducted with the following results:

Member	Yes	No	Abstain
Bowen	X		
Elliot	X		
Hagopian	X		
Harlos	X		
Nekhaila	X		
Smith	X		
McArdle			X
<b>TOTALS</b>	<b>6</b>	<b>0</b>	<b>1</b>

*This motion PASSED with a roll call vote of 6-0-1. [20220825-02]*

*Secretary Harlos moved to expend \$4,000 to support Caroline Avery from the candidate support budget line. (20220825-03)*

A roll call vote was conducted with the following results:

Member	Yes	No	Abstain
Bowen	X		
Elliot	X		
Hagopian		X	
Harlos	X		
Nekhaila	X		
Smith	X		
McArdle			X
<b>TOTALS</b>	<b>6</b>	<b>0</b>	<b>1</b>

*This motion PASSED with a roll call vote of 5-1-1.. [20220825-03]*



## LIBERTARIAN PARTY OF NEW MEXICO DISPUTE

See Appendices G and H for relevant documents relating to this issue.

**WITHOUT OBJECTION**, Ms. Harlos moved to go into Executive Session to discuss legal issues surrounding the dispute with the Libertarian Party of New Mexico.

The LNC entered into a five (5) minute recess.

### EXECUTIVE SESSION

**WITHOUT OBJECTION**, the Executive Committee went into Executive Session at 11:00 p.m. with the rest of the LNC and staff present.

### ADJOURNMENT

The Executive Committee arose out of Executive Session and adjourned for the day **WITHOUT OBJECTION** at 11:53 p.m.

### TABLE OF NUMBERED MOTIONS/BALLOTS

\*Note that the master log of motions in 2022 can be found here: <https://tinyurl.com/Incvotes2022>

ID#	Motion/Ballot	Result
20220825-01	Approve \$15,000 to assist the Larry Sharpe ballot access drive suit	<b>PASSED</b>
20220825-02	Approve \$5,000 to assist the Brittney Kosin candidate challenge lawsuit	<b>PASSED</b>
20220825-03	Approve \$4,000 to assist the Caroline Avery candidate challenge lawsuit	<b>PASSED</b>

### TABLE OF APPENDICES

Appendix	Title	Author
<b>A</b>	Log of Registrants	Zoom
<b>B</b>	Transcript of proceedings regarding Larry Sharpe's petition signatures	New York Court (Supreme Court, Albany County)
<b>C</b>	New York Decision and Order	New York Court (Supreme Court, Albany County)
<b>D</b>	Order in case involving Brittney Kosin	Pennsylvania State Court
<b>E</b>	Case law referenced in Pennsylvania Orders	Courts
<b>F</b>	Order in case involving Caroline Avery	Pennsylvania Federal Court

<b>G</b>	Letter from the Libertarian Party of New Mexico	Chris Luchini
<b>H</b>	Letter to the Libertarian Party of New Mexico	Angela McArdle

Respectfully submitted,



**LNC Secretary ~ Secretary@LP.org ~ 561.523.2250**



APPENDIX A – LOG OF REGISTRANTS

REGISTRATION SHEET<sup>2</sup>

<b><u>NAME</u></b>
Sylvia Arrowwood
Tyler Askin
Philip Bertin
Tavis Bost
Tyler Braaten
Joseph Brungardt
Justin Carman
Jay Carr
Nick Ciesielski
Eric Cordova
Cipriana Costello
Robert Cowburn
Gary Donoyan
Christopher Fraser
June Genis
Pietro Geraci
Helen Gilson
Alison Graham
Tim Hagan
Wayne Harlos
Larry Henneman
Susan Hogarth
Travis Irvine
Andrew Jacobs
Jonathan Jacobs
Mark K
Andrew Kolstee
TJ Kosin
Rebecca Lau
Ken Moellman
Chuck Moulton
Jennifer O'Connor
Christopher Olenski
George Phillies
Ryan Roberts
Mimi Robson

<sup>2</sup> The Zoom link required registration. This list comprises all persons who registered (with the exception of LNC members, staff, and other national Party representatives) but not everyone necessarily attended.

<b>NAME</b>
Keith Redhead
Bill Redpath
Richard Schwarz
Larry Sharpe
Trevor Strp
Karyn Thompson
Eric Thraen
Jamie Van Alstine
Cynthia Welch
Richard Winger

APPENDIX B - Transcript of Proceedings Regarding Larry Sharpe's Petition Signatures

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STATE OF NEW YORK  
SUPREME COURT  
-----  
COUNTY OF ALBANY

Application of

**ANDREW HOLLISTER**, as Aggrieved Candidate of the Libertarian Party for the Office of Lieutenant Governor of the State of New York, WILLIAM K. SCHMIDT, as Aggrieved Candidate of the Libertarian Party for the Office of Comptroller of the State of New York, THOMAS D. QUITTER, as Aggrieved Candidate of the Libertarian Party for the Office Of United States Senator from the State of New York, and WILLIAM CODY ANDERSON, as Chair and on behalf of the Libertarian Party of New York, an unincorporated association,

Petitioners,

-against-

Index No.:  
04990-22

NEW YORK STATE BOARD OF ELECTIONS,

and

JOHN P. O'CONNOR, as purported Objector herein,

Respondents,

for an order pursuant to the Election Law and the Constitution of the State of New York and the Constitution of the United States, declaring valid, proper and legally effective the nomination of the candidate Petitioners and directing the Board of Elections to place the names of the candidate Petitioners upon the official ballots and voting machines as candidates for such offices in the General Election to be held on November 8, 2022.

{Colleen B. Neal, Senior Court Reporter (518) 285-8971}

STATE OF NEW YORK  
SUPREME COURT  
-----  
COUNTY OF ALBANY

Application of

**LARRY SHARPE**, as Aggrieved Candidate of the  
Libertarian Party for the Office of Governor  
of the State of New York,

Petitioner,

-against-

Index No.:  
04989-22

NEW YORK STATE BOARD OF ELECTIONS,

and

JOHN P. O'CONNOR, as purported Objector  
herein,

Respondents,

for an order pursuant to the Election Law  
and the Constitution of the State of New York  
and the Constitution of the United States,  
declaring valid, proper and legally effective  
the nomination of the Petitioner and directing  
the Board of Elections to place the name of the  
candidate Petitioner upon the official ballots  
and voting machines as a candidate for such  
office in the General Election to be held on  
November 8, 2022.

HELD AT: Albany County Courthouse  
16 Eagle Street  
Albany, NY 12207  
July 25, 2021

BEFORE: HON. DAVID A. WEINSTEIN  
Acting Supreme Court Justice

APPEARANCES: GARY L. DONOYAN, ESQ.  
565 Plandome Road  
Manhasset, NY 11030  
Attorney for Petitioners (Hollister)

MESSINA, PERILLO & HILL  
285 West Main Street, Suite 203  
Sayville, NY 11782  
BY: JOHN CIAMPOLI, ESQ.  
Attorney for Respondent John O'Connor

LARRY SHARPE, Petitioner  
23-14 24th Avenue  
Astoria, NY 11102  
Appearing Pro Se

NEW YORK STATE BOARD OF ELECTIONS  
40 North Pearl Street  
Albany, NY 12207  
BY: BRIAN QUAIL, ESQ.  
KEVIN MURPHY, ESQ.  
Attorneys for Respondent Board of Elections

1 THE COURT: We are here today for a series of  
2 consolidated proceedings. The cases of Larry Sharpe  
3 against the New York State Board of Elections and John P.  
4 O'Connor. And Andrew Hollister, et. al, versus the New  
5 York State Board of Elections versus John P. O'Connor.  
6 Those are index numbers 4989-22 and 4990-22.

7 By the way, there's people coming in the lobby,  
8 I assume those are -- I'm just going to admit everyone  
9 since it's a public proceeding. And I know there were  
10 individuals who wanted to watch the proceeding and that's  
11 why we have folks coming in.

12 In addition, the proceeding today has been -- is  
13 going to be heard at the same time. I'm not sure that  
14 there is anything to be heard, but in the proceeding  
15 originally initiated by John O'Connor -- let me get the  
16 index number for that, which is -- the John P. O'Connor  
17 versus Larry Sharpe, et al., that's index number  
18 904469-22.

19 So let me get the parties' appearances for the  
20 record, please. Why don't we start with the petitioners  
21 in the Sharpe and Hollister cases.

22 MR. DONOYAN: Good morning, Your Honor. Gary  
23 Donoyan, 565 Plandome Road, Manhasset, New York, attorney  
24 for petitioners in the Hollister case. Petitioners  
25 Hollister, Schmidt, Quiter and Anderson.

1 MR. SHARPE: Good morning, Your Honor. Larry  
2 Sharpe here at 23-14 24th Avenue, Astoria, New York, here  
3 pro se.

4 THE COURT: Good morning, both of you. And for  
5 the respondents in the Sharpe and Hollister matters?

6 MR. DONOYAN: I am the attorney for all of them  
7 in that case, yes.

8 MR. CIAMPOLI: No, you're the attorney for the  
9 petitioners.

10 MR. DONOYAN: I'm sorry, for the --

11 MR. CIAMPOLI: Go ahead.

12 MR. DONOYAN: For the respondents, yes.

13 MR. CIAMPOLI: For the respondent John O'Connor  
14 in both cases, John Ciampoli, Messina, Perillo & Hill  
15 Sayville, New York.

16 THE COURT: And for the Board of Elections here  
17 today?

18 MR. QUAIL: Good morning, Your Honor. For the  
19 Board of Elections myself, Brian Quail, and Kevin Murphy.

20 Judge, we are here virtually, but if it would  
21 facilitate these proceedings, we are less than 10 minutes  
22 away from the courthouse and we would be happy to go  
23 there. We were just a little bit unclear this morning  
24 about what would be the most appropriate way for us to  
25 appear.



1 THE COURT: I think this is fine. Again, I --  
2 especially since I'm the -- again, I apologize, the  
3 request was to do this in person, which was fine with me.  
4 I had a positive COVID test this morning, which  
5 necessitates me being at home. And as a result, that  
6 changes, somewhat, the dynamic of the proceeding. So I  
7 think it's fine.

8 And I think we have all of the documents from  
9 the Board of Elections. I appreciate everyone providing  
10 anything that had been filed recently.

11 So I think we can go ahead. I think  
12 essentially -- and correct me if I'm wrong, Mr. Donoyan,  
13 Mr. Sharpe, and Mr. Ciampoli -- I mean this is essentially  
14 in the realm of an oral argument. There isn't, I don't  
15 think, any proof beyond the fact I guess of the  
16 determinations of the Board of Elections today; is that  
17 correct?

18 MR. DONOYAN: That's my understanding, Your  
19 Honor, yes.

20 MR. CIAMPOLI: I think that's exactly right,  
21 Your Honor.

22 THE COURT: Okay. So my oral arguments are  
23 somewhat free-flowing, so we're going to go back and forth  
24 between everyone. But why don't we start with -- why  
25 don't I start with Mr. Donoyan and Mr. Sharpe about the

1 question -- I'm trying to understand by reading your  
2 papers if you acknowledge -- if you're challenging the  
3 issue that there are under 45,000 signatures and they're  
4 simply challenging that requirement or if there is a claim  
5 being made here that either there are or there were or may  
6 have been at least 45,000 signatures submitted to the  
7 Board of Elections. Can you clarify that for me?

8 MR. DONOYAN: Yes, Your Honor. Our position is  
9 that we do not concede that there are fewer than 45,000  
10 signatures. We did not -- when we filed we expected that  
11 there would be some number above that based on the number  
12 of sheets. At the time of filing we didn't have an  
13 opportunity actually to count how many signatures were on  
14 each of those 5100 sheets. We did expect that there were  
15 more. There has never been a real count on our side. We  
16 heard allegations from both the objector and from the  
17 Board of Elections as to the number, but we still don't  
18 have any actual confirmation from anyone other than those  
19 adverse parties as to the number.

20 THE COURT: And if I understand your position,  
21 it goes something like this: That Mr. O'Connor is not an  
22 appropriate objector and, therefore, it was improper for  
23 the Board of Elections to have counted those signatures.

24 MR. DONOYAN: Not exactly, Your Honor.

25 THE COURT: Okay, so go ahead.

1 MR. DONOYAN: The position on that particular  
2 point -- we have several points. With regard to that  
3 point, when the Board of Elections made its determination  
4 on our petition we were surprised by that because that  
5 was -- you know, there had been an objector, Mr. O'Connor,  
6 only one. We expected that there might have been some  
7 issues with regard to that objector.

8 But at least we thought that that process, which  
9 is what -- which is done by what I call the State Board of  
10 Elections staff where they will call a hearing, allow both  
11 sides an opportunity to appear and argue their position  
12 typically after their preliminary review, that we would  
13 have had an opportunity at that point to object to the  
14 objector.

15 Instead, what the commissioners themselves did  
16 at their hearing was announce that the staff had, rather  
17 than holding such a hearing, had gone ahead and made a  
18 conclusion without such a hearing and that the  
19 commissioners were then prepared to and did adopt that as  
20 a prime facie ruling on it, which we held violates the  
21 state's statute, that it should be presumptively valid  
22 because it appears to have sufficient signatures.

23 THE COURT: And it does that simply because of  
24 the number of pages and the number of signatures that each  
25 page has basically; is that correct?

1 MR. DONOYAN: That's right. 5100 sheets would  
2 provide presumptively valid petition.

3 THE COURT: Let me just -- just a side point --  
4 we have a number of spectators watching, which is fine,  
5 this is a public proceeding. Just everyone make sure to  
6 mute yourselves and turn off your cameras if you're just  
7 here to watch the proceeding.

8 So let me just understand one more thing here  
9 and then I'll ask the Board of Elections. Isn't one way  
10 to resolve this issue -- and I'm just throwing it out  
11 there -- the fact there's a potential dispute about the  
12 number of signatures, is to ask the Board of Elections to  
13 submit them for in-camera review? I mean it's --  
14 ultimately there's certain questions that don't lend  
15 themselves to that kind of fact-finding and certain ones  
16 that do. Either there are that number or not. If there  
17 are, there may be other issues that can be raised. But if  
18 there are not, putting aside for now the constitutional  
19 objections, doesn't that end the factual objection? Isn't  
20 that one way to address this issue?

21 MR. DONOYAN: Was that question directed to me,  
22 Your Honor?

23 THE COURT: Yes, sure.

24 MR. DONOYAN: Oh, I'm sorry. Yes. Well, with  
25 regard to the number of signatures, it's true that our

1 complaint has to do with the identity of the people who  
2 are doing the counting so far. If that count was subject  
3 to the Court's review, that would be -- that would address  
4 that.

5 Although, it still would not resolve the  
6 underlying issue, which is that we are entitled to a  
7 hearing with the NYSBOE staff. And if for some other  
8 reason, other than the number of signatures, that hearing  
9 finds that the objection is not valid, let's say it wasn't  
10 served properly, for example, which we haven't actually  
11 even addressed, then without a valid objector, which they  
12 explicitly didn't acknowledge if it was true or not, then  
13 the petition should be deemed valid.

14 THE COURT: So let me just ask you are there  
15 other arguments that you are raising -- would raise at a  
16 hearing or would have raised at a hearing beyond the  
17 argument that there may be -- or on their face there  
18 appear to be in your argument 45,000 signatures? Is there  
19 a challenge to service of the objection?

20 MR. DONOYAN: Yes, Your Honor. And not only  
21 that, there's an issue with regard to the filing of the  
22 proof of the service, which is also unclear. There's one  
23 of the candidates who has claimed not to have received the  
24 specifications. And there was also some long confusion,  
25 and there still seems to be some confusion, whether the

1 proof of service of those specifications which is required  
2 to be filed was filed properly.

3 THE COURT: Okay. I'm going to give  
4 Mr. Ciampoli a chance to respond, but let me just start  
5 with the Board of Elections since what you've said really  
6 concerns its conduct in this.

7 What is your view about whether or not -- why a  
8 hearing was not required? Why don't you respond to the  
9 points that have been made.

10 MR. QUAIL: Thank you, Judge. A Couple of items  
11 on this. First, I would direct the Court's attention to  
12 the case of *Sloan v. Kellner*, 120 A.D.3d 895, Third  
13 Department again in 2014. And that case is somewhat  
14 similar here because the issue in that case came up as to  
15 whether or not the Board had the authority without a  
16 hearing to simply count the number of signatures on a  
17 petition and then find that there were insufficient  
18 signatures and disqualify the petition.

19 And I think that case clearly stands for the  
20 proposition that the Board has that power. That the prima  
21 facie review of the petition to determine whether or not  
22 it appears to have sufficient signatures can include a  
23 ministerial account of those signatures.

24 But more fundamentally, even if we find that  
25 that is not the case, it's axiomatic; that when you have

1 an objection to a petition, you have to know what the  
2 starting number of signatures is to determine on the  
3 specifications of objections how many to subtract from the  
4 starting number.

5 So, of course, at the get-go the Board of  
6 Elections would count the number of signatures. If that  
7 facial count of the number of signatures reveals that you  
8 don't have enough, then there is no reason to exert the  
9 Board's administrative resources to proceed with  
10 consideration of the individual line-by-line  
11 specifications that may have been raised by the objector  
12 because there already are not enough.

13 So either way, whether scenario A or scenario B,  
14 the Board was well within its rights not to have a  
15 hearing. The other piece that I would note, Your Honor --  
16 I'm sorry.

17 THE COURT: No, I'm just going to ask you a  
18 question. Is it your position that's the case even if  
19 hypothetically the objector proved to be invalid? Let's  
20 say the objections weren't served properly or some of the  
21 other issues that were raised would still -- is that still  
22 the case, in your view under the *Sloan* decision, that  
23 the --

24 MR. QUAIL: Yes.

25 THE COURT: -- Board of Elections has the

1 entitlement to do a prima facie count on signatures?

2 MR. QUAIL: Yes. And there's a specific fact in  
3 *Sloan v. Kellner* that I think compels that determination.  
4 And that is in *Sloan v. Kellner* there were several  
5 candidates on the petition, but there was only an  
6 objection to one of them. The Board invalidated the  
7 entire petition based on account of the number of  
8 signatures. And the Appellate Division held that the  
9 Board was within its rights to determine that the petition  
10 was, quote, facially defective and invalid in its  
11 entirety.

12 So I believe the answer to Your Honor's question  
13 is yes.

14 THE COURT: I interrupted you, so go ahead.

15 MR. QUAIL: So the other piece to this scenario  
16 is, you know, once the Board has rendered its analysis  
17 there's insufficient number of signatures, it's simply  
18 able to make that determination, and it did.

19 THE COURT: So let me just hear -- Mr. Ciampoli,  
20 do you have anything to add on the question of the 45,000  
21 signatures?

22 MR. CIAMPOLI: Well, the Board routinely -- and  
23 this I have from personal knowledge from when I served as  
24 counsel to the Board -- the Board routinely does what is  
25 called a prima facie review of a petition. I've seen



1 statewide petitions that had five pages or less. The  
2 Board can just look at those, they don't have to count  
3 pages, they don't have to count signatures, and tell that  
4 there is an insufficient petition here.

5 Here I believe the pages had 10 signatures per  
6 page and we're talking about a petition that's 2500 or  
7 more signatures short of the mark. So even if every page  
8 was filled with 10 signatures, that's over 250 pages. So  
9 it becomes relevant to what we know and do every day.  
10 That is half of a ream of paper that you would put into a  
11 printer or a copy machine. That's a thick wad of pages.  
12 And that's assuming that every page was filled with  
13 signatures.

14 So the Board could go and look based on the  
15 number of pages submitted -- and I think it was 11 volumes  
16 that were submitted -- and make that determination prime  
17 facie.

18 Our objection was that there were insufficient  
19 signatures. There is nothing here that is any different.  
20 I think the *Sloan* case is very much on point. I believe  
21 the Board would not have gone forward without the proof of  
22 service being filed with it.

23 I will give you the Third Department case that  
24 says it really doesn't matter if you don't open your mail,  
25 it matters that the proof of service in a petition case

1           where objections are involved is that the specific  
2           objections must be served by certified mail upon the  
3           respondent-candidates. That was done here. I believe the  
4           Board's records will reflect that. And there's really not  
5           an issue for the Court to detain itself with.

6                       MR. SHARPE: Could I speak to this, Your Honor,  
7           if you don't mind?

8                       THE COURT: Yes, you may, one second. Let me  
9           just ask Mr. Ciampoli, I'm not suggesting I decide to do  
10          this, but what's your view if the Court -- about the  
11          idea -- would it be appropriate for the Court to do an  
12          in-camera review to make sure that the count was correct?

13                      MR. CIAMPOLI: I don't have a problem with the  
14          Board counting the signatures. You know, it certainly  
15          would be a lot better if the Court wanted to direct that  
16          before entering a final determination. It certainly would  
17          be a lot better than wasting the resources of the Board on  
18          a full hearing just to have a count taken.

19                      And that's the problem with the petitioners.  
20          The petitioners are saying we filed enough signatures.  
21          They haven't told the Court how many they filed. That  
22          should not be a real problem for whoever filed the  
23          petition.

24                      MR. QUAIL: Judge, if I may?

25                      THE COURT: Sure, go ahead.

1 MR. QUAIL: As Mr. Donoyan pointed out, one of  
2 the issues that we have in this case is that two of the  
3 three proceedings are not yet e-file cases, though that  
4 recently has come to pass, everyone has consented to that.

5 But we did upload a number of documents into the  
6 O'Connor v. Sharpe case this morning, including copies of  
7 all 11 volumes of the petition and a recapitulation sheet  
8 of the Board's count, which involved a tallying number in  
9 each volume and then counting that up. And then we have  
10 register tapes that were used to actually go page by page  
11 and make the count.

12 And ultimately the count that the Board arrived  
13 at was that there was 42,356 images. The Board of  
14 Elections has no objection to any in-camera review or  
15 count process to verify that number. We would certainly  
16 welcome that. We're confident that the number is what  
17 we've determined it in any event, under 45,000. So  
18 whatever the Court wants to do in that respect is fine  
19 with us.

20 THE COURT: Mr. Donoyan, go ahead, you had a  
21 response?

22 MR. DONOYAN: Yes, Your Honor, just a little bit  
23 of a response.

24 In the case described by both counsel, as well  
25 as in the case referred to by counsel, *Sloan*, they either

1 referred to an objection having been made and reviewed, or  
2 in the case of *Sloan*, an objection having to do with one  
3 out of many of the candidates.

4 This is unique, to my knowledge, where the Board  
5 explicitly said, if you read their determination, this is  
6 without consideration of whether there was an objection.  
7 And that removes one of the protections in the Election  
8 Law for petitions which appear to bear the requisite  
9 number of signatures.

10 As Mr. Ciampoli described the petition in the  
11 *Sloan* case, and Mr. Quail did as well, you can see on its  
12 face the petition in the *Sloan* case did not appear to bear  
13 the requisite number. In our case, you know, contrary to  
14 Mr. Ciampoli's suggestion that there were 2500 pages,  
15 there were 5100 pages.

16 MR. SHARPE: -200.

17 MR. DONOYAN: As many as 5200. So that's not  
18 what Mr. Ciampoli is describing. On its face it does  
19 appear to bear the requisite number and no objector was  
20 considered. At least there should be a review, not by  
21 this Court because it's not raised in this court, but by  
22 the Board of Elections as to whether the objection was  
23 properly made.

24 THE COURT: Let me just ask you though if the  
25 question here is simply are there enough signatures on the

1 petition, what would have to take place at a hearing  
2 beyond somebody counting the signatures? There either are  
3 or aren't that number of signatures.

4 MR. DONOYAN: Your Honor, it does appear that  
5 the Board is convinced that their count is fine. But what  
6 the Board hasn't considered is whether there is a legal  
7 objection to the petition. Without that, it doesn't  
8 matter what their count of the signatures is. The  
9 petition should be held valid if there is no valid  
10 objector because it appears to bear the requisite number  
11 of signatures.

12 MR. SHARPE: Your Honor, if I could, just for  
13 two seconds?

14 THE COURT: Sure. Go ahead.

15 MR. SHARPE: I know the *Sloan* case. I know Sam  
16 *Sloan* personally. I know what happened in that case and  
17 the one that Mr. Ciampoli talked about. It was blatantly  
18 obvious that there were not enough signatures. You can't  
19 have 50,000 signatures with 5 pages. That's impossible.  
20 Anyone would notice that.

21 With 5200 pages, Your Honor, at 10 per, that's  
22 52,000 signatures. If it averaged 9, that's still over.  
23 If it averaged 8 1/2, it's still over. You would have to  
24 physically count all of them to know what the average was.

25 Prima facie, you have to actually have an actual

1 count. Looking at that, it is clear there could  
2 absolutely be the appropriate number of signatures. And  
3 how do I know that? Because I was physically there when  
4 we submitted them, Your Honor.

5 And we had to rush because of the way it  
6 actually works, how difficult it is to get these  
7 signatures. And you can see by the timestamp, there was  
8 less than 10 minutes left of them closing that day when we  
9 actually submitted those signatures. We didn't have time  
10 to count them. We assumed there was enough because there  
11 were almost 5200 pages. We assumed there were enough, why  
12 wouldn't the Board of Elections?

13 THE COURT: So, if I understand -- I mean  
14 just -- if you had proof that there were more than 45,000  
15 you'd come in here, submit an affidavit saying we counted  
16 now and there's more than 45,000 signatures or could do  
17 that at some later point.

18 But I think the position here is not -- if I'm  
19 not mistaken -- is the petitioners are never actually  
20 saying that's the case, they're saying that it wasn't a  
21 valid objection, the petition was not on its face invalid  
22 and, therefore, the Board of Elections should not have  
23 reviewed it or should not have reviewed it without  
24 conducting some kind of hearing. Although, again, I'm not  
25 entirely sure what that hearing would be if we're just

1 talking about the number of signatures. But do I have  
2 that correct?

3 MR. DONOYAN: Not exactly, Your Honor. I'm  
4 suggesting that we're entitled to a consideration of  
5 whether the objector was proper. You know, we're not  
6 prepared at this point to prove that the objection was  
7 improper, but at least the Board of Elections should have  
8 made that review before they jumped ahead and concluded  
9 that the petition was improper.

10 THE COURT: You would be entitled --

11 MR. CIAMPOLI: If I may, Your Honor?

12 THE COURT: Hang on a second. The hearing that  
13 you're suggesting, there would not really be a hearing on  
14 the number of signatures, it would be a hearing on the  
15 propriety of the objector?

16 MR. DONOYAN: Well, we weren't aware, until the  
17 public Board of Elections Commissioners meeting that that  
18 was their conclusion. But, yes, before that point is  
19 reached, and counsel for the Board suggests that -- I  
20 think he used the phrase when you have an objection then  
21 you go and you count the signatures to make sure there's  
22 no -- there's a point in having a hearing. And that's  
23 fine.

24 But in this case, although there was an  
25 objection, they explicitly admitted that they did this

1 without consideration of an objection. And this is for  
2 our own sake, as well as for the sake of future  
3 petitioners to the Board who may not have a proper  
4 objector. They're entitled to that in the Election Law  
5 that the objector follows all of the requirements for  
6 service, for validity of the objection and for  
7 qualification of the objector him or herself. All of  
8 those were ignored in this case.

9 And for the sake of Mr. Sharpe and the other  
10 petitioners, as well as future candidates, the Board  
11 should not be making prima facie rulings when the petition  
12 appears to be valid on its face.

13 THE COURT: And what I understand from what  
14 Mr. Sharpe said and you're saying is you're distinguishing  
15 *Sloan* on the ground that in that case it was not facially  
16 valid.

17 MR. DONOYAN: Absolutely correct.

18 MR. SHARPE: Right.

19 THE COURT: Someone else tried to speak before.  
20 I think it was Mr. Ciampoli.

21 MR. CIAMPOLI: Yes, Your Honor.

22 THE COURT: So go ahead.

23 MR. CIAMPOLI: Our position is that this is  
24 *Sloan*. The petition is lacking in signatures. A  
25 substantial number of signatures. A substantial number of



1 pages carrying them. Therefore, it can be determined to  
2 be invalid prima facie.

3 I'm willing to be forgiving here and say, okay,  
4 someone at the Board will go and count and give us a  
5 number. And by the way, so that you know how the Board  
6 does that, okay, their procedure for doing that is they go  
7 page by page and they look at the number of signatures  
8 claimed on each witness statement and then they add that  
9 up.

10 I don't have a problem if the Court wanted to  
11 direct that. It's going to show that the petition had  
12 insufficient number of signatures. It's a lot less  
13 onerous than holding a hearing.

14 The other thing is the Board checks on  
15 objectors. They don't hold hearings, they don't send  
16 things to the commissioners for resolution without having  
17 a file that shows the proof of service without them  
18 showing that -- and the qualification of the objector here  
19 is he has to be a registered voter of the State of New  
20 York qualified to vote for the office and, therefore, to  
21 sign the petition and then he can object.

22 The objection process was done correctly here.  
23 I hear a lot of there's not a qualified objector, the  
24 objections aren't good. Again, there's a burden of proof  
25 there. Someone has to show me how it's not good.

1                   And while it was the certified mailing of court  
2 papers in *Fulani v. Barasch*, which the Court can find at  
3 166 A.D.2d 741, and that's a 1990 case from the Third  
4 Department, the fact that the mailing was done satisfies  
5 the service requirement. If somebody wants to come in and  
6 claim that they never received it, that's very nice, but  
7 that doesn't matter. That's what the Third Department  
8 said in *Fulani v. Barasch*.

9                   So, in short, I'm trying to be as giving as I  
10 can here. If somebody wants the Board to count the number  
11 of signatures on the petition, that's fine, as long as  
12 they do it the way they ordinarily do it. And they can  
13 report back and then we will have a petition that's  
14 invalid.

15                   THE COURT: So let me just move on to another  
16 point, because I think I understand the arguments of the  
17 parties on this.

18                   So in terms of the constitutional arguments that  
19 are made -- either Mr. Sharpe or Mr. Donoyan, you can  
20 answer this -- but why isn't that issue foreclosed by  
21 Judge Koeltl's decision in federal court which addressed  
22 specifically the constitutional challenges to the  
23 petition...

24                   (Microsoft Teams audio issue occurred.)

25                   THE COURT: ...who consider the constitutional

1 challenges to the signature requirements -- the relatively  
2 new signature requirements and rejected those challenges?

3 MR. DONOYAN: Your Honor, the reason is this is  
4 the first time that this issue has arisen after the  
5 failure of any governor candidate independent to qualify  
6 for the ballot. And for the first time -- in fact, by my  
7 understanding, since the 1950s, that there will likely be  
8 only two -- if Mr. Sharpe doesn't qualify, that there will  
9 be only two governor candidates on the ballot at all.

10 This belies many of the arguments made in the  
11 previous cases suggesting by the State Board of Elections  
12 and other defendants that the burden was not too high,  
13 that at least some candidates are likely to get on. I  
14 would like to allow Mr. Sharpe to address the particular  
15 difficulties that his campaign ran into this year that  
16 were not known at the time of the previous cases.

17 THE COURT: Go ahead.

18 MR. SHARPE: Your Honor, the reason I would say  
19 is that all the information that that Court had was either  
20 incorrect or just guesses. The reality of it is now we  
21 see the damage that's done.

22 The state claimed that 45,000 signatures in 6  
23 weeks could be done by anybody who is diligent. That was  
24 the word they used, diligent. The reality of it is to do  
25 this type of work you need to lose one week. You lose a

1 week in trying to figure out where to go, how to go, and  
2 also putting everything together at the end to follow all  
3 the rules of the Board of Elections.

4 So you actually only get about five weeks, not  
5 six. Which means now, on top of that, you've got to get  
6 at least \$50,000 signatures, assuming that maybe 5,000 may  
7 be bad or not correct or something. So now I have to get  
8 10,000 signatures per week. 10,000 per week. That's  
9 2,000 per day.

10 A very talented, very good petitioner can get  
11 100 a day. The average person gets maybe 25 to 50. So  
12 say if I average 50. I need 40 friends to work 5 days a  
13 week, 10 hours a day for 5 weeks straight. Who has that?  
14 That is not diligent. That is someone having a massive  
15 team of people able to make that happen. Forty friends  
16 who can take five weeks off to go work and do this and who  
17 are prepared to go out and ask people randomly to give  
18 them this kind of work.

19 Which means you're going to have to hire people.  
20 At the current going rate, we're looking anywhere from \$15  
21 to \$30 per hour. At \$20 an hour for all those people it's  
22 \$8,000 a day. Who has that kind of money, Your Honor,  
23 besides someone who is already established; besides  
24 someone who is already part of the game?

25 Think about this, if we could: A sitting

1           congressman couldn't do it. A multi-millionaire couldn't  
2           do it. This is now literally impossible. We have a  
3           situation now where the only people who ever run for  
4           office are those who are already in office. We are  
5           creating an aristocracy in our state.

6                         Right now that is true. The current governor  
7           and a sitting congressman are the only people running for  
8           office. How is that in any way, shape or form accurate,  
9           fair? Obviously it isn't. It shows that when we find  
10          here for the first time this year nobody made it.

11                        The idea that anyone who is diligent clearly is  
12          untrue. Tell me a multi-millionaire isn't diligent? I  
13          have to work for a living, Your Honor, and I'm still here  
14          working hard to make this happen. And a multi-millionaire  
15          and a sitting congressman couldn't do it.

16                        This has never been done before, that claim is  
17          absolutely false. They moved the time of year on top of  
18          it. They said that was okay. Well, now I don't have  
19          fairs anymore in the summer to go to, so I have to find  
20          new places to go. This takes more time and energy out of  
21          it.

22                        The other argument was well it's not timely.  
23          Well, it happened just now. We now find out that nobody  
24          is on. This is in my -- my position is, Your Honor, this  
25          is no different than *Brown v. Board of Education*. They

1 thought separate but equal was good, but they found that  
2 it wasn't good and they made a change.

3 This is that. We now have the data. This does  
4 not work. We now know it doesn't work. It ensures that  
5 people who want to be on the ballot can't be on it. And  
6 the reason why that matters more than anything else in the  
7 constitutional aspect of this is many people who run for  
8 office -- most in fact -- understand that they're probably  
9 not going to win. They know the odds are slim.

10 Well, why in the world would you punish  
11 yourself, try to do this, if you know that the odds are  
12 slim that you're going to win? Because the greatest  
13 protest, Your Honor, you can possibly do is to vote  
14 against somebody. Staying home may show apathy, but  
15 showing up and saying no, not you too, is a protest.  
16 Clearly a protest. In fact, the strongest one you can do.

17 And I'll go one step further. About a half a  
18 million New Yorkers make that protest vote every time  
19 there's a large election like this. Over 100,000 did for  
20 me. We are literally disenfranchising voters who want to  
21 have that protest vote. We are disenfranchising our  
22 voters across this state. Most voters across this state  
23 are not democrats or republicans. So what do they get to  
24 do? They can't vote in primaries and now they don't get a  
25 chance to go independently.

1                   So if you can't be in a primary, then you don't  
2                   get to vote. You are disenfranchising all New Yorkers who  
3                   don't want to fall into that road. And here's the biggest  
4                   piece of everything I just said: What's the harm? If I'm  
5                   on the ballot, people can just not vote for me. They did  
6                   by the millions last time. So, clearly, you don't have to  
7                   vote for me if you don't want to.

8                   But if I am on the ballot, there are hundreds of  
9                   thousands of New Yorkers who have a voice, who can vote,  
10                  who can actually be involved in this process that we are  
11                  fighting so much.

12                  We talk about ballot -- we talk about voter  
13                  suppression, we talk about ballot suppression. This is  
14                  that exactly. This is exactly what this is. There is  
15                  only harm with me not being on the ballot and there's no  
16                  harm if I am.

17                  Not just that, no one can get on. We have a  
18                  situation, Your Honor, to where there will be no  
19                  independent governor candidates for a generation. And  
20                  this will also affect, by the way, national politics.  
21                  Because if you can't get on the ballot here in New York,  
22                  you also can't go as an independent candidate as a  
23                  presidential candidate either. We will ensure that for a  
24                  generation there will be no independent vote, no  
25                  independent voice in this state and in this nation. It's

1 not the right answer.

2 THE COURT: Let me talk about something a little  
3 more mundane, which is in all of this argument, which is  
4 the idea of collateral estoppel, res judicata, the idea  
5 that you may make a very strong argument, you make an  
6 argument one judge may consider valid, another may not.

7 And we have a principle which says when a judge  
8 has ruled on the same issue for the same parties that's  
9 brought which the party had an opportunity to make that  
10 argument, chose the court, made it there, then at that  
11 point, for all kinds of other reasons having to do with  
12 not wanting conflicting rulings between the courts, the  
13 Court has to defer to that other Court's decision.

14 And that's what I'm trying to figure out is why,  
15 without getting into all of the various arguments, why  
16 isn't the decision from Judge Koeltl cited, Supreme Court  
17 precedence, one Second Circuit precedent in the Sam case,  
18 which also challenges requirement, why doesn't that end  
19 the process for me and I have to just defer to those  
20 rulings?

21 MR. SHARPE: And the answer to that, Your Honor,  
22 is those courts did not have the information I just gave  
23 you. They did not have that information. The information  
24 is new. The situation has changed. And I would submit,  
25 obviously, that I believe that if they had this



1 information they would not have made a decision.

2 THE COURT: Anything else you want to add?

3 MR. CIAMPOLI: May I reply, Your Honor?

4 Obviously, we think that --

5 MR. DONOYAN: That's all as far as me, Your  
6 Honor, yes.

7 THE COURT: Okay. So go ahead, Mr. Ciampoli.

8 MR. CIAMPOLI: Your Honor, I think that res  
9 judicata and collateral estoppel do apply here. But this  
10 Court also has the benefit of this question having been  
11 litigated previously by this county Supreme Court.

12 If the Court can look at Matter of John Bullis,  
13 Index Number 905003 of 2022, which was handed down by  
14 Acting Justice Zwack of this court on July 12th, there is  
15 a rather thorough discussion of the constitutional claims  
16 that were raised.

17 The Court there pointed out that while the  
18 voting is the most fundamental -- is of the most  
19 fundamental significance under our constitutional  
20 structure; however, the right to vote in any manner and  
21 the right to associate for political purposes through the  
22 ballot are not absolute. Relying on the Court of Appeals  
23 decision in *Walsh v. Katz*, 17 N.Y.3d 336, a 2011 Court of  
24 Appeals decision.

25 Stated differently, quote, the states retained

1 the power to regulate their own elections and are  
2 permitted to enact reasonable regulation of elections.  
3 The Court then goes on to cite *Brown v. Erie*  
4 *County Board of Elections*, 197 A.D.3d 1503. That is a  
5 Fourth Department 2021 case. Interestingly, and  
6 Mr. Sharpe made some arguments that sound familiar to me,  
7 here the petitioners attempt to argue the required 45,000  
8 signatures on the statewide independent nominating  
9 petition is such a severe burden as to be constitutionally  
10 impermissible.

11 It goes on to review the case law on that point.  
12 And then Justice Zwack observed: Lastly, even crediting  
13 the petitioners' claims that winter storm, COVID-19 and  
14 the remapping of congressional districts acted to  
15 abbreviate their ability to obtain the required number of  
16 signatures, the Court is not persuaded that they are  
17 entitled to a reduction of the number of signatures  
18 required for the independent nominating petition. Citing  
19 *Matter of Stoppenbach v. Sweeney*, 297 A.D.2d 456. As  
20 pointed out by the Board of Elections under the same  
21 circumstances and conditions, another candidate  
22 successfully filed an independent nominating petition for  
23 the November 2022 general election.

24 At that point Justice Zwack dismissed that  
25 action. That is what you should do here. Snowstorms,

1           lack of county fairs notwithstanding, the state had the  
2           right to change its law. I may like it or not like it,  
3           but it withstands judicial scrutiny and it is  
4           constitutional. And it has been, in this very courthouse,  
5           held to be constitutional.

6                   THE COURT: Do you want to address the argument  
7           that what's happened in this election is evidence that the  
8           burdens that are placed on third parties by the heightened  
9           signature requirements?

10                   MR. CIAMPOLI: I direct the Court to look at the  
11           filings made by the petitioner in the Bullis case. They  
12           echo the arguments that were made here today, that it was  
13           impossible and that it was unduly burdensome.

14                   Well, as the State Board pointed out in that  
15           case, there is a statewide candidate who navigated the  
16           process and obtained an independent petition that met the  
17           requirements.

18                   THE COURT: And I take it that's a candidate for  
19           office other than governor?

20                   MR. CIAMPOLI: I believe it is. I will rely on  
21           the State Board's...

22                   MR. QUAIL: Senate.

23                   MR. CIAMPOLI: U.S. Senate, right?

24                   MR. QUAIL: Yes. May I clarify?

25                   THE COURT: Sure.

1 MR. QUAIL: The office was United States  
2 Senator, which is also a statewide office. It has the  
3 identical petitioning requirement, which is 45,000  
4 signatures. And the candidate's name was Diane Sare, the  
5 independent LaRouche movement.

6 MR. DONOYAN: Your Honor, let me just point  
7 out --

8 THE COURT: Go ahead.

9 MR. DONOYAN: -- one quick point. The matter of  
10 Bullis case relied on by counsel, that was denied based on  
11 timeliness. What he was referring to was *Dicta*. There's  
12 been no case that's been on point, other than in *Dicta*,  
13 since the filing deadline.

14 In fact, I consulted with the attorneys in that  
15 case. Although they filed by business day three, they  
16 didn't complete service in time. That was the reason that  
17 that case was denied, not because of any *res judicata*  
18 issue at all.

19 THE COURT: Right. But to be clear, there are  
20 two -- there's Second Circuit decision and then there's  
21 the decision brought by the Libertarian Party itself that  
22 is on appeal now for the District Court that made those  
23 decisions. And the argument you're making is that the  
24 facts of this election have demonstrated that that  
25 decision was based on a misunderstanding of the burdens

1           that are faced by independent parties.

2                       MR. DONOYAN: I'm just addressing counsel's  
3 point that there has been a judicial ruling since the  
4 filing deadline and that's incorrect, unless you're  
5 considering *Dicta*, which this Court should not consider.

6                       MR. SHARPE: If I could touch the Diane Sare  
7 piece. This is something that's most important, Your  
8 Honor. She wasn't challenged, so we don't know if she has  
9 45,000 valid signatures or not. They are allowing her to  
10 have it. They're doing prime facie for her, but not for  
11 anyone else. She wasn't challenged. Now, I'm not saying  
12 she has or has not, I don't know. We don't know.

13                      Now, what happened in the case of Independence  
14 Party is there were literally thousands of fraudulent  
15 signatures, that's why that didn't work. What if she has  
16 the same? I don't know that. But we don't know that.  
17 How can we count her when she wasn't challenged? And the  
18 reason why she wasn't challenged, obviously, is because  
19 her race does not allow ballot access. If she wins, if  
20 she becomes our next U.S. senator, does not change ballot  
21 access in New York State. She was not challenged. We  
22 don't know if she actually had 45,000 accurate signatures  
23 or not, so how can we count that?

24                      MR. QUAIL: She filed more than 60,000  
25 signatures.

1 MR. SHARPE: So we know that those signatures  
2 are all valid? We don't.

3 MR. QUAIL: No, I take your point.

4 MR. SHARPE: Thank you. We don't know that,  
5 right? We don't know -- in theory, they could be 30,000  
6 photocopies. We don't know.

7 THE COURT: I understand. Your point is it  
8 wasn't challenged --

9 MR. SHARPE: So we don't know.

10 THE COURT: -- that there was somebody who  
11 qualified under the process. Your point is there was no  
12 objector, right? I understand.

13 There are some other arguments that are made --  
14 Mr. Ciampoli, you make arguments about necessary parties  
15 and about service. Do you want to talk to any of those?

16 MR. CIAMPOLI: Well, the necessary parties,  
17 there are two actions here, okay, and I submit that the  
18 fact that the Court's consolidated them for hearing does  
19 not relieve Mr. Sharpe of serving and naming as parties to  
20 his action all of the other people who appeared on that  
21 petition. And it doesn't --

22 And in the Hollister case Mr. Sharpe isn't named  
23 as a respondent to the action. So, therefore, you can't  
24 make a ruling in either case without effecting a necessary  
25 party who was not named, not served, rendering those cases

1 procedurally defective.

2 THE COURT: Is it the same set of petitioners  
3 that impacts all the candidates? The candidate for  
4 governor, lieutenant governor, comptroller, et cetera?

5 MR. CIAMPOLI: Yes. It's one petition. You  
6 have to name every candidate on that petition given the  
7 nature of the claim that the entire petition doesn't have  
8 enough signatures.

9 THE COURT: Mr. Donoyan, do you want to make any  
10 response to that?

11 MR. DONOYAN: Sure. My point would just be that  
12 all of the candidates have the Sixth Amendment right to  
13 counsel of their own choosing or to appear without  
14 counsel. Mr. Sharpe elected to appear without counsel.  
15 The other candidates on the same petition elected to  
16 appear with counsel. And there's no practical way to  
17 include such a pleading in a single pleading. So the  
18 pleadings were bifurcated and filed at exactly the same  
19 time, as Your Honor personally knows, and were served at  
20 exactly the same time. There's no question that all  
21 respondents and all petitioners were provided notice of  
22 this proceeding. Of each of these proceedings.

23 THE COURT: Go ahead, Mr. Donoyan, I didn't hear  
24 the last part.

25 MR. DONOYAN: I should have said each party to

1 each of these proceedings was given notice to both of  
2 these proceedings is the point.

3 THE COURT: The other candidates, besides  
4 Mr. Sharpe, they all received a copy of Mr. Sharpe's  
5 petition, vice versa?

6 MR. DONOYAN: Well, they did, as clients of mine  
7 in this case. They were advised of all of the  
8 proceedings. As an officer of the court, I can say my  
9 clients were fully advised of both proceedings.

10 MR. CIAMPOLI: And, Your Honor, my point is the  
11 docket does not reflect that because they were not named  
12 as parties. So Mr. Sharpe's running mates were not named  
13 as parties to his lawsuit and he was not named as a party  
14 to their lawsuit. There's nothing in the docket of either  
15 case that indicates that they were named and served. They  
16 are necessary parties, there's no doubt about that.

17 So, therefore, procedurally both cases fail.  
18 And I don't know what the problem would have been for a  
19 joint petition to the Court with Mr. Sharpe doing a  
20 verification saying I'm proceeding pro se and Mr. Donoyan  
21 doing a verification saying I'm proceeding for these  
22 people who are my clients. I've seen that happen before,  
23 so I don't know why it's so impossible.

24 THE COURT: Mr. Ciampoli, do you want to talk  
25 about the service arguments at all?



1 MR. CIAMPOLI: Are you referring to service  
2 of...

3 THE COURT: Let me ask it this way: Are there  
4 any other arguments that are raised in your Answer that  
5 you wanted to address?

6 MR. CIAMPOLI: I believe that in my -- I  
7 certainly will stand on the pleadings that I've given to  
8 the Court.

9 MR. DONOYAN: Your Honor, I do have original  
10 affirmations of service with regard to these two petitions  
11 that I'm ready to hand up to the Court.

12 THE COURT: Okay. Do you have access to E-file  
13 them?

14 MR. DONOYAN: I do.

15 THE COURT: So you can certainly E-file those.  
16 I thought that -- maybe I'm wrong -- I thought that one of  
17 the Answers had a service argument, but that's okay. Let  
18 me ask it this way: Do any of the parties have anything  
19 else they want to raise in regards to this proceeding?

20 MR. SHARPE: I do, Your Honor.

21 THE COURT: Go ahead.

22 MR. SHARPE: The piece that I want to bring up,  
23 which I think is the one of the most important pieces  
24 here, is in 2018 I went out of my way, and so did  
25 thousands of New Yorkers, with time, money and energy to

1 get ballot access and party status for my party. And we  
2 did it.

3 And we put hundreds of thousands of dollars into  
4 this, time and energy. Ten thousand of my own dollars  
5 into this. And I didn't work for a year. And I have a  
6 wife and two kids, so you can imagine that's a challenge  
7 that I put up with.

8 And I did that so that I could have ballot  
9 access for a third party in New York State that would  
10 actually have some impact in a state that I love  
11 tremendously, that's why I'm still here, as I watch people  
12 simply begin to check out and leave our state, and I  
13 wanted to change something.

14 And when I got that, the assumption was we'd get  
15 four years of ballot access and have to redo it again in  
16 2022 under the same or maybe even different rules, but I  
17 would have it for four years. And within one to two years  
18 New York State changed those rules. They reneged on that  
19 contract with a citizen.

20 And I know the argument is but hey, Larry, they  
21 didn't say it was for four years. I know you didn't say  
22 it was four years. I know the state didn't say that. But  
23 for literally decades that had been the rule. Since  
24 Libertarian party existed that was -- it was four years.  
25 That was the agreement that I made with my state, they

1 told me to do and I did and I lost it.

2 And if this was a regular everyday contract  
3 outside of the state, if it was buying a house or a car or  
4 a chair, there would have to be some asterisk that says as  
5 is or subject to change. I got none of that. And when I  
6 came back for recourse I was pushed away multiple times.  
7 And now I'm being pushed away again.

8 This is, in my view, the worst of everything.  
9 If I would have had those four years to build up, if I had  
10 that time, maybe I would have had a chance to make this  
11 work. I would have had people around me, support  
12 structures required to be a party and to make this work.  
13 I lost my time and money and energy and hundreds of  
14 thousands of New Yorkers were literally -- lost all --  
15 they were disenfranchised by the state.

16 I mentioned earlier the idea that with the BOE  
17 not giving me a hearing, they violated my right. They  
18 took my rights away. I have the right to a hearing, Your  
19 Honor. Whether I'm wrong or right, they can look me in  
20 the eye and laugh at me and count my signatures, that's  
21 fine. I deserved a hearing. I didn't get one.

22 When it came to changing the rules, they made  
23 the rules so hard that it was impossible for me or anyone  
24 else to make it. Again, they took my rights away.  
25 They're disenfranchising me on multiple times, multiple

1 people.

2 And now the third time I made a deal with the  
3 state and the state reneged. I lost my rights again. I  
4 feel in my heart there must be some kind of remedy, Your  
5 Honor. And when there are laws, I know that we have to  
6 follow the law. I get it. But when there are laws that  
7 are unjust or wrong or that hurt people, us little guys  
8 don't have the power to change that. The big guys do. We  
9 come to judges like you, Your Honor. We come to you to  
10 help us to make it right, to go against the state, to show  
11 the state has gone too far.

12 The state has lots of people who support it  
13 constantly. We need people to help us out. You are our  
14 hope, Your Honor. You are the one who can give us the  
15 hope to fix this.

16 MR. DONOYAN: Your Honor, if I could elaborate  
17 just a bit on that?

18 THE COURT: Yes. I have a question for this,  
19 which is I understand the equitable -- the equities  
20 underlying this argument, which are sympathetic, but  
21 there's got to be a constitutional hook that those  
22 equities rely on in order for them to challenge --

23 (Microsoft Teams audio issue occurred.)

24 THE COURT: I'll start from the beginning. I  
25 understand the equitable nature of the argument you're

1 making. What constitutional provision, if any, prevents  
2 the state from changing the signature requirements? Not  
3 signature requirements, about, in this case, the vote  
4 requirements to get ballot access?

5 MR. DONOYAN: Your Honor, I'll address that.  
6 But, briefly, also, I will suggest that the pleadings  
7 provide a proposed remedy as Mr. Sharpe suggests that  
8 there was -- there was an implied promise by the state  
9 that party status would continue for four years from 2018.

10 With that in mind, the Libertarian Party of New  
11 York proceeded when it nominated Mr. Sharpe, as well as  
12 the other statewide candidates, for the ballot this year.  
13 Not only did they prepare to proceed with the independent  
14 nominating petition process, they also proceeded with the  
15 certification process, which would have been the method if  
16 they were a party.

17 That was filed at the State Board of Elections.  
18 That evidence is provided in the pleadings. That would  
19 provide another opportunity for the Court to provide  
20 relief just this one year for the Libertarian Party  
21 candidates.

22 THE COURT: What's the basis of the implied  
23 promise? Where does that derive from?

24 MR. SHARPE: Fifty years, Your Honor, of that  
25 being the case. It was always every four years,

1 governor candidate. It never changed for decades. My  
2 lifetime, that never changed. Your lifetime, that was the  
3 rule. And then all of a sudden after I get it for the  
4 first time in the history of the Libertarian Party, then  
5 the rules change, Your Honor. That's it.

6 If it was always that way, why would I assume  
7 anything else? Why would I think that if I do this they  
8 can tomorrow just change the rules and throw me off the  
9 ballot? It's common sense. It's common law, in my view.

10 THE COURT: Just to be clear, access was it for  
11 two years or one year?

12 MR. SHARPE: Four years.

13 MR. DONOYAN: Let me elaborate. The law with  
14 regard to obtaining recognized party status until the year  
15 2019 was that a party need -- or a candidate need achieve  
16 50,000 votes for that particular line, whether it's a  
17 party or an independent body, and that would last for four  
18 years.

19 So it was the law in 2018 when that was  
20 achieved. The expectation was that the Libertarian Party  
21 would have recognized party status for four years. In the  
22 event the law was changed in 2019 and in effect it was  
23 retroactive saying that starting in 2020, two years after  
24 the first two years of the four-year period, the  
25 qualification would have to be done by the presidential

1 candidate in the event the presidential candidate did not  
2 reach that much higher level and that's why the  
3 Libertarian Party is now considered to be an independent  
4 body rather than a recognized party.

5 So we have that alternative argument, Your  
6 Honor, in this case that the LPNY should have been  
7 recognized as a party throughout 2022. It's a one-time  
8 argument that the law should have been put in place not in  
9 the midst of the period, but at the end of the period.

10 And with regard to your other point, Your Honor,  
11 the constitutional hook with regard to the difficulties  
12 this year that were only discovered or revealed after the  
13 end of the petition period, that's the First Amendment of  
14 the U.S. Constitution as well as the New York State  
15 Constitution, the right to vote, which has been clearly  
16 applied to the right to have free and clear elections and  
17 candidates for office without undue burdens.

18 THE COURT: Mr. Ciampoli or anyone from the  
19 Board of Elections want to respond?

20 MR. CIAMPOLI: Let me go very quickly. There is  
21 an argument in there that a certificate was filed back in  
22 February. 16-102 of the Election Law specifies the  
23 statute of limitations as being 10 days from the meeting  
24 or the filing of the certificate. Their case was filed I  
25 believe in June, but that's way more than 10 days, so

1           that's academic there.

2                       The remainder of the argument with regard to the  
3           certificate is basically a back-door attempt to reopen the  
4           Sam case. The Sam case was about the number of votes you  
5           needed to attain ballot access.

6                       Now, with regard to this implied contract,  
7           number one, and I believe it's *Mondello v. Nassau County*  
8           *Board of Elections*, which is a Second Department case  
9           where it says you sit as a court of law not a court of  
10          equity in an Election Law case. That the Legislature has  
11          given the courts specific powers with regard to ballot  
12          access and you're limited to those powers and you may not  
13          fashion equitable remedy.

14                      Secondly, the one thing that Mr. Sharpe and  
15          Mr. Donoyan leave out of their argument is that at all  
16          times they knew the Legislature was in existence and was  
17          going in and out of session, which means that the  
18          Legislature could have changed any law that was on the  
19          books at any time.

20                      To the extent that they changed the law and  
21          there was an argument made that that was raising the vote  
22          total required for party access was unconstitutional, that  
23          was already disposed of in the federal courts. There's  
24          nothing left here.

25                      Beyond that, I don't know if anyone here has



1           toured the state capitol building in Texas, but there is  
2           inscribed in the marble there a motto that no man's life,  
3           liberty or property are safe when the Legislature is in  
4           session. That seems to come to mind here because they  
5           thought they had something for four years, but the  
6           Legislature came into session and exercised their powers  
7           to take it away.

8                         Lastly, you asked if I had something about  
9           service. My last affirmative defense was procedural to  
10          preserve my right. I'll ask Mr. Donoyan to share with me  
11          the affidavits of service that he's filing. I'm sure that  
12          they're sufficient, but if they're not, I preserve my  
13          right to object to them.

14                        THE COURT: Okay. Anyone else have anything  
15          else to say about anything?

16                        MR. QUAIL: Your Honor, three very quick points.  
17          The Board of Elections did not conduct a hearing because  
18          there were no facts to determine. Once the petition  
19          number of signatures was counted, there simply was no  
20          basis, and that's why the Board's determination of the  
21          objections says that the further consideration of the  
22          objection was academic.

23                        Secondly, the language in 6-1541 of the Election  
24          Law has been ascribed a very narrow meaning. I suggest to  
25          the Court that its plain language that says that the

1           presumption of validity attaches, quote, when the  
2           petition -- excuse me -- when the petition, quote, is in  
3           proper form and appears to bear the requisite number of  
4           signatures authenticated in the manner described by this  
5           chapter. That language is certainly broad enough to  
6           permit the Board of Elections to take a ministerial count  
7           of the number of signatures on a page.

8                         And final point, Your Honor, I would direct the  
9           Court to our third objection in point of law in which we  
10          point out the limited powers of the courts in 16-102  
11          proceedings, which this clearly is identified by the  
12          petitioners as, whereby the Court of Appeals in *Gross v.*  
13          *Albany County Board of Elections* noted that where the  
14          Legislature provides for a framework and regulations  
15          dealing with, quote, specific particulars, there is no  
16          invitation for the courts to exercise flexibility and  
17          statutory interpretation. Thank you, Your Honor.

18                         THE COURT: Sure.

19                         MR. DONOYAN: One final point, Your Honor?

20                         THE COURT: Sure.

21                         MR. DONOYAN: Counsel just suggested that the  
22          determination by the State Board concluded as follows:  
23          Further consideration of the objection is academic.  
24          That's incorrect. The determination actually said the  
25          consideration of the objection is academic. They concede

1           that they didn't consider the objection at all. This is  
2           our statutory objection.

3                       They keep switching back and forth between  
4           claiming that the objection was enough to open the door,  
5           but then they didn't have to go further. No, they either  
6           considered the objection or not. They concede that they  
7           did not.

8                       We're entitled to consideration of an objection.  
9           And if that objection is insufficient for whatever reason,  
10          whether it's number of signatures or some other reason, if  
11          it's inadequate, the petition should be held valid. Thank  
12          you, Your Honor.

13                      MR. SHARPE: If I could add the last piece, Your  
14          Honor, please?

15                      THE COURT: Sure. Mr. Sharpe and then  
16          Mr. Ciampoli.

17                      MR. SHARPE: When the Board says they have the  
18          right or they can check anyway they like, sure, they can.  
19          But they didn't check Diane Sare's, they checked mine. So  
20          they chose one to check and one not to check. That's a  
21          problem, in my view, Your Honor. I deserve a hearing.  
22          Whether it's academic or not, then I still get a hearing.  
23          Academic or not, then we'll sit there and be academic.  
24          But I deserve a hearing. I'm supposed to get a hearing.  
25          I should get a hearing, Your Honor.

1                   Second piece. When it comes to -- you asked  
2                   about the constitutionality of this. As I mentioned, this  
3                   is our voice. It is literally a protest vote. It is part  
4                   of who we are. We want to be heard, Your Honor, of course  
5                   we do. Why do so many people run? Of course, because  
6                   they want to be heard. They want to be able to say no the  
7                   system doesn't work, I don't like this system, I want  
8                   something different. That is literally my First Amendment  
9                   right to create a party, to have it to be valid, to able  
10                  to protest.

11                  I say again most of us realize the odds of our  
12                  victory are slim to none. So why are we doing it? It is  
13                  our protest. It is our voice. If they take away our  
14                  choice, they take away our voice. That's the way it  
15                  works.

16                  But I'll go one step further. The new laws say  
17                  you have to have a presidential candidate to actually gain  
18                  ballot access. What local party is going to have a  
19                  presidential candidate? What local party is going to have  
20                  a national presidential candidate? It's nonexistent.  
21                  This, by default, is saying that there can be no parties.  
22                  That is unconstitutional. I should be able to have a  
23                  local party on the ballot. Why do I have to have a  
24                  presidential candidate for that?

25                  And the last piece I'll bring up, and I'll wrap

1 up, I apologize, Your Honor, last piece --

2 THE COURT: No, no, it's okay. Just so the  
3 record is clear, obviously the answer to that -- I  
4 understand your challenge and your objection to that.  
5 There is an alternative process for a local party, which  
6 is the petitioning process, and I understand your  
7 arguments about why you consider that to be not possible  
8 to be used, but there is -- ballot access is not only  
9 through the presidential election, it's also through  
10 petitioner.

11 MR. SHARPE: Yes, through a system that  
12 literally no one made. And for the first time in 80 years  
13 there will not be an independent candidate on the ballot  
14 this year for governor. So, yes, agreed. I just feel  
15 like it's obvious that that's no small person to be able  
16 to do that.

17 And the last piece I'll bring up is I know that  
18 both parties are saying that you don't have the right to  
19 make a change or to deal with this in equitable fashion.  
20 What I would argue, Your Honor, is the legislation is full  
21 of Democrats and Republicans. They're not affected by  
22 this.

23 The only way we change this is by third party  
24 showing how wrong this is. If you are not the one to make  
25 a change, if you cannot affect the Legislature, if you

1           can't check them, then no one can. How in the world can I  
2           check Legislature if I can't get on the ballot; if I can't  
3           build my party out; if I can't get my word out to make  
4           changes that I think are correct or valid?

5                     Your Honor, I say again, whether they believe  
6           you should be able to do something or not, if you can't,  
7           then there is no recourse. Then there will simply be two  
8           parties in this state. And as you know, there's one  
9           dominant party in this state and this one party will  
10          dominate our state for a generation.

11                    It will devastate our democracy in New York  
12          State and maybe across the country. I don't even know  
13          that. But surely this state. Someone has to step up,  
14          Your Honor. And while the other judges didn't, I would  
15          argue again they did not have the information that you  
16          have. They did not have it. You have it. You can make a  
17          choice. Thank you.

18                    THE COURT: Thank you, Mr. Sharpe. And  
19          Mr. Ciampoli, you have the last word.

20                    MR. CIAMPOLI: The last word is I've looked at  
21          Mr. Donoyan's affidavits of service, they seem to be in  
22          order. So that last affirmative defense you can consider  
23          withdrawn. I think you have all the issues, Your Honor.

24                    MR. QUAIL: I have a housekeeping matter.

25                    THE COURT: Sure.

1 MR. QUAIL: We do have sort of the  
2 square-peg-round-hole issue of one of the three cases was  
3 E-filed, the other two aren't. So the record is not all  
4 sort of as it should be. So I'm just wondering if it  
5 might be helpful for the Court to just advise the parties  
6 that it would be all right to file all these materials  
7 under these other index numbers even though it may happen,  
8 you know, after today. Unless the other two cases have  
9 been E-filed at this point. Or we can certainly ship this  
10 stuff over to the county clerk.

11 THE COURT: I think they are now E-filed; is  
12 that correct?

13 MR. CIAMPOLI: Yes, Your Honor. And I was the  
14 fly in the ointment because Mr. Donoyan's email to me with  
15 the stip went into junk and I didn't see it until I went  
16 and did a search for everything from his email.

17 THE COURT: That's fine. So let me just ask a  
18 question. Isn't O'Connor now moot, the original case?

19 MR. CIAMPOLI: I don't believe so. It's not  
20 moot when they come in to try and validate the petition.

21 THE COURT: Okay. I understand. So I guess  
22 what's the easiest thing, to have everything filed in the  
23 original O'Connor case?

24 MR. DONOYAN: Your Honor, let me just -- another  
25 housekeeping matter. I requested that my case, the

1 Hollister case, be E-filed. I did not request the Sharpe  
2 case be E-filed. But with Mr. Sharpe's consent, I suggest  
3 that that one also be E-filed at this point so all  
4 three -- and I think that can be done by the Court,  
5 especially with all the parties present.

6 THE COURT: Is that okay with you?

7 MR. CIAMPOLI: That's fine by me.

8 THE COURT: Is that okay with you, Mr. Sharpe?

9 MR. SHARPE: Yes, Your Honor.

10 THE COURT: I'm not sure I can do it. I'll  
11 check with the clerk's office. And what's your request,  
12 Mr. Quail, where do you want all of these papers filed?

13 MR. QUAIL: Well, my request, Your Honor, is  
14 that I think that it was going to take a certain increment  
15 of time for the Hollister case to actually become  
16 available on E-filing. This morning when I searched, it  
17 didn't pop up. That perhaps has already been resolved. I  
18 just want a place to also file all this stuff. If it's  
19 available by E-file today, we'll file all the stuff today  
20 in both cases. We've already filed it in O'Connor and  
21 everything is fine.

22 I just didn't want to have a situation where we  
23 end up filing things after the date of the hearing and  
24 then have some suggestion that that would be improper.

25 THE COURT: Understood. So the parties have



1 leave to file things after the date of the hearing and  
2 they can do so, as soon as Hollister becomes available,  
3 they can file it there. I will check into the Sharpe case  
4 and see if just based on the representation today I can  
5 have that converted to E-filing.

6 MR. DONOYAN: I trust the State Board of  
7 Elections is also fine with the Sharpe case being E-filed?

8 MR. QUAIL: Absolutely.

9 MR. DONOYAN: Very well.

10 THE COURT: I thank the parties for their  
11 arguments. I again apologize that, the idea was to do  
12 this in person, that we couldn't. I appreciate everyone's  
13 excellent job getting this done and setting forth your  
14 arguments. I will shortly issue a decision on this.

15 MR. CIAMPOLI: Your Honor, thank you.

16 MR. DONOYAN: Thank you, Your Honor.

17 (The proceedings in the above-entitled matter  
18 were concluded at approximately 12:12 p.m.)

19  
20 Certified to be a true and accurate transcript.

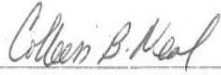
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Colleen B. Neal, Senior Court Reporter  
Albany County Courthouse  
Albany, New York 12207

APPENDIX C - New York Decision and Order

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NYSCEF DOC. NO. 25

INDEX NO. 904469-22  
RECEIVED NYSCEF: 08/10/2022

**STATE OF NEW YORK  
SUPREME COURT      COUNTY OF ALBANY**

---

LARRY SHARPE, as Aggrieved Candidate of the Libertarian  
Party for the Office of Governor of the State of New York,

Petitioner,

-against-

NEW YORK STATE BOARD OF ELECTIONS,

and

JOHN P. O'CONNOR, as purported Objector, herein,

Respondents,

for an order pursuant to the Election Law and the  
Constitution of the State of New York and the  
Constitution of the United States declaring valid, proper  
and legally effective the nomination of the Petitioner and  
directing the Board of Elections to place the name of the  
candidate Petitioner upon the official ballots and voting  
machines as a candidate for such office in the General Election  
to be held on November 8, 2022.

---

Application of

ANDREW HOLLISTER, as Aggrieved Candidate of the Libertarian  
Party for the Office of Lieutenant Governor of the State of New  
York, WILLIAM K. SCHMIDT, as Aggrieved Candidate of the  
Libertarian Party for the Office of Comptroller of the State of New  
York, THOMAS D. QUITTER, as Aggrieved Candidate of the  
Libertarian Party for the Office of United States Senator from the  
State of New York, and WILLIAM CODY ANDERSON, as Chair  
and on behalf of the Libertarian Party of New York, an  
unincorporated association,

Petitioners,

**DECISION AND ORDER**

Index No.: 04989-22

RJI No.: 01-22-141830

Index No.: 904990-22

RJI No.: 01-22-141831

NYSCEF DOC. NO. 25

INDEX NO. 904469-22  
RECEIVED NYSCEF: 08/10/2022

-against-

NEW YORK STATE BOARD OF ELECTIONS,  
and JOHN P. O'CONNOR, as purported Objector, herein,

Respondents,

for an order pursuant to the Election Law and the Constitution of the State of New York and the Constitution of the United States declaring valid, proper and legally effective the nomination of the Petitioner and directing the Board of Elections to place the name of the candidate Petitioner upon the official ballots and voting machines as a candidate for such office in the General Election to be held on November 8, 2022.

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In the Matter of the Application of JOHN P. O'CONNOR,  
objector aggrieved,

Petitioner,

Index No.: 904469-22  
RJI No. 01-22-141623

-against-

Candidates, LARRY SHARPE (Governor), ANDREW HOLLISTER (Lt. Governor), SEAN C. HAYES (Attorney General), WILLIAM K. SCHMIDT (Comptroller), THOMAS D. QUITER (U.S. Senator), Candidates, and New York State Board of Elections, and the COMMISSIONERS THEREOF CONSTITUTING THE BOARD,

Respondents,

For an Order Pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring Invalid the Independent nominating Petitions Purporting to Nominate the Respondent Candidate in the 2022 General Election, and to Restrain the said Board of Elections from Placing the Name of said Candidate Upon the Official Ballots of Said Election.

APPEARANCES:

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*Petitioner Pro Se*  
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New York State Board of Elections  
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**David A. Weinstein, J.:**

This Decision and Order addresses three separate petitions concerning the efforts of the Libertarian Party ("LP" or "Libertarian") to gain ballot access for its statewide candidates in the 2022 New York State elections. The first of these proceedings, *O'Connor v Sharpe, et al.*, ("*O'Connor*") was brought by Order to Show Cause and Petition filed June 13, 2022, and sought to preemptively challenge the nominating petitions filed by the Libertarian candidates for the 2022 primary and general election for Governor (Larry Sharpe), Lieutenant Governor (Andrew Hollister), Attorney General (Sean C. Hayes), Comptroller (William K. Schmidt), and US Senator (Thomas D. Quitter) on May 31, 2022, in the event they were approved by the Board of

Elections (“BOE” or the “Board”).

The LP candidates commenced their own proceedings on June 30, 2022 by two petitions brought by separate Orders to Show Cause, seeking to designate these statewide candidates for placement on the general election ballot. One petition, *Sharpe v O'Connor et al.* (“*Sharpe*”) was filed by the Libertarian gubernatorial candidate Larry Sharpe proceeding pro se, and the second, *Hollister, et al. v O'Connor, et al.* (“*Hollister*”) was filed by counsel for three other statewide candidates<sup>1</sup> and LP Chair William Cody Anderson. Both named O'Connor and BOE as respondents.

The present dispute takes place against the backdrop of amendments to New York State’s ballot access laws enacted in April 2020, which increased the requirements for so-called third parties to gain a place on the ballot in statewide elections. Prior to those amendments, for 85 years any party that received at least 50,000 votes in a gubernatorial election was deemed a “political party,” and received a designated line or “berth” on the ballot in statewide elections for the next four years (*see SAM Party of New York v Kosinski*, 987 F 3d 267, 271 [2d Cir 2021]). A party that did not meet this threshold had the status of “independent body,” and could only obtain a place on the ballot by obtaining 15,000 signatures on nominating petitions (*see Libertarian Party of New York v New York Board of Elections*, 539 F Supp 3d 310, 316 [SD NY 2021]).

Changes to these rules were enacted as part of the legislation accompanying the budget for fiscal year 2021 (*see* 2020 NY Laws Ch 58, pt. ZZZ, § 12). Under those amendments, the

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<sup>1</sup> For reasons not discussed in the papers before me, Sean C. Hayes is named in the *O'Connor* petition as the Libertarian nominee for Attorney General, but is not listed as a petitioner in the *Hollister* caption (*see Hollister* Pet ¶ 7 and WHEREFORE clause [confirming that Hayes was the AG nominee, without explaining why he is not a party to the proceeding, although it lists his placement on the ballot among the relief sought])

threshold number of votes which an independent body had to receive to obtain political party status, and thus an automatic place on the next statewide ballot, was raised from 50,000 to 2% of the total vote, or 130,000, whichever is greater (*see Elec Law § 1-104(3)*). Moreover, this amount of votes must be secured in both the gubernatorial and presidential elections. A party that fails to attain that threshold will lose its ballot spot, and instead has to submit petitions signed by 45,000 registered voters, or one per cent of the votes cast in the previous gubernatorial election, whichever is less, in order for its candidates to run for state office (*see Elec Law § 6-142(1)*).

In the 2018 New York election for governor, Libertarian Party candidate Sharpe received 95,033 votes, meeting the threshold for political party status then in effect. In the 2020 presidential election, however, the Party's candidate received 60,234 votes, or 0.7% of the total, falling short of the new requirement for ballot status (*see Libertarian Party of New York*, 539 F Supp at 318). As a result, it was decertified as a party by the BOE (*id.*).

On February 19, 2022, the Libertarian Party nominated Sharpe, Hollister, Hayes, Schmidt and Quitter as its slate of candidates for the 2022 general election (*Sharpe Pet ¶ 4*). On March 1, 2022, the BOE received a certificate of designation for the Party purporting to designate these candidates for the 2022 primary elections. The Board issued a determination on March 1, 2022, stating: "As the Libertarian Party lost its status as a political party with ballot status as of the 2018 general election, the aforesaid designation is facially invalid"<sup>2</sup> (BOE Answer, *Sharpe*, Ex

<sup>2</sup> As noted, the Libertarian Party met the threshold then in effect in the 2018 election, so it is not clear why the determination referred to the party losing its status "as of the 2018 general election," rather than 2020 (*see* BOE Answer, *Hollister ¶ 14* ["In 2020, the Libertarian Party's candidate for president received only 60,383 votes . . . [and a]ccordingly, the Libertarian Party ceased to be a recognized party pursuant to Election Law 1-104 (3)"]. Since there is no disagreement that the LP did not obtain the requisite number of votes needed to avoid decertification under the amended statute in 2020, the reference to the 2018 election has no impact on the matter before me.

A).

On May 31, the LP filed nominating petitions with the Board, seeking ballot status via that route (*see Sharpe* Pet ¶ 6). O'Connor filed objections to the petition (*id.* ¶ 8), and in the O'Connor petition made his preemptive challenge to any grant of ballot access that might be granted by the Board (*id.* ¶ 9). In a Determination issued June 27, 2022, the BOE found "[a]fter a prima facie examination" of the LP petitions, that they contained "no more than 42,356 signatures," falling short of the 45,000 necessary to qualify for ballot access under Election Law § 6-142(1). On this basis, the petitions were found to be invalid (*id.*, Ex 2).

Petitioners in *Sharpe* and *Hollister*<sup>3</sup> challenge the BOE rulings on two fronts. First, they argue that it was improper for the Board to reject its designating petitions without a hearing. Second, they contend that the requirements for ballot access enacted via 2020 amendments to the Election Law impose unconstitutionally severe restrictions on ballot access.<sup>4</sup>

In regard to the first contention, petitioners assert that since the nominating petitions covered 5,100 pages, with each having space for ten signatures, they were not facially inadequate, and thus the only basis on which Board review could have been triggered was via the objections made by O'Connor – which it contends should have been considered only following a hearing (*id.* ¶¶ 15-16). Absent a hearing, according to petitioners, BOE was bound to accept the count of petitioners as prima facie correct, and thus it should have treated the petition as

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<sup>3</sup> Since, as set forth below, the matters before me are resolved on the basis of the *Sharpe* and *Hollister* petitions, all reference to "petitioners" are to the petitioners in those matters, and not to O'Connor in his capacity as petitioner in the proceeding he initiated.

<sup>4</sup> The petitions don't *exactly* say that, but rather assert that the requirements should be rejected on "equitable" grounds. But since the statutory requirements are binding so long as they are constitutional, I do not see any other way to understand this argument.



“presumptively valid” (*id.*). At argument before the Court, petitioners declined to either make the affirmative claim that the petitions contained sufficient signatures to meet the legal requirement for ballot access,<sup>5</sup> or to seek an in camera review by the Court to determine if this was the case. Their argument thus rests on the proposition that they are entitled to a BOE administrative hearing before the Board can make any determination on whether they have submitted sufficient signatures to qualify for the ballot.

Respondents O’Connor and BOE have served answers to the *Sharpe* and *Hollister* petitions, and O’Connor has moved to dismiss these proceedings. In their pleadings, respondents raise various defenses, including: (1) the petitions lack merit, because the Board had the power to count the signatures submitted by the LP, and properly found those signatures to be insufficient; (2) any challenge to the March 4 Determination – i.e., the determination that found the LP not qualified for the ballot as a result of its prior election performance – is time-barred; (3) the Court cannot alter the signature requirement set by the Legislature; and (4) the constitutional challenges to the revised signature requirements in section 6-102 are barred by collateral estoppel and res judicata, as a result of the dismissal of identical arguments made by the LP in federal court in *Libertarian Party of the State of New York v New York Board of Elections*. In addition, respondent O’Connor asserts that the petitions must be dismissed for failure to name necessary parties – specifically, all of the affected candidates must be named on each petition, which is not the case given that they filed two separate, unconsolidated proceedings.

At oral argument, petitioners responded to the issue preclusion defense by asserting that,

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<sup>5</sup> Sharpe represented at argument that given the rush to meet the petitioning deadline and the burdens imposed by the new signature requirements, petitioners did not have the time to determine the total number of signatures obtained before their submission.

since the federal court decision, events have proven that ballot access under the new requirements is well nigh impossible. Specifically, they pointed out that no candidate had qualified for state office under the new petitioning requirements in 2022, except for those nominated by the Republican and Democratic Parties. As respondents noted, however, one third-party candidate has qualified under the new signature requirements for the ballot in the 2022 US Senate election.

Sharpe also argued that the amendment violated a “contract” that existed between the LP and the State of New York, formed when the Party initially qualified for subsequent ballot placement by the votes it received in the 2018 election. Specifically, he contended that longstanding law allowed the LP to retain such ballot access for four years, and the State wrongfully upset such established expectations by changing the vote requirements for access and taking it away before the four-year period had elapsed.

#### Discussion

##### I. The Board’s Review

Under Election Law § 6-154(1), “[a]ny petition filed with the officer or board charged with the duty of receiving it shall be presumptively valid if it is in proper form and appears to bear the requisite number of signatures, authenticated in a manner prescribed by this chapter.” The statute then goes on, in its second paragraph, to provide the procedure for filing objections and for a determination to be made thereon (*see* Election Law § 6-154[2]-[4]). There is no reference anywhere in the statute to a requirement that a hearing be conducted (*see Matter of Meader v Barasch* 133 AD2d 925, 927 [3d Dept 1987], *ly denied* 70 NY2d 611 [1987] [“the Board held, and petitioner does not dispute, that there was no statutory requirement for a

hearing,” citing Election Law § 6-154]; *see also Matter of Iocovozzi v Herkimer County Bd. of Elections*, 76 AD3d 797, 798 [4th Dept 2010] [“Petitioner was not entitled to any greater due process than that provided by the statutory process for judicial review of respondent’s determination pursuant to Election Law § 16-102(1)”].

The essence of petitioners’ argument is that, because it was not apparent on the face of the petition that it was insufficient, the Board had to accept its validity except upon objection, and it could not rule on such objection without a hearing. But as respondents point out, the Third Department has made clear that the Board may conduct just such a facial review for the sufficiency of a nominating petition, regardless of whether there has been an objection. Specifically, in *Sloane v Kellner* (120 AD3d 895 [3d Dept 2014]), the Board considered a petition filed by four candidates, although objections were filed to only one, and went on to invalidate the petition as to all of the candidates because they lacked sufficient signatures. The Third Department found that the Board had acted properly in taking these actions, as it was “free to hold that the designating petition, which lacked the necessary number of signatures to support any of petitioners’ candidacies, was facially defective and invalid in its entirety” (*id.* at 896).<sup>6</sup>

*Sloane* is dispositive of petitioners’ procedural arguments. The only basis they have presented to distinguish *Sloane* from the matter before me was that *Sloane* dealt with petitions

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<sup>6</sup> The Court initially dismissed the one petition subject to objection on jurisdictional grounds. It was in the context of discussing the other petitions on the Court’s assumption (but without deciding) that they were not subject to the same jurisdictional bar, that the Court found the Board had properly invalidated all the petitions since they “lacked the necessary number of signatures to support any of petitioners’ candidacies” (*id.* at 896). In light of this procedural background, petitioners argue that the ruling is dicta in this regard, and the Court never reached a definitive and binding holding as to whether an objection triggers the need for a hearing rather than a facial ruling. But there is nothing in the decision which even hints that the Court’s ruling on the Board’s facial review power turns on whether or not there had been an objection. Nor would such a ruling make sense, as it would give the Board greater power of oversight when no one objected to the petition than in an instance where an objection was made. In any event, as set forth above, there is no right to a hearing, nor any barrier to a review by the BOE for facial sufficiency, simply because an objection has been filed.

that were *really* defective on their face – since they had less than 1/3 of the signatures needed – while here the defect could not have been determined unless the Board totaled up the signatures. Thus, according to petitioners, the Board’s authority to determine whether a petition “appears to be valid” meant it could give it a visual once over, but not actually add up the signatures to make sure. There is nothing in the statute which hints at such a “the Board can look but it better not count” rule, and any such principle would defy logic. There is no applicable legal standard by which the Court could assess whether a designating petition was so “obviously defective” that it could be rejected on its face, or “close enough,” so as to require a hearing. Rather, the way to find out whether a petition appears to be defective is to do what the BOE did here: count the signatures. Moreover, given that this step is purely ministerial, it is unclear what value a hearing would add. If the petitioners thought that the Board counted wrong, it could demonstrate such in a court challenge. Instead, the position they took at oral argument was to avoid a check of the Board’s math, and rest their claim entirely on the assertion that they were cheated out of some additional procedure, without pointing to any apparent purpose such process would serve.

Accordingly, I find nothing improper in the Board’s review, and no basis to direct that any further proceedings be conducted. In any case, in a proceeding to validate a designating petition “the burden of proof is on the candidate to establish that the petition is valid, and not merely to establish that the Board committed a procedural error” (*Matter of Boniello v Niagara County Bd. of Elections*, 131 AD3d 806, 807 [4th Dept 2015] [citation omitted]). Here, petitioners make no attempt to meet this burden. Instead, they seek “merely” to establish that the Board erred in its procedure. Even if that were correct – and for reasons set forth above, I find it is not – it would not provide a basis for overturning the BOE’s Determination.

For all these reasons, petitioners have not shown that the Board's Determination that the LP designating petitions lacked the requisite number of signatures was invalid, and thus the challenge to that Determination in the *Sharpe* and *Hollister* petitions must be denied.

## II. "Equitable" Challenges

Petitioners also argue that the Court should "in equity" declare that the designating petitions they have submitted are valid. The *Hollister* petitioners argue that they are entitled to such relief because the LP properly qualified for a berth on the ballot in the 2018 gubernatorial election (*see* *Hollister* Petition ¶ 20). For his part, Sharpe makes a detailed argument about how the new signature requirements, and the time frame in which they must be achieved, present an "insurmountable" obstacle to "smaller independent campaigns"<sup>7</sup> (*Sharpe* Petition ¶ 33).

These arguments do not mention the word "unconstitutional" in regard to the statutory requirements at issue, and with good reason. The Libertarian Party (and petitioner Sharpe himself) already challenged the constitutionality of the 2020 Election Law amendments in a

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<sup>7</sup> As noted above, respondents contend that any challenge to the BOE's March 1 Determination finding the certificate of designation of its candidates for the June 28 primary to be invalid is now untimely. Respondent O'Connor contends that such a challenge is subject to the provision of Election Law § 16-102(2) providing: "A proceeding with respect to a primary, convention, meeting of a party committee, or caucus shall be instituted within ten days after the holding of such primary or convention or the filing of the certificate of nominations made at such caucus or meeting of a party committee." For its part, he Board cites both that provision and a different clause of section 16-102(2) which states: "A proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later." The Board does not say which clause it thinks to be applicable, but notes that the challenge would be untimely under either one. None of the cited language clearly governs a Board's invalidation of a certificate of designation, nor do respondents argue what limitations period might apply if the specific language of section 16-102 is inapposite. Given the uncertainty of the merits of this argument, and since the petitions must be dismissed on other grounds in any event, I decline, on the basis of the submissions before me, to find the petitions untimely. For the same reason, I need not address respondent O'Connor's argument that the petitioners must be dismissed for failure to join necessary parties.

federal court action, and the federal district court rejected that challenge in its entirety<sup>8</sup> (*see Libertarian Party of New York, supra*). Under the doctrine of collateral estoppel, that decision resolves the constitutional issues underlying petitioners' argument (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984] [collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same"]).

Petitioners take a few shots at getting around the federal court's ruling, but none are convincing. They argue that the difficulty of third parties' efforts to secure ballot access in the present election demonstrates the severity of the obstacles imposed by the new requirements. But the decision of the federal district court was based, *inter alia*, on Supreme Court decisions upholding far more onerous requirements, not on a prediction as to whether third parties would succeed in getting their candidates before the voters. Nothing in the 2022 experience with ballot access alters its analysis – even absent the fact that one candidate *has* successfully petitioned on to the ballot in a statewide election. In any case, the Supreme Court precedents cited by the federal district court would defeat such a challenge, even if the decision in *Libertarian Party of New York* did not formally bind this Court (*see Jenness v Fortson*, 403 US 431 [1971] [upholding constitutionality of law requiring political organizations receiving less than 20% of the vote in the most recent presidential or gubernatorial election to obtain signatures from 5% of the electorate to qualify for ballot]).

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<sup>8</sup> An appeal from this decision is pending in the Second Circuit. That does not, however, alter its preclusive effect (*see 77 Water St., Inc. v. JTC Painting & Decorating Corp.*, 148 AD3d 1092, 1095 [2d Dept 2017]; *see also Matter of Philomena V.*, 165 AD3d 1384, 1385 [3d Dept 2018]).

As to the claim that there was some kind of implicit contract or reliance interest that the Libertarian Party had as a result of obtaining ballot access in the 2018 gubernatorial election to maintain that access through 2022, petitioners point to no constitutional provision which prevented the State from altering its ballot access requirements over the four years that followed the 2018 election. In this regard, I note that the Second Circuit has already rejected a challenge to the statute by an entity that achieved ballot status in the 2018 election, but lost it for not fielding a presidential candidate in New York in 2020 – without any intimation that it was unconstitutional for the State to change the rules post-2018 (*see SAM Party of New York, supra*).

Finally, petitioner Sharpe argued that the courts must intervene to address the severity of the new law's requirements, since they are the only institution available to fix a situation where the two major parties craft election rules that keep out potential competitors, and thereby preserve their own hold on the electoral system. Without discounting petitioners' description of the obstacles that are presented to smaller parties in changing the electoral rules via the legislative process, the existence of such barriers does not vest this Court with the power to remake the procedures for designating candidates as petitioners urge, so long as the system designed by the Legislature meets constitutional standards. To the contrary, the Court of Appeals has cautioned that "where . . . the Legislature 'erects a rigid framework of regulation, detailing . . . specific particulars,' there is no invitation for the courts to exercise flexibility in statutory interpretation" (*Gross v Albany County Board of Elec.*, 3 NY3d 251, 258 [2004] [citation and internal quotation marks omitted]). In other words, there is no legal basis for the Court to rewrite the State's electoral rules as petitioners would wish.

In light of the foregoing, the *Sharpe* and *Hollister* petitions are denied and dismissed in

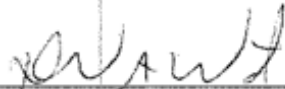
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their entirety. The *O'Connor* petition is denied as moot.

**ENTER**

Dated: Albany, New York  
August 10, 2022

  
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David A. Weinstein  
Acting Supreme Court Justice

Papers Considered:

1. Petition in *O'Connor v Sharpe*, et al., No. 904469-22, with Emergency Affirmation in Support (Corrected) dated June 12, 2022.
2. Exhibits 1 through 15 submitted by Board of Elections in *O'Connor v Sharpe*.
3. Verified Petition in *Hollister, et al. v New York State Board of Elections, et al.* No. 904990-22, with appended exhibits.
4. Verified Petition in *Sharpe v New York State Board of Elections, et al.*, No. 4989-22
5. Answers of Respondent Board of Elections in *Sharpe* and *Hollister*, with appended Exhibits.
6. Answer, Objections in Point of Law, and Motions to Dismiss of Respondent *O'Connor* in *Sharpe* and *Hollister*.



APPENDIX D - Order in Case Involving Brittney Kosin

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Nomination Paper of Brittany :  
Kosin for Representative in the :  
General Assembly from the 178th :  
Legislative District :  
: No. 393 M.D. 2022  
Objection of: Mary Roderick, John :  
Coppens, and Andrew Gannon : Heard: August 16, 2022

BEFORE: HONORABLE ELLEN CEISLER, Judge

MEMORANDUM OPINION  
BY JUDGE CEISLER

FILED: August 23, 2022

Before this Court is the Petition to Set Aside the Nomination Papers (Petition to Set Aside), submitted by Objectors Mary Roderick, John Coppens, and Andrew Gannon (Objectors), through which they seek dismissal of Brittany Kosin's Nomination papers to run as the Libertarian Party candidate for Representative in the General Assembly from the 178<sup>th</sup> Legislative District. Objectors argue that Candidate had previously filed nomination petitions for candidacy in the Republican primary for the same office, and that she is therefore barred from running under Section 976(e) of the Pennsylvania Election Code (Election Code).<sup>1</sup> For the reasons provided herein, the Petition to Set Aside is granted.

**I. Background**

On March 28, 2022, Kosin filed a nomination petition to run as a candidate in the Republican primary for the Pennsylvania General Assembly seat representing the 178<sup>th</sup> District. The nomination petitions included the purported signatures of 337

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<sup>1</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. § 2936(e).

registered Republican voters in the district.<sup>2</sup> On April 4, 2022, Objectors<sup>3</sup> filed a petition to set aside Kosin’s candidacy. Therein, they alleged that 98 of the 337 signatures were invalid, placing the number of valid signatures below the 300 signatures required.

The parties met privately on April 5, 2022, and reached an agreement that Kosin’s nominating petition lacked the requisite number of valid signatures. The parties signed a Stipulation which acknowledged that Kosin’s nomination petition did not contain 300 valid signatures. The document states: “[i]t is further stipulated Respondent, Brittany Kosin, agrees to withdraw her [n]omination [p]etitions as a Republican Party candidate for Representative in the General Assembly for the 178th District.” Once the Stipulation was submitted, this Court issued a *per curiam* order granting the Petition to Set Aside and directing the Secretary of the Commonwealth to remove Kosin’s name from the ballot. *See In Re: Petition to Set Aside Nomination Petitions of Brittany Kosin as Republican Candidate for State Representative in the 178th Legislative District* (Pa. Cmwlth., No. 178 M.D. 2022, filed April 6, 2022). A hearing scheduled for April 7, 2022 before this Court on the objectors’ petition was canceled.

On August 1, 2022, Kosin filed nomination papers to be certified as the Libertarian candidate in the general election for the same General Assembly seat. On August 8, 2022, Objectors filed the Petition to Set Aside currently before this Court, in which they alleged that Section 976(e) barred Kosin’s general election

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<sup>2</sup> Section 912.1(14) of the Election Code provides that a candidate for the Office of Representative in the General Assembly must present at least 300 valid signatures of registered and enrolled electors of the political party of the candidate. 25 P.S. § 2872.1(14).

<sup>3</sup> Objectors included Roderick and two other objectors, who are not parties to the instant matter.

candidacy.<sup>4</sup> Pursuant to an Order of the Court, *In re: Objections to Nomination Papers of State Level Minor Political Party Candidates and Independent Candidates of Political Bodies—General Election 2022* (Pa. Cmwlth., No. 126 Misc. Dkt. No. 3, filed July 29, 2022), the posting of the Petition to Set Aside on the Court’s website constituted service upon Kosin. On August 16, 2022, this Court held a hearing on Objectors’ Petition.<sup>5</sup> Kosin and counsel representing Objectors were present.

In defense of her nomination papers, Kosin relied on *Packrall v. Quail*, 192 A.2d 704, 706 (Pa. 1963). In *Packrall* our Supreme Court created an exception to Section 976(e) for candidates who withdraw their nomination papers pursuant to Section 914 of the Election Code. Specifically, Section 914 establishes a grace period in which a primary candidate may withdraw, by written request to the appropriate election officials, until “the fifteenth day next succeeding the last day for filing nomination petitions” for the desired office. 25 P.S. § 2874. Candidates hold “an absolute right” to withdraw their names within the grace period. *In re Challenge to Objection to Nominating Petitions of Evans*, 458 A.2d 1056, 1058 (Pa. Cmwlth. 1983).

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<sup>4</sup> Section 976(e) provides, in relevant part:

When any . . . nomination paper is presented in the office ... of any county board of elections for filing within the period limited by this act, it shall be the duty of said ... 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).

<sup>5</sup> The hearing took place simultaneously with *In re: Nomination Paper of Caroline Avery for Representative in Congress from the 1st Congressional District* (Pa. Cmwlth., No. 392 M.D. 2022) due to the similar legal issues presented in both cases. While there is one transcript for both hearings, opinions will be written separately for each case.

Kosin acknowledged that she did not withdraw pursuant to Section 914, but argued that *In re Cohen*, 225 A.3d 1083 (Pa. 2020) supported her position. In that case, the Supreme Court permitted the general election candidacy of a Philadelphia City Council candidate, who had previously withdrawn her primary candidacy pursuant to Section 978.4 of the Election Code, well after the Section 914 deadline had passed.<sup>6</sup> In Kosin’s view, per *In re Cohen*, there is no effective difference between a voluntary withdrawal under Sections 914 or 978.4, and that both are valid exceptions to Section 976(e).

Kosin acknowledged that she did not withdraw under either provision, and that her primary candidacy ended when this Court granted the objectors’ petition to set aside. However, Kosin maintained that *In re Cohen* nevertheless supports her position because the end of her primary candidacy was, in part, the result of her own decision. For support, she referred to the Stipulation signed by the parties, which provided that she had “agree[d] to withdraw.”

Objectors argued that Kosin was clearly prohibited by the plain language of Section 976(e) from filing the Nomination Papers. They noted that *Packrall* was clearly inapposite, since Kosin never withdrew pursuant to Section 914, and that her interpretation of *In re Cohen* was inaccurate. They explained that the majority of Justices in *In re Cohen* clearly held that *future* candidates who withdraw pursuant to Section 978.4 should not be granted the same relief as the candidate in that case.

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<sup>6</sup> Section 978.4 provides, in relevant part:

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 . . . 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.

Finally, Objectors maintained that Kosin’s name was not withdrawn from the primary at all, but removed by this Court. They concluded that Kosin’s general election candidacy is therefore prevented by the “clear mandate” of *In re Benkoski*, 943 A.2d 212 (Pa. 2007). In that case, the Supreme Court 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.

## II. Discussion

As noted, Section 976(e) of the Election Code prohibits the filing of nomination papers “if the candidate named therein has filed a nomination petition for any public office for the ensuing<sup>7</sup> primary, or has been nominated for any such office by nomination papers previously filed.” 25 P.S. 2936(e). This Court has stated that the clear purposes behind the provision are “to require a candidate to choose between the primary route and the nomination route to the general election ballot[,] and to prevent a losing primary candidate from filing nomination papers.” *Baronett v. Tucker*, 365 A.2d at 181. Accordingly, it is often referred to as the Election Code’s “sore loser” provision. *See In re Nader*, 858 A.2d 1167, 1178 (Pa. 2004) (explaining the “sore loser” designation).

Our Supreme Court has granted exceptions to Section 976(e)’s broad prohibition. In *Packrall*, the Court reasoned that a primary candidate who withdrew his name pursuant to Section 914 had effectively undone the practical effects of his purported candidacy. The Court therefore held that Section 976(e) “did not prevent

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<sup>7</sup> It should be noted that the reference to an “ensuing” primary is a relic of a time when paperwork for both the primaries and the general election was required to be submitted before the primary. *See Baronett v. Tucker*, 365 A.2d 179, 180 (Pa. Cmwlth. 1976) (explaining the statutory language’s background). The practice of our courts ever since has been to construe “ensuing primary” as a reference to the primary occurring earlier in the year. *Id.*

the acceptance of [the] nomination paper” of such a candidate for the general election. 192 A.2d at 706. In *In re Benkoski*, however, the Court declined to extend that exception to candidates who were judicially removed from the ballot, holding 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.” 943 A.2d at 216.

More recently, in *In re Cohen*, the Court, candidate Sherrie Cohen, a former Democratic Philadelphia City Council primary candidate decided to end her candidacy in the 2019 primary approximately one month before the primary election. 225 A.3d at 1084-85. Since the deadline to withdraw her nomination papers pursuant to Section 914 had passed, Cohen successfully petitioned for a court order removing her name from the ballot, pursuant to Section 978.4 of the Election Code. *Id.* at 1085. Cohen later filed nomination papers to appear on the general election ballot as a City Council candidate representing the “A Better Council Party.” *Id.*

Objectors filed a petition to set aside Cohen’s nomination papers to the Philadelphia Court of Common Pleas. The trial court agreed with objectors that Cohen’s general election candidacy was barred by Section 976(e), and granted their petition to set aside her nomination papers. *Id.* at 1086. Cohen appealed to this Court. In a single-judge order, the Honorable Michael Wojcik affirmed the trial court, holding that the circumstances of Cohen’s candidacy did not justify an extension of *Packrall*. See *In Re: Nomination Papers of Sherrie Cohen as Candidate for the Office of Philadelphia City Council-at-Large* (Pa. Cmwlth., Nos. 1157 & 1158 C.D. 2019, filed September 5, 2019), slip op. at 14-15. On October 3, 2019, the Supreme Court reversed, issuing a per curiam order directing Cohen’s name to

be placed on the general election ballot. *See In re Nomination Papers of Sherrie Cohen*, 218 A.3d 387 (Pa. 2019) (*per curiam*). In light of the exigent circumstances of the matter, with the election just weeks away, the Supreme Court issued the *per curiam* order indicating that there would be an Opinion Following the Judgment of the Court (OFJC) to explain more fully the reasoning behind the *per curiam* order.

On February 19, 2020, the OFJC was issued. Analyzing the Court’s various opinions issued with the OFJC, it is abundantly clear that the majority of the Supreme Court did not support the reasoning in that opinion.

In the OFJC, Justice Sallie Mundy, joined by now-Chief Justice Max Baer, held that there was “no principled reason to distinguish between the voluntariness of a withdrawal under Section 914 or Section 978.4.” 225 A.3d at 1090. According to Justice Mundy, since *Packrall* was clearly applicable to candidates who had withdrawn pursuant to the first of those provisions, its exception to Section 976(e)’s “sore loser” provision could, just as easily be granted to candidates who had withdrawn under the second provision. *Id.*

In a dissenting opinion, joined by Justice Kevin Dougherty, then-Chief Justice Thomas Saylor expressed strong concern that extending *Packrall*’s reach beyond Section 914, the Court was empowering candidates “to make strategic decisions to shift tracks after having proceeded deep into the primary process.” *Id.* at 1091. He noted that Cohen, unlike the candidate in *Packrall*, had “actively participated” in the primary process, and only withdrew for political reasons. *Id.* Then-Chief Justice Saylor concluded that the *Packrall* exception “should be confined to the scenario in which it arose”: when a candidate withdraws administratively, within the Section 914 grace period.



In a separate dissent written by Justice David Wecht, the Justice argued that *Packrall* itself “was wrongly decided, and it should be overruled.” 225 A.3d at 1093. Regarding Justice Mundy’s opinion, Justice Wecht claimed that it “relies exclusively on a principle derived from a judicial carve-out unsupported by the Election Code.” *Id.* Justice Wecht cautioned against any “judicial reformation” of Section 976(e); however “harsh” or “unwise” its broad prohibition, since the statutory language clearly allows “no exception for who previously filed nomination petitions but whose names did not ultimately appear on the primary ballot.” *Id.* While the Election Code is to be construed liberally, Justice Wecht wrote, that principle does not give the Court “license to act as a super-legislature.” *Id.* at 1096.

In a concurring opinion written by Justice Christine Donohue, and joined by Justice Debra Todd, Justice Donohue noted that their vote for the original per curiam order occurred “when the matter was presented to us on an expedited basis.” Ultimately, they found Justice Wecht’s arguments persuasive, and concluded that his interpretation of Section 976(e) should be its “prevailing interpretation . . . in *future* cases.” *Id.* at 1090 (emphasis added).

Instantly, Kosin argues that the OFJC represents the opinion of the Court, and that its extension of *Packrall* to candidate Cohen’s candidacy constitutes binding precedent on this Court. Objectors counter that the OFJC represented the opinion of only two Justices. The remaining five called either for restricting *Packrall*’s reach only to candidates who withdrew pursuant to Section 914, or for overturning *Packrall* entirely. Objectors correctly argue that the clear majority of justices *In re Cohen* ultimately agree on one key point: Pursuant to Section 976(e), a candidate who had previously filed nomination petitions for candidacy in the primary, and who

did not withdraw pursuant to Section 914, is precluded from filing nomination papers to appear on the general election ballot for the same position.

This Court agrees with Objectors' theory of how fractured decisions by our Supreme Court are to be considered. In *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *rev'd on other grounds*, 529 U.S. 277 (2000), the Supreme Court was faced with a similar predicament. It explained that:

[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.*"

*Id.* at 278 (emphasis added).

Assuming arguendo that Kosin's interpretation of *In re Cohen* is correct, her candidacy is still not saved. In the OFJC, Justice Mundy carefully distinguished Cohen's voluntary withdrawal of her valid nominating papers from the judicial removal of defective nominating papers; "the decisive factor underpinning this Court's refusal to apply *Packrall* in *Benkoski*," she wrote, "is not present in this case." 225 A.3d at 1090. While Kosin is correct that some of the Stipulation's language implies a voluntary withdrawal, that language does not change the fact that Kosin's primary candidacy ended when this Court granted the objectors' petition to set aside. Kosin was free to petition to have her name withdrawn pursuant to Section 978.4, but did not do so. In any case, the Stipulation also acknowledged that the nominating petition was defective, which prevents Kosin from filing the Nominating Petition under *Benkoski* without regard to the voluntariness of her candidacy's

termination. Kosin is therefore barred from filing the Nomination Paper under both *Benkoski* and *In re Cohen*.

### III. Conclusion

In light of the clear precedential guidance from our Supreme Court, this Court grants Objectors' Petition to Set Aside and dismisses Kosin's Nomination Papers for Libertarian Party candidate for Representative in the General Assembly from the 178<sup>th</sup> Legislative District.



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ELLEN CEISLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Nomination Paper of Brittany :  
Kosin for Representative in the :  
General Assembly from the 178th :  
Legislative District :  
: No. 393 M.D. 2022  
Objection of: Mary Roderick, John :  
Coppens, and Andrew Gannon :

**ORDER**

AND NOW, this 23<sup>rd</sup> day of August, 2022, it is hereby ORDERED that Objectors Mary Roderick, John Coppens, and Andrew Gannon's Petition to Set Aside the nomination papers of Brittany Kosin as Libertarian Candidate for Representative in the General Assembly representing the 178<sup>th</sup> Legislative District is GRANTED.

The Secretary of the Commonwealth is directed to remove Kosin's name as a Libertarian candidate for Representative in the General Assembly representing the 178<sup>th</sup> Legislative District from the November 8, 2022 primary ballot, and to transmit this order promptly to the Bucks County Board of Elections. The Chief Clerk is directed to send a copy of this order to the Secretary of the Commonwealth.



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ELLEN CEISLER, Judge

Order Exit  
08/23/2022

APPENDIX E - Order in Case Involving Caroline Avery

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Nomination Paper of Caroline :  
Avery for Representative in Congress :  
from the 1st Congressional District :  
: No. 392 M.D. 2022  
:  
Objection of: David R. Breidinger, Ellen:  
Cox, and Diane Dowler : Heard: August 16, 2022

BEFORE: HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE CEISLER

FILED: August 23, 2022

Before this Court is the Petition to Set Aside the Nomination Paper (Petition to Set Aside) submitted by Objectors David R. Breidinger, Ellen Cox, and Diane Dowler (Objectors), through which they seek dismissal of Caroline Avery's nomination paper to run as the Libertarian Party candidate for Representative from the 1st Congressional District. Objectors argue that Avery had previously filed papers for candidacy in the Republican primary for the same office, and that she is therefore barred from running under Section 976(e) of the Pennsylvania Election Code (Election Code).<sup>1</sup> For the reasons provided herein, the Petition to Set Aside is granted.

**I. Background**

On March 15, 2022, Avery filed nomination petitions to run as a Republican candidate for Representative of First Congressional District in the May 17, 2022 primary. Her petitioners consisted of the purported signatures of 1,300 registered Republicans in the district. On March 22, 2022, objector Michael Zolfo filed a

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<sup>1</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. § 2936.

Petition to Set Aside, in which he alleged that 480 of the Nomination Petition's 1,300 signatures were defective, leaving it well short of the 1,000 required.<sup>2</sup>

A hearing on the Petition to Set Aside took place before Senior Judge Bonnie Brigance Leadbetter on March 29, 2022. Soon after it began, Avery stated that she had decided to withdraw her candidacy. Avery asked the Court to issue an order removing her name from the ballot, pursuant to Section 978.4 of the Election Code.<sup>3</sup> Senior Judge Leadbetter granted the request. *See In Re: Nomination Petitions of Caroline Avery as Avery for Representative in Congress for the First Congressional District* (Pa. Cmwlth., No. 114 M.D. 2022, filed March 29, 2022).

On August 1, 2022, Avery submitted her Nomination Paper and Avery's Affidavit seeking certification as the Libertarian Party candidate in the general election for Representative in Congress from the First District. Objectors filed the Petition to Set Aside currently before this Court on August 8, 2022.<sup>4</sup> Therein, Objectors alleged that Avery was barred from filing papers by Section 976(e) of the Election Code.<sup>5</sup> On August 16, 2022, a hearing on the Petition to Set Aside

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<sup>2</sup> Section 912.1(12) of the Election Code provides that a candidate for the Office of Representative in Congress must present at least 1,000 valid signatures of registered and enrolled electors of the political party of the candidate. 25 P.S. § 2872.1(12).

<sup>3</sup> In relevant part, Section 978.4 provides that, "[u]pon 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 . . . 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.

<sup>4</sup> Pursuant to a *per curiam* Order, *In re: Objections to Nomination Papers of State Level Minor Political Party Candidates and Independent Candidates of Political Bodies—General Election 2022* (Pa. Cmwlth., No. 126 Misc. Dkt. No. 3, filed July 29, 2022), the posting of the Petition to Set Aside on the Court's website constituted service upon Avery.

<sup>5</sup> Section 976(e) provides, in relevant part:  
**(Footnote continued on next page...)**

occurred.<sup>6</sup> Avery, her counsel, and counsel representing Objectors attended the hearing. At this hearing, Avery testified that before her March 29, 2022 hearing, she had become disillusioned by local Republican party leadership and that, early in the hearing, she made the decision to leave the party before the Petition to Set Aside was fully adjudicated. Avery testified that she decided at that point to voluntarily withdraw her nomination petitions.

During argument, Avery’s counsel explained the significance of what he described Avery’s her voluntary withdrawal. Counsel noted that, since *Packrall v. Quail*, 192 A.2d 704 (Pa. 1963), our Supreme Court has held that candidates who withdraw their names pursuant to Section 914 of the Election Code are permitted to file nominating papers in the general election.<sup>7</sup> More recently, in *In re Cohen for Office of Philadelphia City Council-at-Large*, 225 A.3d 1083, 1090 (Pa. 2020), the Supreme Court permitted an aspirant to public office to appear on the general

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When any . . . nomination paper is presented in the office ... of any county board of elections for filing within the period limited by this act, it shall be the duty of said ... 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).

<sup>6</sup> The hearing took place simultaneously with *In Re: Nomination Paper of Brittany Kosin for Representative in the General Assembly from the 178th Legislative District* (Pa Cmwlt., 393 M.D. 2022) due to the similar legal issues presented in both cases. While there is one transcript for both hearings, opinions will be written separately for each case.

<sup>7</sup> Under Section 914 of the Election Code, a primary candidate may withdraw, by written request to the appropriate election officials, until “the fifteenth day next succeeding the last day for filing nomination petitions” for the desired office. 25 P.S. § 2874. Aveyrs hold “an absolute right” to withdraw their names by that date. *In re Challenge to Objection to Nominating Petitions of Evans*, 458 A.2d 1056, 1058 (Pa. Cmwlt. 1983).



election ballot who, like Avery, had withdrawn via court order, after the deadline under Section 914 had passed. In Avery’s view, the holding of *In re Cohen* permits future candidates who voluntarily withdraw from primaries to file general election nominating papers.

Objectors argued that Section 976(e) of the Election Code unambiguously prohibited Avery from filing the Nomination Paper. They noted that *Packrall* was clearly inapposite since Avery never withdraw pursuant to Section 914. Objectors further argued that Avery incorrectly interpreted the holding of *In re Cohen* and that this decision did not support her argument. According to objectors, the majority of Justices in *In re Cohen* held that future candidates who withdraw pursuant to Section 978.4 should *not* be granted the same relief. Lastly, addressing the long-standing principle that our courts interpret the Election Code liberally, Objectors maintained that the principle is only properly applied in instances of ambiguity in the legislation’s language. Objectors maintained that neither Section 976(e), nor the holding of *In re Cohen*, was ambiguous.

## II. Discussion

As noted, Section 976(e) of the Election Code prohibits the filing of nomination papers “if the candidate named therein has filed a nomination petition for any public office for the ensuing<sup>8</sup> primary, or has been nominated for any such office by nomination papers previously filed.” 25 P.S. 2936(e). This Court has stated that the clear purposes behind the provision are “to require a candidate to choose between the primary route and the nomination route to the general election

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<sup>8</sup> It should be noted that the reference to an “ensuing” primary is a relic of a time when paperwork for both the primaries and the general election was required to be submitted before the primary. See *Baronett v. Tucker*, 365 A.2d 179, 180 (Pa. Cmwlth. 1976) (explaining the statutory language’s background). The practice of our courts ever since has been to construe “ensuing primary” as a reference to the primary occurring earlier in the year. *Id.*

ballot[,] and to prevent a losing primary candidate from filing nomination papers.” *Baronett v. Tucker*, 365 A.2d at 181. Accordingly, it is often referred to as the Election Code’s “sore loser” provision. See *In re Nader*, 858 A.2d 1167, 1178 (Pa. 2004) (explaining the “sore loser” moniker).

Our Supreme Court has sometimes granted exceptions to Section 976(e)’s broad prohibition. In *Packrall*, the Court reasoned that a primary candidate who withdrew his name pursuant to Section 914 had effectively undone the practical effects of his purported candidacy. The Court therefore held that Section 976(e) “did not prevent the acceptance of [the] nomination paper” of such a candidate for the general election. 192 A.2d at 706.

More recently, in *In re Cohen*, the Court, candidate Sherrie Cohen, a former Democratic Philadelphia City Council primary candidate decided to end her candidacy in the 2019 primary approximately one month before the primary election. 225 A.3d at 1084-85. Since the deadline to withdraw her nomination papers pursuant to Section 914 had passed, Cohen successfully petitioned for a court order removing her name from the ballot, pursuant to Section 978.4 of the Election Code. *Id.* at 1085. Cohen later filed nomination papers to appear on the general election ballot as a City Council candidate representing the “A Better Council Party.” *Id.*

Objectors filed a petition to set aside Cohen’s nomination papers to the Philadelphia Court of Common Pleas. The trial court agreed with objectors that Cohen’s general election candidacy was barred by Section 976(e), and granted their petition to set aside her nomination papers. *Id.* at 1086. Cohen appealed to the Commonwealth Court. In a single-judge order, the Honorable Michael H. Wojcik affirmed the trial court, holding that the circumstances of Cohen’s candidacy did not justify an extension of *Packrall*. See *In Re: Nomination Papers of Sherrie Cohen as*

*Candidate for the Office of Philadelphia City Council-at-Large* (Pa. Cmwlth., Nos. 1157 & 1158 C.D. 2019, filed September 5, 2019), slip op. at 14-15. On October 3, 2019, the Supreme Court reversed, issuing a per curiam order directing Cohen’s name to be placed on the general election ballot. *See In re Nomination Papers of Sherrie Cohen*, 218 A.3d 387 (Pa. 2019) (*per curiam*). In light of the exigent circumstances of the matter, with the general election just weeks away, the Supreme Court issued the per curiam order, indicating that there would be Opinion Following the Judgment of the Court (OFJC) to explain more fully the reasoning behind the per curiam order.

On February 19, 2020, the OFJC was issued. Analyzing the Court’s various opinions issued with the OFJC, it is abundantly clear that the majority of the Supreme Court did not support the reasoning in that opinion.

In the OFJC, Justice Sallie Mundy, joined by now-Chief Justice Max Baer, held that there was “no principled reason to distinguish between the voluntariness of a withdrawal under Section 914 or Section 978.4.” 225 A.3d at 1090. According to Justice Mundy, since *Packrall* was clearly applicable to candidates who had withdrawn pursuant to the first of those provisions, its exception to Section 976(e)’s “sore loser” provision could, just as easily be granted to candidates who had withdrawn under the second provision. *Id.*

In a dissenting opinion, joined by Justice Kevin Dougherty, then-Chief Justice Thomas Saylor expressed strong concern that extending *Packrall*’s reach beyond Section 914, the Court was empowering candidates “to make strategic decisions to shift tracks after having proceeded deep into the primary process.” *Id.* at 1091. Justice Saylor concluded that the *Packrall* exception “should be confined to the

scenario in which it arose”: when a candidate withdraws administratively, within the Section 914 grace period.

In a separate dissent written by Justice David Wecht, the Justice argued that *Packrall* itself “was wrongly decided, and it should be overruled.” 225 A.3d at 1093. Regarding Justice Mundy’s opinion, Justice Wecht claimed that it “relies exclusively on a principle derived from a judicial carve-out unsupported by the Election Code.” *Id.* at 1095. Justice Wecht cautioned against any “judicial reformation” of Section 976(e); however “harsh” or “unwise” its broad prohibition, the statutory language clearly allows “no exception for candidates who previously filed nomination petitions but whose names did not ultimately appear on the primary ballot.” *Id.* at 1093. While the Election Code is to be construed liberally, Justice Wecht wrote, that principle does not give the Court “license to act as a super-legislature.” *Id.* at 1096.

In a concurring opinion written by Justice Christine Donohue, and joined by Justice Debra Todd, Justice Donohue noted that their vote for the original per curiam order occurred “when the matter was presented to us on an expedited basis.” Ultimately, they found Justice Wecht’s arguments persuasive, and concluded that his interpretation of Section 976(e) should be its “prevailing interpretation . . . in *future* cases.” *Id.* at 1090 (emphasis added).

Instantly, Avery argues that the OFJC represents the opinion of the Court, and that its extension of *Packrall* to candidate Cohen’s candidacy constitutes binding precedent on this Court. Objectors counter that the OFJC represented the opinion of only two Justices. The remaining five Justice’s called either for restricting *Packrall*’s reach only to candidates who withdrew pursuant to Section 914, or for overturning *Packrall* entirely. Objectors correctly argue that the clear majority of justices *In re*

*Cohen* ultimately agree on one key point: Pursuant to Section 976(e), a candidate who had previously filed nomination petitions for candidacy in the primary, and who did not request an administrative withdrawal pursuant to Section 914, is precluded from filing nomination papers to appear on the general election ballot for the same position.

This Court also agrees with Objectors' theory of how fractured decisions by our Supreme Court are to be considered. In *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *rev'd on other grounds*, 529 U.S. 277 (2000), the Supreme Court was faced with a similar predicament. It explained that:

[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.*"

*Id.* at 278 (emphasis added).

Two recent Supreme Court decisions, *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017) and *In re T.S.*, 192 A.3d 1080 (Pa. 2018), provide further guidance on how to proceed in similar circumstances. In *L.B.M.*, the Court issued a decision which yielded a lead opinion, a concurring opinion, and two dissents. None of the four opinions was joined in full by more than two other justices.. 161 A.3d at 183. 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. 192 A.3d at 1088.

The Supreme Court in *T.S.* concluded that it was not bound by the *L.B.M.* lead opinion. *See T.S.*, 192 A.3d at 1088 (disagreeing with appellant's contention that an issue agreed upon only by the three-justice plurality in *L.B.M.* reflected "prevailing

case law of the Commonwealth”). 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. *See Id.* (explaining that “[t]his majority view of the Justices was apparent *from the face of the opinions* in *L.B.M.*, as the Superior Court has recognized on multiple occasions”) (emphasis added) (citations omitted).

Since 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 Court disagrees that it is precedentially bound to grant Avery that relief. She is therefore barred from filing the Nominating Paper pursuant to the plain language of Section 976(e) of the Election Code.

### III. Conclusion

In light of the clear precedential guidance from our Supreme Court, this Court grants Objectors’ Petition to Set Aside and dismisses Avery’s Nomination Papers for Libertarian Party candidate for Representative in the General Assembly from the 178<sup>th</sup> Legislative District.



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ELLEN CEISLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Nomination Paper of Caroline :  
Avery for Representative in Congress :  
from the 1st Congressional District :  
: No. 392 M.D. 2022  
:  
Objection of: David R. Breidinger, Ellen:  
Cox, and Diane Dowler :

**ORDER**

AND NOW, this 23<sup>rd</sup> day of August, 2022, it is hereby ORDERED that Objectors David R. Breidinger, Ellen Cox, and Diane Dowler's Petition to Set Aside the Nomination Paper of Caroline Avery as Libertarian Candidate for Representative in Congress from the 1st Congressional District is GRANTED.

The Secretary of the Commonwealth is directed to remove Avery's name as a Libertarian candidate for Representative in Congress from the 1st Congressional District from the November 8, 2022 primary ballot, and to transmit this order promptly to the Bucks County Board of Elections. The Chief Clerk is directed to send a copy of this order to the Secretary of the Commonwealth.



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ELLEN CEISLER, Judge

Order Exit  
08/23/2022

APPENDIX F – Case Law Referenced in Pennsylvania Orders

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No. 31 EAP 2019  
Supreme Court of Pennsylvania.

## In re Cohen

225 A.3d 1083 (Pa. 2020)  
Decided Feb 19, 2020

No. 31 EAP 2019 No. 32 EAP 2019

02-19-2020

IN RE: Nomination Papers of Sherrie COHEN as Candidate FOR the OFFICE OF PHILADELPHIA CITY COUNCIL-AT-LARGE Appeal of: Sherrie Cohen In re: Nomination Papers of Sherrie Cohen as Candidate for the Office of Philadelphia City Council-at-Large Appeal of: Sherrie Cohen

JUSTICE MUNDY

### OPINION FOLLOWING THE JUDGMENT OF THE COURT

On October 3, 2019, this Court reversed the order of the Commonwealth Court and directed that the name of Sherrie Cohen be placed on the November 5, 2019 ballot as an independent candidate for Philadelphia City Council-at-Large. *See In re Nomination Papers of Sherrie Cohen*, 218 A.3d 387 (Pa. 2019). 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. We now set forth our reasons for concluding that Cohen's withdrawal as a candidate in the Democratic primary election for City Council-at-Large did not preclude her from running in the general election as an independent candidate.

On March 12, 2019, Cohen filed nomination petitions to appear on the ballot in the May 21, 2019 Democratic primary election for an at-large seat on City Council. An experienced candidate, she hired a campaign staff, raised money, and sought endorsements. Prior to the primary, a controversy developed over comments that Cohen's campaign manager had made about another candidate, Appellee Deja <sup>1085</sup> Lynn Alvarez. As a result, Cohen decided to end her campaign.

Pursuant to Section 914 of the Election Code (Code), a candidate may withdraw her name by filing a written request in the office in which her nomination petition was filed not later than 15 days after the last day for filing nomination petitions. 25 P.S. § 2874. The last date for Cohen to do so was March 27, 2019. However, Section 978.4 of the Code provides that after the deadline has passed, a candidate may petition the court of common pleas to withdraw her name, "and the court shall order the withdrawal of said candidate's name ... except upon a showing of special circumstances." 25 P.S. § 2938.4.

Cohen filed a petition to withdraw on April 17, 2019, which the court of common pleas granted on April 18, 2019. The same day, Cohen filed a change of registration from the Democratic Party to independent voter.<sup>1</sup>

<sup>1</sup> Section 951.1 of the Election Code provides, in relevant part:



In re Cohen 225 A.3d 1083 (Pa. 2020)



Any person who is a registered and enrolled member of a party during any period of time beginning with thirty (30) days before the primary and extending through the general or municipal election of that same year shall be ineligible to be the candidate of a political body in a general or municipal election held in that same year[.]

25 P.S. § 2911.1. Because Cohen was not a registered member of a party thirty days before the May 21, 2019 primary, Section 951.1 is not implicated in this matter.

On August 1, 2019, Cohen filed nomination papers to appear on the November 5, 2019 general election ballot as the candidate for A Better Council Party for an at-large seat on City Council. On August 7, 2019, Appellee Alvarez and Appellee Christopher M. Vogler, who is a duly qualified elector, filed separate petitions to set aside Cohen's nomination papers. By agreement of the parties, the cases were heard together.

In her petition, Appellee Alvarez asserted that because Cohen "was a *bona fide* [Democratic] candidate" in the municipal primary election, she was barred from running in the November 5, 2019 municipal election pursuant to Section 976(e) of the Code, (commonly referred to as a "sore loser provision"), which provides, in relevant part:

When any ... nomination paper is presented in the office ... of any county board of elections for filing within the period limited by this act, it shall be the duty of said ... 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).<sup>2</sup>

<sup>2</sup> As recognized by the trial court:


The "ensuing primary" language dates from a time when nomination papers for the general election were required to be filed before the primary election was held. *Baronett v. Tucker*, 365 A.2d 179, 180 (Pa. Cmwlth. 1976). That time requirement was struck down as unconstitutional. *Salera v. Tucker*, 399 F.Supp. 1258 (E.D. Pa. 1975), *aff'd mem.*, 424 U.S. 959 [96 S.Ct. 1451, 47 L.Ed.2d 727] (1976). The Commonwealth Court subsequently interpreted the "ensuing primary" language of Section 976 of the Election Code to refer to the "primary immediately preceding the general election" in which the candidate seeks a ballot position. *Baronett*, 365 A.2d at 181.

Trial Ct. Op., 8/16/19, at 4 n.4.

The trial court held a hearing on August 12, 2019. Cohen testified that she filed nomination petitions to be elected as a Democratic candidate for an at-large seat on City Council. N.T., 8/12/19, at 44. She conceded that she sought the endorsement of the Philadelphia City Democratic Committee but did not receive it despite having been an endorsed candidate in 2015. *Id.* at 48-49. She stated that after the incident involving her campaign manager and Appellee Alvarez, she lost the support of the Victory Fund, an organization that supports LGBT candidates. The Victory Fund had supported Cohen in her unsuccessful City Council campaigns in 2011 and 2015. *Id.* at 53-54. Cohen identified a Facebook post in which she stated that she decided to suspend her campaign because she saw no true path to victory. *Id.* at 62-63.



In re Cohen 225 A.3d 1083 (Pa. 2020)

 On August 16, 2019, the trial court issued an order granting the petitions to set aside Cohen's nomination papers. In an opinion in support of the order, the court looked to *Packrall v. Quail*, 411 Pa. 555, 192 A.2d 704 (1963), where this Court held that when a candidate withdraws his nomination petitions for a primary ballot "within the permitted period," his subsequently filed nomination papers may be accepted. *Id.* at 705. The trial court distinguished the instant matter from *Packrall* because "Cohen required Court intervention to leave the primary ballot." Trial Ct. Opinion at 9. The court determined this to be the decisive factor in concluding that she was "subject to the 'sore loser' provision." *Id.*

Cohen filed a timely appeal to the Commonwealth Court. In a single-judge memorandum and order, the Honorable Michael H. Wojcik affirmed the order of the trial court. The Commonwealth Court rejected Cohen's reliance on *Packrall*, a decision that it had previously explained as follows:

We believe the basis for the holding in *Packrall* is that a candidate has the time to voluntarily withdraw his or her petition - a grace period in which the person can decide if he or she wants to participate in that election cycle as a candidate of a particular party. When a person withdraws of his or her own volition within the time for filing, it "undoes," *ab initio*, the filing because a person gets to choose whether he or she wants to go through the primary process to seek an office.

*Lachina v. Berks County Board of Elections*, 887 A.2d 326, 329 (Pa. Cmwlth.), *aff'd* 584 Pa. 493, 884 A.2d 867 (2005).

The court also rejected Cohen's reliance on *Oliviero v. Diven*, 908 A.2d 933 (Pa. Cmwlth. 2006). In *Oliviero*, the court granted Michael Diven leave to withdraw his nomination petitions as a Republican candidate for state representative pursuant to Section 978.4 of the Code. Diven subsequently launched a write-in campaign, which he won. Petitioners filed a motion for preliminary injunction seeking to prevent Diven from being certified as the Republican candidate. The *Oliviero* court denied the requested relief. Judge Wojcik noted the distinctions between *Packrall* and the instant matter (Packrall's withdrawal of nomination petitions as of right versus Cohen's withdrawal by leave of court) and *Oliviero* and the instant matter (Diven's write-in campaign following withdrawal of nomination petitions by leave of court versus Cohen's filing of nomination papers following withdrawal of nomination petitions by leave of court). Based on these distinctions, Judge Wojcik held, "as a result, neither [ *Packrall* nor *Oliviero* ] compels a different result in this case." Cmwlth. Ct. Op. at 9.

Like the trial court, the Commonwealth Court relied on the portion of this Court's decision in *Benkoski* stating that "a plain meaning approach to the statutory language 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." \*1087 *In re Benkoski*, 596 Pa. 267, 943 A.2d 212, 216 (Pa. 2007).

On September 26, 2019, this Court granted allowance of appeal limited to the following issue:


Did the Commonwealth Court and the trial court err by not considering the withdrawal of Candidate's nomination petition by court order to be a voluntary withdrawal that would allow her to file nomination papers pursuant to *Packrall v. Quail*, 411 Pa. 555, 192 A.2d 704 (1963) ?

*In re Nomination Papers of Sherrie Cohen*, 218 A.3d 383, 2019 WL 4687075.

Cohen asserts that the Commonwealth Court erred by failing to consider withdrawal by court order under Section 978.4 to have the same effect as voluntary withdrawal pursuant to Section 914. Her argument rests on *Packrall*, *supra*, where the Board of Elections of Washington County refused to accept the nomination papers



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 of Mike Packrall as candidate of the Good Government Party for the office of county commissioner. Packrall had filed nomination petitions to be placed on the primary ballot as a Democratic candidate for the offices of county commissioner and county treasurer. However, he withdrew his petitions within the permitted period, and thereafter the Good Government Party filed papers nominating him for county commissioner. The Board of Elections refused to accept the nomination papers because Packrall's prior filing of nomination petitions disqualified him. The court of common pleas affirmed. On appeal, this Court reversed, holding that Section 976 requires only that the person seeking nomination not be the candidate of another political group at the time the nomination paper is filed. *Packrall*, 192 A.2d at 706. Because Packrall had withdrawn his nomination petition, and thus was not a candidate for the Democratic primary, Section 976 did not prevent the acceptance of his nomination paper as the candidate of the Good Government Party. *Id.* Accordingly, Cohen maintains that *Packrall* has severely restricted Section 976, which provides that a candidate who has filed a nominating petition for any public office during the primary election may not subsequently be nominated by nomination papers.

Section 978.4 was added to the Code in 1980, allowing a candidate to withdraw her nomination petition beyond the deadline set forth in Section 914 by filing a petition in the court of common pleas. Section 978.4 provides that the court shall order the withdrawal "except upon a showing of special circumstances." 25 P.S. § 2938.4.<sup>3</sup>

This was the provision under which the court of common pleas permitted Cohen to withdraw her nomination 1088 petitions on April 18, 2019.<sup>4</sup> \*1088 Cohen argues that the Commonwealth Court and the trial court erroneously created an artificial line between administrative withdrawals under Section 914 as opposed to court-ordered withdrawals under Section 978. Appellant's Brief at 37. She notes that in *Packrall*, the candidate withdrew his nomination petitions within the fifteen-day time period, and despite the language of the sore loser statute, this Court allowed him to file nominating papers and run as an independent in the general election. Cohen asserts that the Commonwealth Court erroneously limited "the holding of *Packrall* by creating this artificial distinction between administrative and court ordered withdrawal. The Commonwealth Court failed to recognize both withdrawals were voluntary withdrawals, which voided the nominating petitions *ab initio*." *Id.* at 39.

<sup>3</sup> Senator Vincent Fumo stated that he was the prime sponsor of the amendment, and noted:

It was originally drafted to alleviate some of the problems that we have in allowing candidates a sufficient amount of time to withdraw, particularly at the time at issue that we faced in Philadelphia with some 105 candidates running for councilman-at-large for five seats and not having the opportunity to know what their ballot position was until just before the last date of filing. Had they known that they did not have a good ballot position, many of those individuals might have withdrawn and made it much simpler for the Election Commission to conduct the election.

Legislative Journal - Senate, May 21, 1980 at 1669.

<sup>4</sup> Neither the City Commissioners of Philadelphia nor any individual challenged Cohen's withdrawal. In *In re Petition of Dieterick*, 136 Pa.Cmwlth. 66, 583 A.2d 1258 (1990), the Commonwealth Court found that special circumstances existed to prevent the court from ordering withdrawal where ballots had already been printed and the court had serious doubts about the effectiveness of sticker paste-overs to replace the candidate's name. More importantly, absentee ballots had already been sent out, and there was testimony that amended absentee ballots sent to military personnel could not be returned before the deadline.

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Like the Commonwealth Court, Cohen also relies on *Oliviero*, *supra*. However, she focuses on a different aspect of the decision. As noted, the court of common pleas granted Diven leave to withdraw his nomination petitions as a Republican candidate for state representative pursuant to Section 978.4 of the Code. Diven subsequently launched a write-in campaign, which he won. The Commonwealth Court denied a preliminary injunction seeking to prevent Diven from being certified as the Republican candidate. Judge Wojcik deemed *Oliviero* inapposite because it involved a write-in campaign rather than the filing of nomination papers following court-approved withdrawal.

However, Cohen relies on *Oliviero* for a different point:

[The] "sore loser" provisions of the Election Code stand for the proposition that once a candidate's name has been stricken from the primary ballot or the candidate loses his party's nomination in the primary, the candidate is then precluded from filing nomination papers for the general election. They are not applicable here as Diven's name was not "stricken" from the ballot and Diven did not "lose" the primary. Rather, Diven withdrew his nomination petition and voluntarily chose not to participate in the primary process. In doing so, Diven's voluntary withdrawal "undid" *ab initio* his nomination petition. Once Diven withdrew his nomination petition, his name did not appear on the ballot as a candidate for the Republican Party in the primary election.

*Oliviero*, 908 A.2d at 939 (citation omitted).

Cohen asserts that *Oliviero* "very clearly indicated there is no distinction between administrative withdrawal in fifteen days through the Board of Elections or later court ordered withdrawal." Appellant's Brief at 42. Cohen points out the trial court "ignored" *Oliviero* when it wrote:


Unlike in *Packrall*, where the candidate was able to choose whether he wanted to go through with the primary process, [Cohen] required Court intervention to leave the primary ballot. This process did not undo, *ab initio*, her initial filing of nomination petitions and thus she is subject to the "sore loser" provisions.

Trial Ct. Op. at 9. Cohen also asserts that the Commonwealth Court's opinion did not properly address *Oliviero*. *Id.* at 43.

Cohen next draws our attention to *Benkoski*, *supra*. In that case, Edward Benkoski, Sr. filed nomination petitions to appear on the May 2007 ballot as a candidate for Supervisor of Bear Creek Township. However, the 1089 petitions were set aside due to non-compliance with the Ethics Act. Benkoski thereafter filed nomination papers as an Independent candidate on the November 2007 general election ballot. The court of common pleas held that because Benkoski was stricken from the primary election ballot, he was precluded from appearing on the general election ballot. A panel of the Commonwealth Court reversed, concluding that the setting aside of a nomination petition or paper undoes, *ab initio*, the initial filing of a candidate's nomination petition or paper. As summarized by this Court:

[The Commonwealth Court] analogized the setting aside of a nomination petition to a voluntary withdrawal of such a petition to conclude that "there was technically no filing of the nomination petition as the petition has been deemed invalid." Thus, the court held that Section 976(e) does not preclude a candidate from subsequently filing nomination papers to appear on the ballot in the general election where his or her primary nominating petition has been set aside.



 *Benkoski*, 943 A.2d at 214 (citation omitted). This Court granted allowance of appeal and reversed the Commonwealth Court. In doing so, the Court spoke approvingly of *Lachina*, *supra*, where Judge Pellegrini held that a candidate who was removed from the ballot for defects in her nomination petition could not submit nomination papers for the general election for the same office. As noted, Judge Pellegrini recognized that the voluntary withdrawal of the candidate's nomination petition in *Packrall* " 'undoes,' *ab initio*, the filing." *Lachina*, 887 A.2d at 329. Furthermore, Judge Pellegrini contrasted *Packrall* to *Baronett*, *supra*, where the Commonwealth Court held that a candidate who ran unsuccessfully in the Democratic primary was precluded from filing nomination papers for the same position on the general election ballot as the candidate of the Federalist Body.

This Court held that the *Lachina* court's construction of "Section 976(e) comports with the ... reference to that section as a 'sore loser' provision." *Benkoski*, 943 A.2d at 214. We then noted that under the plain meaning of Section 976(e), "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 216. This Court further noted, "[a]lthough *Packrall* is also arguably in tension with the plain language of the statute, we decline to extend a holding concerning the voluntary withdrawal of a nomination petition to unsuccessful candidates attempting to circumvent their filing of defective nomination petitions." *Id.*

Cohen asserts that *Benkoski* affirmed the concept in *Packrall* that a voluntary withdrawal allows a candidate to file nomination papers as an Independent. According to Cohen, it did not overrule *Packrall*, but simply declined to extend its holding to grant relief to a candidate who was removed from the primary ballot. "Nowhere in *Benkoski* does the Supreme Court limit the *Packrall* case to only those cases where the candidates have withdrawn their nomination petitions administratively. Any withdrawal, either administratively or by court order, is treated as a voluntary withdrawal." Appellant's Brief at 50.

Appellees recognize that the withdrawal of nomination petitions prior to the deadline for voluntary withdrawal undoes the filing *ab initio*. However, they do not explain why voluntary withdrawal of nomination petitions with court approval should not have the same effect under this Court's decisions in *Packrall* and *Benkoski*.

<sup>1090</sup>We agree with Cohen that "[t]he Commonwealth Court failed to acknowledge <sup>1090</sup> that the important dividing line in this area of the law is between voluntary withdraw[als] and candidates getting stricken from the ballot." Appellant's Brief at 47. The decisive factor underpinning this Court's refusal to apply *Packrall* in *Benkoski* is not present in this case. Rather, application of *Packrall*, a case that has been central to our election jurisprudence for more than half a century, is appropriate where a candidate's nomination petitions have not been stricken but have simply been withdrawn. Because there is no principled reason to distinguish between the voluntariness of a withdrawal under Section 914 or Section 978.4, Cohen is entitled to relief from this Court. This is especially so in light of "the longstanding and overriding policy in our Commonwealth to protect the elective franchise." *In re Nomination Petition of Driscoll*, 577 Pa. 501, 847 A.2d 44, 49 (2014).

For these reasons we ordered that Cohen's name be placed on the ballot for the 2019 general election.<sup>5</sup>

<sup>5</sup> Chief Justice Saylor opines that pursuant to *Benkoski*, *Packrall* should be limited to "a voluntary withdrawal of a nomination petition within the statutory period." Saylor, C.J. Dissenting Op. at 1091. In *Benkoski*, this Court stated, "we hold 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." *Benkoski*, 943 A.2d at 216. Because the decisive factor in *Benkoski* was the defective nomination petition, rather than the nature of the withdrawal (administratively or by court permission), reliance on

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*Benkoski* to preclude Cohen from filing nomination papers as an independent candidate is unavailing.

With respect to Justice Wecht's position that this Court should overrule *Packrall*, Chief Justice Saylor correctly points out that the Legislature has not altered the material language of Section 976 despite the fact that *Packrall* has existed for more than fifty years. Saylor, C.J. Dissenting Op. at 1091, n.1. In addition, the question whether *Packrall* should be overruled as contrary to the plain language of Section 976 was not raised in the courts below and therefore is not properly raised in this Court. See Pa.R.A.P. 302(e) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

Justice Baer joins the Opinion Following the Judgment of the Court.

Justice Donohue files a concurring opinion in which Justice Todd joins.

Chief Justice Saylor files a dissenting opinion in which Justice Dougherty joins.

Justice Wecht files a dissenting opinion.

JUSTICE DONOHUE, concurring

I joined the position of the Lead Opinion placing Appellant Sherrie Cohen on the general election ballot as a candidate for Philadelphia City Council-at-Large when the matter was presented to us on an expedited basis. I joined the Lead Opinion's position because I saw no principled reason not to apply this Court's prior decision in *Packrall v. Quail*, 411 Pa. 555, 192 A.2d 704 (1963), to the circumstances presented in the present case. Having reviewed Justice Wecht's thoughtful and well-reasoned Dissenting Opinion, however, I find it to be highly persuasive and, in my view, should be the prevailing interpretation of Section 976(e) of the Election Code, 25 P.S. § 2936(e), in future cases.

Justice Todd joins this concurring opinion.

CHIEF JUSTICE SAYLOR, dissenting

The lead Justices fault the appellees for supplying no principled reason to distinguish between the voluntary withdrawal of a nomination petition within the Election Code's 15-day grace period, see 25 P.S. § 2874, and a later withdrawal subject to the requirement of court approval, see *id.* § 2938.4. See Lead Opinion, at 1089–90. To the contrary, I find that appellee Alvarez, at least, has provided a persuasive explanation.

In this regard, appellee Alvarez couches the issue presented as:

whether there should be an exception to the plain language of Section 976, which prohibits the filing of any nomination papers "if the candidate named therein has filed a nomination petition for any public office for the ensuing primary," for a candidate who actively participated in the primary election but petitioned to the court to withdraw her nomination after believing she could not win.

Brief for Appellee Alvarez at 6. Her argument proceeds to reconcile the *void ab initio* logic of *Packrall v. Quail*, 411 Pa. 555, 192 A.2d 704 (1963), with Section 976(e) of the Election Code, 25 P.S. § 2936(e), as follows:



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The key determinant of whether someone has "filed a nomination petition" is whether someone has chosen to go through the primary process. [Appellant] chose to go through the primary process. She ran for office, sought endorsement, [and] was placed on the ballot. Only when her campaign began to falter did she choose to end it. This is distinct from *Packrall*, where the candidate withdrew before the primary process had begun.

\* \* \*

[Appellant] would have it that candidates who cannot win after running in the primary could have their second chance as long as they quit the day before the primary election. This cannot be.

Instead, the plain language of Section 976(e) should govern[.]

*Id.* at 11-13; *accord id.* at 7 ("The sore loser statute cannot be used to game the system.").

Although I agree with the lead Justices that *Packrall* should not be overruled,<sup>1</sup> its approach remains "arguably in tension with the plain language of the statute." *In re Benkoski*, 596 Pa. 267, 274, 943 A.2d 212, 216 (2007). Accordingly -- and consistent with the determinations of the intermediate and county courts -- it seems to me 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. *Cf. id.* (declining to extend *Packrall* for the benefit of candidates removed from ballots based on defects in their nomination petitions). In this regard, 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.

<sup>1</sup> 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." *Verizon Pa., Inc. v. Commonwealth*, 633 Pa. 578, 598, 127 A.3d 745, 757 (2015). 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.

<sup>1</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600 -3591.

For the above reasons, I would have affirmed, crediting the rationales of both the Commonwealth Court and the court of common pleas.

Justice Dougherty joins this dissenting opinion.

<sup>1092</sup>JUSTICE WECHT, dissenting\*<sup>1092</sup> The Lead Opinion contends that "there is no principled reason" to refrain from extending this Court's decision in *Packrall v. Quail*, 411 Pa. 555, 192 A.2d 704 (1963), to the circumstances of this case. Opinion Following the Judgment of the Court ("OFJC") at 1089-90. 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,<sup>1</sup> 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*, 596 Pa. 267, 943 A.2d 212 (2007). In that case, nomination petitions for several Democratic candidates had been stricken for non-compliance with the Ethics Act for 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* 1093 nomination petition for any public office for a \*1093 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




 CaseText 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*, 26 Pa.Cmwlth. 559, 365 A.2d 179, 181 (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*, 355 Pa. 196, 49 A.2d 411, 412 (1946) (emphasis added); see generally *Working Families Party v. Commonwealth*, — Pa. —, 209 A.3d 270, 292-94, 293 n.13 (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*, 244 Pa. 447, 91 A. 520, 523 (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 <sup>1094</sup>Raiding Act, which "requir[ed] each candidate" for political office "to include in the affidavit <sup>\*1094</sup> 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.*, 319 Pa. 47, 179 A. 553, 553 (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*, 499 Pa. 26, 451 A.2d 427, 430 (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.<sup>2</sup> 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*

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 *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 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.").

<sup>2</sup> 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*, 575 Pa. 140, 834 A.2d 1126 (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").

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, 94 S.Ct. 1274, 39 L.Ed.2d 714 (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,"  
1095irrespective of the results of a primary \*1095 election. *Id.* at 733, 749, 94 S.Ct. 1274 (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*, 627 Pa. 1, 99 A.3d 381, 386 (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, 96 S.Ct. 1451, 47 L.Ed.2d 727 (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*, 389 Pa. 609, 133 A.2d 809, 811, 813 (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.<sup>3</sup> 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 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



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stemming from the lingering controversy involving Objector Alvarez.<sup>4</sup> 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 1089–90, the Lead Opinion goes beyond even *Packrall*'s approach, short shriving *Packrall*'s limiting principle in the process.

<sup>3</sup> See *In re Challenge to Objection to Nominating Petitions of Evans*, 73 Pa.Cmwlth. 634, 458 A.2d 1056, 1057 n.2 (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.").

<sup>4</sup> 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-philadelphiaprimary-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).

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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 candidate of their choice," *In re Ross*, 411 Pa. 45, 190 A.2d 719, 720 (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*, 467 Pa. 491, 359 A.2d 383, 384 (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*, 409 Pa. 241, 186 A.2d 24, 27 (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 1090. "[T]he doctrine of *stare decisis* was never intended to be used as a principle to perpetuate erroneous rules of law." *In re Paulmier*, 594 Pa. 433, 937 A.2d 364, 371 (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*, 413 Pa. 305, 196 A.2d 371, 376 (1964) (Cohen, J., dissenting), by sanctioning the electoral gamesmanship that the framers of our Election Code sought to avoid. I respectfully dissent.

In re Cohen 225 A.3d 1083 (Pa. 2020)



APPENDIX G – Letter from the Libertarian Party of New Mexico

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8100 Wyoming Blvd NE Ste M4, #341, Albuquerque NM 87113

17 August 2022

To the Libertarian National Committee,

In response to the letter from the Libertarian National Committee Chair, dated Aug 9, 2022: This notice is to inform Libertarian National Committee, Inc that the Libertarian Party of New Mexico is an independent organization and state political party operating as an entity in the State of New Mexico. The Libertarian Party of New Mexico does not recognize any actions, directives, orders, commands, rulings, or any other interference with the internal operations of the Libertarian Party of New Mexico by the Libertarian National Committee or any of its affiliated committees.

The Libertarian Party of New Mexico is asserting legal associational rights in executing the operations of the Libertarian Party of New Mexico under the direction of Libertarian Party of New Mexico leadership and the bylaws of our private organization.

Any actions taken by the Libertarian National Committee that interfere with the autonomy and the independence of the Libertarian Party of New Mexico are not recognized and are not legitimate.

By attempting to interfere with the operations of the Libertarian Party of New Mexico, the Libertarian National Committee has violated its own bylaws, Article 5, Section 5:

The autonomy of the affiliate and sub-affiliate parties shall not be abridged by the National Committee or any other committee of the Party, except as provided by these bylaws.

In addition to illegitimately attempting to directing the affairs of the LPNM, the LNC Chair's letter contains a number of misstatements of fact, that have been addressed at <http://lpnm.us/LNC>

The Libertarian Party of New Mexico demands that the Libertarian National Committee rescind the letter from LNC Chair, and the motion it was based on, within 10 days of the receipt of this letter.

Chris Luchini  
Chair  
Libertarian Party of New Mexico

APPENDIX H – Letter to the Libertarian Party of New Mexico

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Angela McArdle, Chair  
Libertarian National Committee  
1444 Duke St.  
Alexandria, VA 22314

August 9, 2022

**Re: Recent Decision of the LNC Re: Libertarian Party of New Mexico's Constitutional Convention**

To Mr. Luchini and the Executive Committee of the Libertarian Party of New Mexico:

We are in receipt of your letter stating that you do not recognize our recent vote or actions and that you will assert legal rights in executing your operations. We'd like to address some of these assertions and the underlying reasons for our actions.

We do not share your interpretation of bylaw 5.5 which contains the oft-neglected phrase "except as provided by these bylaws." The rest of the bylaws require that the LNC be able to properly identify the affiliate which necessarily includes its essential defining characteristics such as its leadership and its governing documents (as outlined very cogently in the Mattson opinion in the *Delaware* matter before the national Judicial Committee earlier this year). While your letter states that the LPNM is asserting its "associational rights" -- such rights are defined by the Constitution and Bylaws in place at the time which were violated by the invalid July 12, 2022, convention, thus it is the LPNM that has violated the associational rights it set for itself and its members. A full exposition of these violations can be found here:

[https://drive.google.com/file/d/1JLy\\_WtfEROJb0NEADF\\_57BXnvJHCjyyT/view?usp=sharing](https://drive.google.com/file/d/1JLy_WtfEROJb0NEADF_57BXnvJHCjyyT/view?usp=sharing).

Additionally, attached to this letter is a brief rebuttal to your alleged "point by point" response which we note did not address the disputed points in any substance.

The list of complaints we received is lengthy, and it did not come from a single caucus or ideological faction within your state affiliate. Who else is supposed to intervene when the members of a state affiliate complain to the national party that their rights have been violated repeatedly? No one desires to get involved in state affiliate matters, but your state affiliate members are demanding someone get involved because their rights have been violated, and they have no other recourse outside of a legal challenge.

We have seen leadership conflict play out multiple times over the past two years, in multiple states, but the most notorious incident was the Oregon split and the fight between Reeves and Wagner, which ended up in Court.

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There are two very important takeaways in the *Reeves v. Wagner* case, and in *Cousins v. Wigoda* dfg – a Supreme Court case that was cited in *Reeves*: The Courts do not feel it is their place to interpret or enforce our bylaws. Neither does the Secretary of State. This prevailing attitude dragged the Oregon case out unnecessarily and we do not want to see such a split happen again.

When push came to shove, the Oregon appellate court recognized that the Secretary of State was not prevented from determining who should be listed as the officers of a political party for the purpose of nominating candidates. Unfortunately, the entire litigation process took many years and spanned two court cases and an appeal.

What can we learn from the Oregon dispute?

Court intervention is not the best way to resolve our disputes. It is a time sink. It kills morale. It does not further our goals. The Courts would prefer to stay out of our bylaws disputes.

These sort of time sinks kill a party's ability to function, grow, fundraise, and get candidates elected. For over a year, aggrieved LPNM members have complained about their member rights being violated. Two of your candidates have reached out to national, looking for help because they've received no support from their state party.

Why did we get involved? We've got many other things to be concerned with: candidate support, affiliate support, development, communications and outreach, and overall strategy. But we need functional affiliates to reach peak performance at the national level. You are an affiliate and we are tied together, for better or for worse, in name and branding, in the struggle for ballot access, and in delegate selection to the national convention.

The members of LPNM need to be able to count on both the state and national party to be functional, to pursue the goal of liberty, and to advocate for our candidates.

To this extent, we are reaching out to the Secretary of State with the results of our vote on the rightful operative documents of LPNM. We hope that you will work towards a resolution with us so that we can both provide support to candidates running in the current election cycle, set up a framework to support the 2024 presidential race, and to respect the voting and membership rights of your members.

Please reach out if you have additional questions, or if you need assistance mediating with your members. You may also avail yourself of the national judicial committee if you believe the LNC reached its decision in error.

Very truly yours,

Angela McArdle, Chair

### BRIEF REBUTTAL TO POINT BY POINT RESPONSE OF THE LPNM

**Defective Notice:** It was not disputed that a notice was published in a newspaper or that information regarding the date and time were both published on the website and emailed to *some* LPNM dues-paying members at least thirty (30) days prior to the convention. It is unclear why the LPNM would simply reassert facts that were never in dispute. The issues, in fact, were that the purported website notice and email **did not contain all the information required** by the LPNM Constitution and Bylaws; and that the **entire dues-paying membership** was not notified, only a specific subgroup, which is also in violation of the LPNM Constitution and Bylaws. Further, the website notice did not contain any information about the specific proposals to be heard as required by the special meeting rules under RONR.

**Denial of Member Voting Rights:** It was also not disputed that only members who had fully paid their dues at least thirty (30) days prior the convention were entitled to vote. Once again, it is unclear why the LPNM would simply reassert facts that were never in dispute. The issue was not the terminus point by which dues must be paid, but the beginning time period, which is the close of the last valid convention. The LPNM asserts this was its March 5, 2022 convention. That is not the case as that convention was also invalid due to fatally defective notice as not only did the purported notice fail to contain all the information required by the LPNM Constitution and Bylaws, it was not posted to the website at least thirty (30) days prior to the convention as both video evidence and the Wayback Machine demonstrate. Thus, the beginning point during which dues must have been paid was not March 5, 2022, but June 11, 2021—twelve (12) months prior to the thirty (30) day period prior to the convention since the last valid convention of the LPNM was on March 27, 2021. This resulted in a denial of voting rights of enough LPNM members in a sufficient number to effect the results.

**Electronic Meetings:** The LPNM Constitution and Bylaws do not permit electronic conventions and NM law for non-profit organizations does not permit electronic member meetings unless authorized in the organization's governing documents. The burden of proof is therefore on the LPNM leadership to prove there was an executive order or other regulation in place *at the time of the convention on July 12, 2022* that authorized same. You provided a public health order dated August 12, 2022, a full month after the convention, which was not in place at the time of your convention. Further, this public health order only extended orders that were already in place. The prior orders that were previously in effect had expired earlier this year. Thus, it does not appear that there was emergency authorization at the time of the convention to hold it electronically.

Please note, however, that the defects noted in the convention are entirely severable and any one of them, on their own, are sufficient to render the convention invalid.