IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: REQUESTS FOR AN ADVISORY OPINION OF THE JUSTICES	)))	Consol. Nos. 35, 2025 & 38, 2025

OPENING BRIEF OF THE POSITION OF GOVERNOR MEYER

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Martin S. Lessner (No. 3109)
Richard J. Thomas (No. 5073)
Elisabeth S. Bradley (No. 5459)
M. Paige Valeski (No. 6336)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Attorneys for the Position of Governor Meyer

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NATURE OF PROCEEDINGS

On January 30, 2025, the Justices of the Supreme Court received a request from Governor Matthew Meyer for an opinion concerning the proper construction of Article III, Sections 9 and 12 of the Delaware Constitution of 1897.[1] On January 31, 2025, the Justices received Senate Concurrent Resolution No. 16 whereby the General Assembly similarly requested an opinion, by March 10, 2025, concerning the proper construction of Article III, Section 9.[2]

By Order entered February 6, 2025, the Justices appointed the undersigned counsel to brief and argue the position of Governor Meyer in response to the following four questions:

> (1) Given Supreme Court precedent, should the Court respond to the questions from the Governor and the General Assembly through [10] *Del.* § 141?[3]
>
> Assuming the answer to Question 1 is affirmative:
>
> (2) Did the Delaware Constitution, including Article III, Section 9, empower Governor Bethany Hall-Long to submit Diamond State Port Corporation nominations to the State Senate between January 7, 2025 and January 21, 2025?

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[1] *Request of the Governor for an Advisory Opinion of the Justices*, No. 35, 2025.

[2] *Request of the General Assembly for an Advisory Opinion of the Justices*, No. 38, 2025.

[3] Although the Order referenced 8 *Del. C.* § 141, counsel has respectfully assumed that the referenced statute was intended to be 10 *Del. C.* § 141.

(3) Assuming the answer to Question 2 is affirmative, did the Delaware Constitution, including Article III, Section 9, and separation of powers considerations, permit Governor Meyer to withdraw those nominations before Senate confirmation?

(4) Assuming the answer to Question 3 is negative and the Senate votes to confirm the nominations, does Governor Meyer have the discretion to withhold commissions for confirmed nominees to the Diamond State Port Corporation?

This is the opening brief of the position of Governor Meyer on these questions. For the reasons set forth herein, based on Delaware constitutional principles, the Justices should answer all four questions in the affirmative.

SUMMARY OF ARGUMENT

1. The Justices may (and, respectfully, should) opine on the questions raised by the Governor and General Assembly under 10 *Del. C.* § 141 and other applicable statutes and rules. These questions arise from a controversy about the powers and duties of the Governor and the State Senate under the Delaware Constitution and involve important issues of first impression in which the public has a significant interest. This distinguishes these questions from cases where the Justices have declined to offer opinions.

2. Governor Meyer does not dispute that Governor Bethany Hall-Long was Governor between January 7 and 21, 2025, and that the Delaware Constitution empowered her to submit the names of potential appointees for the Diamond State Port Corporation board of directors to the State Senate for its consent. Importantly, however, both Governor Hall-Long and Governor Meyer retained the authority to withdraw those nominations at any time before the appointment process was complete—a process that not only requires State Senate consent but also the Governor's discretionary issuance of a commission, which is neither mandatory nor ministerial.

3. The Delaware Constitution, consistent with separation of powers principles, grants Governor Meyer the authority to withdraw nominations at any time before a formal appointment, including prior to State Senate consent. This principle

was well established in the federal system at the time the Delaware Constitution was drafted, and nothing in the Delaware Constitution indicates a departure from this understanding. The Governor's explicit appointment power inherently includes the discretion to withdraw nominations at any point before the process is complete—an appointment is not finalized until the State Senate consents and the Governor exercises discretion to issue a commission. This interpretation is reinforced by precedent from federal and state courts in other jurisdictions and best upholds Delaware's constitutional commitment to the separation of powers.

4. Delaware constitutional principles provide the Governor with discretion to withhold commissions from nominees notwithstanding State Senate consent to the nominee. State Senate consent signifies only an absence of objection to the Governor's proposed candidate; it does not impose a requirement for the Governor to issue a commission. Furthermore, State Senate consent is merely a prerequisite to, not the culmination of, the appointment process. The Governor retains full discretion over appointments until the final step—signing and sealing the commission—a step that is neither mandatory nor ministerial. This interpretation aligns with federal and state judicial precedent and preserves the constitutional balance between the executive's appointment authority and the legislative branch's advisory role via the consent process.

STATEMENT OF FACTS

A. The Diamond State Port Corporation

The Diamond State Port Corporation (the "DSPC") is a "public instrumentality of the State of Delaware that promotes the State's economic vitality by sustaining and promoting the Port of Wilmington, Delaware as a competitive and viable full service, multi-modal operation through its ownership of the port terminal facilities." (A97-99.) It is "a membership corporation with the Department of State as sole member[.]" 29 *Del. C.* § 8781(a).

The DSPC's board of directors (the "DSPC Board") comprises 14 members.[4] Seven are members *ex officio*. The remaining seven are appointed by the Governor "with the advice and consent of the Senate" and "consist of individuals from the private or public business sectors and organized labor familiar with port and economic development issues." 29 *Del. C.* § 8781(b). The questions posed to the Justices in this matter pertain to the nominations of five of the seven non-*ex officio* posts, which currently consist of one vacant seat and six seats occupied by holdover directors with expired terms. (A100-111.)

[4] The statute erroneously states that there are 15 board members and 8 *ex officio* board members; it does not account for the 2018 repeal of subsection (b)(3), which eliminated the seat of the Director of the Division of Small Business, Development and Tourism, resulting in only seven *ex officio* board seats. Economic Development-Transfer of Powers and Duties, 2018 Delaware Laws Ch. 374 (H.B. 432).

B. The Governor (Bethany Hall-Long) Nominates Five Candidates for Appointment to the DSPC Board and Submits Their Names for State Senate Consent.

On January 7, 2025, Governor John C. Carney, Jr. resigned his office to become Mayor of the City of Wilmington, and the Lieutenant Governor, Bethany Hall-Long, assumed the role as the 75th Governor of Delaware by operation of law. Del. Const. art. III, § 20. (A50-54.)

By five separate letters to the Senate of the 153rd General Assembly, dated January 16, 2025,[5] Governor Hall-Long "nominate[d] for the consideration of the Senate to confirm appointment" for five nominees each "to be appointed as a Director of the Board of Directors of the Diamond State Port Corporation to serve a term to expire 3 years from the date of Senate confirmation." (A55-59.)

C. On January 21, 2025, the Governor (Matthew Meyer) Withdraws the Five Nominations Sent to the State Senate on January 16, 2025.

On January 21, 2025, Matthew Meyer was sworn in as the 76th Governor of Delaware. (A70-73.) That same day, Governor Meyer sent a letter to the State Senate withdrawing the five nominations to the DSPC Board made on January 16, 2025:

[5] The State Senate was in session at the time of the nominations, having convened the 153rd General Assembly on January 14, 2025. *See* Del. Const. art. II, § 4 ("The General Assembly shall convene on the second Tuesday of January of each calendar year[.]").

> In conformity with the Constitution and the laws of the State of Delaware, I hereby respectfully withdraw the following nominations for appointments to the Board of Directors of the Diamond State Port Corporation . . . .
>
> [Listing the five withdrawn nominees]
>
> I respectfully request that the Senate take no further action on them.
>
> I understand the economic importance of the Port and the significant oversight responsibilities of its Board of Directors. I look forward in my first days in office to collaborating with the Senate on a robust and deliberate nomination process concerning candidates for these appointments. Some of the individuals whose names have just been withdrawn may very well return to my own short list of nominees, along with other potentially qualified candidates for the appointments. Now is the time for considered collaboration on this important matter.

(A74.)

D. The Senate Does Not Accept The Governor's Withdrawal Of The Nominees, And States That They Are Still "[V]iable [N]ominees [B]efore the Senate."

Later that same day, the Governor received a response from the President Pro Tempore of the State Senate claiming that the prior nominees remained before the Senate but inviting the Governor to submit his own nominations:

> The Senate is in receipt of your letter from this morning regarding several nominations made by your predecessor for appointment to the Diamond State Port Corporation's Board of Directors.
>
> We believe, based on our own legal research, that these are viable nominees before the Senate. Whether you take issue with process, or with individual nominees on their

> perceived merits, we invite you to advance your own nominees for Senate consideration – a step that is well within your rights as Governor.
>
> As you write in your letter, "now is the time for considered collaboration on this important matter." We agree that a "robust and deliberative process" is critical.
>
> That's why we have yet to schedule confirmation hearings for any of the nominees in question. We would note, however, our swift efforts to hold confirmation hearings for your cabinet secretaries, four of whom will join the Port's Board of Directors should they be confirmed by the Senate in the coming days.
>
> Together, we have a collective responsibility to decide on the best path forward for this critical infrastructure project and the working families who stand to benefit from its long-term viability. The Senate has a responsibility to confirm nominees to the Board who best share that vision.

(A75.)

E. The Senate Accepts the Withdrawal of One Nominee, But Proceeds to Hold a Senate Executive Committee Hearing For the Other Four Nominees the Governor has Withdrawn.

On January 29, 2025, the Senate Executive Committee issued an agenda for hearings on the withdrawn nominations to the DSPC Board, to occur the very next day, January 30, 2025, beginning at 10:00 a.m. (A76-77.) The Senate Executive Committee only accepted one nominee's own withdrawal of his nomination. The Senate Executive Committee did not accept the Governor's withdrawal of the other four nominees and kept their nominations on the agenda. (*Id*.)

The Governor sent another letter to the State Senate on the morning of January 30, 2025, prior to the Senate Executive Committee hearings, notifying the State Senate that, as the nominations had been validly withdrawn by the Governor, they were not viable:

> In my last letter to you on January 21, 2025, the date of my inauguration, I withdrew nominations to the Diamond State Port Corporation's Board of Directors, which my predecessor made at the end of her two-week term as Governor.
>
> I stressed the need for deliberate consideration of potential appointees to the Diamond State Port Corporation's Board of Directors. The Port is an asset supported by hundreds of millions of taxpayers' dollars. The Port's board members have significant responsibilities in ensuring the health of an asset that so many Delawareans depend upon for their livelihoods….
>
> But yesterday, just eight days after our correspondence, with no prior notice to me or the public, the Senate Executive Committee posted a notice for hearings this morning on the same nominees I have ordered to be withdrawn. I am deeply concerned by the hurried nature of the nominations and the Senate's proceedings.
>
> Yesterday, my legal counsel provided your attorney with authority supporting my ability to withdraw these nominations from the Office of the Governor. The law is clear that those nominations are no longer viable. If the former nominees' hearings continue, I will have no choice but to secure clarity through the courts. Too many lives depend on the stability of the Port and its leadership.

(A84.)

Notwithstanding the letters from the Governor to the State Senate stating that the nominations to the DSPC Board had been withdrawn, the Senate Executive Committee proceeded with the January 30, 2025 hearings on the nominations. (*See* A78.) At the conclusion of the hearing, the four withdrawn nominees were voted "Out of Committee." (*See* A81.)

On January 30, 2025, Governor Meyer requested an opinion of the Justices concerning the proper construction of Article III, Sections 9 and 12 of the Delaware Constitution. (A85-88, 90-93.) More specifically, Governor Meyer asked: "Did I have the discretion to withdraw the nominations prior to Senate confirmation?" and "If the answer to the preceding question is in the negative, if the Senate votes to confirm the nominations, do I have the discretion to withhold issuing commissions to the subject offices?" (A92.)

The same day, the General Assembly passed Senate Concurrent Resolution 16, "request[ing] an advisory opinion of the Justices of the Delaware Supreme Court regarding whether a Delaware Governor can withdraw nominations submitted by the preceding Governor that otherwise are properly before the State Senate." (A95.) At the end of the day on January 30, 2025, the General Assembly went into recess until March 11, 2025. (A113-114.)

The following day, the General Assembly submitted its request for an opinion of the Justices concerning the proper construction of Article III, Section 9. (A96.) The General Assembly asked:

> (1) Did the Delaware Constitution, including Article III, Section 9 thereof, empower Governor Bethany Hall-Long to submit nominations to the State Senate on a date between January 7, 2025, and January 21, 2025?
>
> (2) If the answer to Question 1 is affirmative, does the Delaware Constitution, including Article III, Section 9 thereof, and separation of powers considerations imbued therein, permit Governor Matthew Meyer to withdraw the Nominations lawfully before the Senate for consideration?

(*Id*.)

By Order entered February 6, 2025, the Justices consolidated the two actions, appointed counsel to brief the positions of Governor Meyer and the General Assembly, and asked them to address the following four questions:

> (1) Given Supreme Court precedent, should the Court respond to the questions from the Governor and the General Assembly through [10] *Del.* § 141?
>
> Assuming the answer to Question 1 is affirmative:
>
> (2) Did the Delaware Constitution, including Article III, Section 9, empower Governor Bethany Hall-Long to submit Diamond State Port Corporation nominations to the State Senate between January 7, 2025 and January 21, 2025?
>
> (3) Assuming the answer to Question 2 is affirmative, did the

Delaware Constitution, including Article III, Section 9, and separation of powers considerations, permit Governor Meyer to withdraw those nominations before Senate confirmation?

(4) Assuming the answer to Question 3 is negative and the Senate votes to confirm the nominations, does Governor Meyer have the discretion to withhold commissions for confirmed nominees to the Diamond State Port Corporation?

(Dkt. 3.)

ARGUMENT

I. THE JUSTICES SHOULD RESPOND TO THE QUESTIONS FROM THE GOVERNOR AND THE GENERAL ASSEMBLY.

A. Question Presented

Given Delaware Supreme Court precedent, should the Justices respond to the questions from the Governor and the General Assembly through 10 *Del. C.* § 141 ("Section 141")?

B. Scope of Review

Pursuant to Section 141, 29 *Del. C.* § 2102, and Delaware Supreme Court Rule 44, the Justices have original jurisdiction to hear and respond to questions from the Governor and the General Assembly.

C. Merits of the Argument

Yes, the Justices should respond to the questions from the Governor and the General Assembly. Section 141 empowers the Justices to provide advisory opinions on constitutional issues upon request from the Governor or General Assembly to assist them in performing their duties. It provides, in pertinent part:

> The Justices of the Supreme Court, whenever the Governor of this State or a majority of the members elected to each House may by resolution require it for public information, or to enable them to discharge their duties, may give them their opinions in writing touching the proper construction of any provision in the Constitution of this State, or of the United States[.]

10 *Del. C.* § 141(a). *See also* 29 *Del. C.* § 2102 ("The Governor may, . . . to enable the Governor to discharge the duties of office with fidelity, request the members of the Supreme Court to give their opinions in writing touching the proper construction of any provision in the Constitution of this State[.]"); Del. Supr. Ct. R. 44 (establishing procedures for considering and responding to such requests).

Section 141 states that the Justices "*may* give their opinions" (emphasis added) granting them discretion in deciding whether to respond. *See In re Request of Governor for Advisory Opinion*, 722 A.2d 307, 309 (Del. 1998) ("Delaware law permits, but does not require, the Justices to give their opinions[.]"). But where, as here, the questions presented are "important [and] raise[] an issue of first impression," and it is "in the public interest to provide the answer in a timely manner[,]" there is a strong argument for the Justices to respond. *See id.*

The questions presented by the Governor and the General Assembly are not merely hypothetical but have "a bearing upon a present constitutional duty awaiting performance by" the State Senate and the Governor. *Opinions of the Justices*, 88 A.2d 128, 130 (Del. 1952). There is a live controversy over whether the Delaware Constitution prohibits the Governor from withdrawing the five DSPC Board nominations made by the previous Governor and, if the State Senate consents to those nominees despite their withdrawal, whether the Governor can then be mandated by a judicial order to appoint the withdrawn nominees by signing and

sealing their commissions. These questions involve the proper construction of the Delaware Constitution and significant separation of powers considerations, important issues on which the Justices "can speak authoritatively." *Opinion of the Justices*, 413 A.2d 1245, 1248 (Del. 1980). Indeed, Justices frequently have provided advisory opinions concerning the proper construction of the Delaware Constitution. *See, e.g.*, *Request of the Governor*, 722 A.2d at 308 (opining on whether a Delaware State Police officer held "office under this State" for purposes of Delaware Constitution Article II, Section 14); *Opinion of the Justices*, 647 A.2d 1104, 1105 (Del. 1994) (opining on the application of Article III, Section 11 to the possible appointment of the Governor to Amtrak's board of directors); *Opinion of the Justices*, 358 A.2d 705, 706-07 (Del. 1976) (opining on the Governor's duties under Article III, Section 18 to approve, veto or ignore a bill); *Opinion of the Justices*, 352 A.2d 406, 407 (Del. 1976) (opining on the Governor's authority under Article III, Section 9, to appoint directors to Farmers Bank of the State of Delaware); *Opinion of the Justices*, 330 A.2d 764, 765 (Del. 1974) (opining on the proper construction of Article II, Section 4 as it relates to the Governor's executive privilege to recall the General Assembly into session); *Opinion of the Justices*, 320 A.2d 735, 736 (Del. 1974) (opining on when the Governor must "submit to the State Senate a name for confirmation" where a judgeship becomes vacant while the State Senate is in session); *Opinion of the Justices*, 264 A.2d 342, 343 (Del. 1970) (opining on the

scope and meaning of Article XVI, Sections 1 and 2 as they relate to amendments revising the Constitution); *Opinion of the Justices*, 225 A.2d 481, 482 (Del. 1966) (opining on the proper construction of the Delaware Constitution as it relates to the right of the Lieutenant Governor, as Senate President, to vote when the State Senate is equally divided).

Moreover, the Governor's power to withdraw nominees presents issues of first impression for Delaware. *See* Randy J. Holland, *The Delaware State Constitution* 140 (2nd ed. 2017) (noting that the construction of Article III, Section 12 of the Delaware Constitution "has not been subject to judicial interpretation"). This appears to be the only instance where both the Governor and the General Assembly have simultaneously requested an opinion on the proper construction of Article III, Sections 9 and 12 of the Delaware Constitution regarding the same issues and facts.

Additionally, the questions raised present significant public policy concerns, warranting a prompt resolution by the Justices. The DSPC is a public instrumentality of the State of Delaware and has received significant taxpayer investment. (*See* A1-45.) The question of who will be appointed to serve on the DSPC Board therefore is one of significant public interest. Providing a timely answer would prevent further uncertainty over the governance of the DSPC and ensure public confidence in its leadership.

In their February 6 Order, the Justices cited cases in which the Justices previously declined to answer questions posed on unrelated issues. Those cases are distinguishable. Here, the issue is not a particular "person's existing claim to office" where regular binding adversary proceedings would be available at the trial court level. *See Opinion of the Justices*, 424 A.2d 663, 664 (Del. 1980) (declining to advise on "the issue of the right to hold public office" because regular legal proceedings were available). Nor do the questions here involve proposed legislation that may change before enactment. *See Opinion of the Justices*, 200 A.2d 570, 572 (Del. 1964) (declining to answer a hypothetical question about the constitutionality of proposed legislation, not yet submitted to the General Assembly, that had "no bearing upon a present constitutional duty requiring" action).

Rather, in light of the active controversy concerning constitutional issues of first impression, the precedent supporting advisory opinions in similar cases, and the public interests at issue, the Governor respectfully submits that the questions presented merit consideration by the Justices. Their guidance would help resolve any uncertainties concerning the Governor's and State Senate's constitutional powers and duties and ensure compliance with the separation of powers.

II. GOVERNOR MEYER DOES NOT DISPUTE THAT THE DELAWARE CONSTITUTION PERMITTED GOVERNOR HALL-LONG TO SUBMIT DSPC BOARD NOMINATIONS TO THE STATE SENATE ON JANUARY 17, 2025.

A. Question Presented

Assuming the answer to Question 1 is affirmative, did the Delaware Constitution, including Article III, Section 9, empower Governor Bethany Hall-Long to submit DSPC Board nominations to the State Senate between January 7, 2025 and January 21, 2025?

B. Scope of Review

See Section I.B., *supra*.

C. Merits of the Argument

Yes, and Governor Meyer does not dispute that former Governor Bethany Hall-Long was the Governor of Delaware between January 7 and 21, 2025, or that the Delaware Constitution, including Article III, Section 9, expressly empowers Governors—including former Governor Bethany Hall-Long—to submit the names of potential DSPC Board appointees to the State Senate for its consent. Nevertheless, as explained below, those nominations were subject to withdrawal by the Governor prior to consent from the State Senate and, even if State Senate consent were given, before a formal commission issued from the Governor in office.

III. GOVERNOR MEYER HAS THE AUTHORITY TO WITHDRAW A NOMINATION BEFORE THE STATE SENATE PROVIDES CONSENT.

A. Question Presented

Assuming the answer to Question 2 is affirmative, did the Delaware Constitution, including Article III, Section 9, and separation of powers considerations, permit Governor Meyer to withdraw those nominations before State Senate confirmation?

B. Scope of Review

See Section I.B., *supra*.

C. Merits of the Argument

Yes, the Delaware Constitution and separation of powers considerations give Governor Meyer the discretion and authority to withdraw nominations for appointments to state offices before the State Senate gives its consent.

The Delaware Constitution gives the Governor discretionary power over appointments, limited only by the need for State Senate consent before the Governor may finalize the appointment. Del. Const. art. III, §§ 9, 12. This was well understood in the federal context when the Delaware Constitution was drafted, and nothing in the Delaware Constitution suggests a contrary intent. The Governor's right to withdraw nominations is an implicit part of his appointment power, a conclusion endorsed by numerous federal and state courts. Moreover, an

interpretation of the Delaware Constitution that allows the Governor to withdraw a request for State Senate consent best respects the separation of powers embraced by the Delaware Constitution. Each of these points is further explained below.

1. The Governor Has Discretionary Appointment Power, Including Authority to Withdraw Nominations Until the Nominee has a Vested Right to Office.

"Generally, resort to constitutional history or construction is not appropriate where the language of the constitution is clear and unequivocal. Constitutional phrases must, if possible, be given their ordinary or plain meaning. Courts are called upon to construe the language of the constitution only when it is in some way obscure or doubtful in its meaning." *State, ex rel. Oberly v. Troise*, 526 A.2d 898, 902 (Del. 1987) (citations omitted). The Court may "deem it advisable to consider whether the Delaware constitutional debates offer evidence which might support action by this Court to apply a judicial remedy inconsistent with the ordinary meaning of the express language of article III, § 9." *Id*.

Article III, Section 9 of the Delaware Constitution expressly empowers the Governor to appoint "by and with the consent of a majority of all the members elected to the Senate, such officers as he or she is or may be authorized by this Constitution or by law to appoint." Del. Const. art. III, § 9. Delaware statutory law, in turn, authorizes the Governor to appoint seven directors to the board of the DSPC: "The remaining 7 [non-*ex officio*] directors shall be appointed by the Governor with

the advice and consent the Senate." 29 *Del. C.* § 8781(b) ("Section 8781"). This grants the Governor broad discretion in appointing DSPC Board members, constrained only by the consent of the State Senate to the Governor's selection.

Importantly, nothing in the Delaware Constitution or Section 8781 suggests that the Governor's discretionary power over appointments to the DSPC Board ends once the name of a nominee is submitted to the State Senate, or that the Governor otherwise is prohibited from withdrawing a nominee from consideration prior to (or even after) receiving State Senate consent. Indeed, Section 8781 provides that the Governor's appointment must be made with the "advice" and consent of the State Senate. 29 *Del. C.* § 8781(b). State Senate "advice" would be meaningful only if the Governor could alter nominations after submitting them to the State Senate and receiving such advice.

When the Delaware Constitution was drafted in 1897, it had been well understood for almost a century that the analogous federal system permitted the President to withdraw a nominee prior to consent from the United States Senate (and, as described below, even *after* such consent). In the 1803 decision *Marbury v. Madison*, the United States Supreme Court held that the President's discretion over the appointment of officers continued up until the time the President signed the commission for candidates after the U.S. Senate had consented, which was the final Presidential act required to give the appointee the right to take office. 5 U.S. 137,

157 (1803); *see also Mimmack v. United States*, 97 U.S. 426, 430 (1878) ("The President's appointing power is only completely exercised when he performs the last act required from him: which is signing the commission, and causing to be thereunto affixed the seal of the United States."); *Appointment of A Senate-Confirmed Nominee*, 23 Op. O.L.C. 232 (1999) ("*1999 Counsel Opinion*") ("[T]he President, until he takes the final public act necessary to complete the appointment, retains the full discretion not to appoint a nominee. . . . [T]he Constitution commits to the President's sole discretion whether to appoint the nominee [even if the nominee has been confirmed by the Senate].").

Given that both the Delaware Constitution and the U.S. Constitution structure the executive's appointment power in a similar manner, particularly in their requirement for legislative consent, federal precedent interpreting Article II, Section 2 of the U.S. Constitution is persuasive authority when considering questions about the Governor's appointment power. *Compare* Del. Const. art. III § 9 ("to appoint, by and with the consent of a majority of all the members elected to the Senate") *with* U.S. Const. art. II, § 2 ("shall nominate, and by and with the Advice and Consent of the Senate, shall appoint"); *see also State ex rel. Gebelein v. Killen*, 454 A.2d 737, 741 (Del. 1982) (indicating that where the Delaware and U.S. Constitutions are similar, "interpretations of the federal constitutional provision, at least those in vogue in 1897, are entitled to great weight").

Had the framers of the 1897 Delaware Constitution intended for Delaware to adopt the opposite approach—that the Governor's appointment power would end upon submission of a nominee for State Senate consent, with the Governor thereafter powerless to withdraw the nominee—the drafters surely would have included language to that effect.

That they did not demonstrates that they intended the Governor's appointment power, like that of the President, to continue until the candidate has a vested right to office, which does not occur before the State Senate consents to the candidate's appointment under Article III, Section 9 and, as explained below, the Governor issues a commission under Article III, Section 12. *See Barron v. Kleinman*, 550 A.2d 324, 326 (Del. 1988) (explaining that State Senate consent is a required step in the appointment process before a candidate has a right to office). Before then, the nomination is merely an expression of the Governor's intent to appoint with the advice and consent of the State Senate and remains subject to change at the Governor's discretion. *See Appointments to Off.—Case of Lieutenant Coxe.*, 4 Op. Atty's Gen. 217, 219 (1843) ("*Lieutenant Coxe*") ("The nomination is not an appointment; nor is that nomination followed by the signification of the advice and consent of the Senate . . . sufficient of themselves to confer upon a citizen an office under the constitution. They serve but to indicate the purpose of the President to appoint, and the consent of the Senate that it should be effectuated; but they do not

divest the executive authority of the discretion to withhold the actual appointment from the nominee.") (quoted in *Dysart v. United States*, 369 F.3d 1303, 1311 (Fed. Cir. 2004)). Here, Governor Meyer validly exercised this discretion when he withdrew the nominations for the DSPC Board on January 21, 2025, prior to State Senate consent.

This conclusion is also supported by long-established constitutional principles providing that when a power (such as the appointment of officers) is expressly granted to a branch of government, the ancillary or implied powers necessary to make that authority effective are also granted if not expressly prohibited. *See McCulloch v. Maryland*, 17 U.S. 316, 316 (1819) ("There is nothing in the constitution of the United States . . . which excludes incidental or implied powers. If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.").

The Governor's appointment power includes the implicit authority to withdraw specific candidates from consideration prior to State Senate consent. *See Hall v. Prince George's Cnty. Democratic Cent. Comm*., 64 A.3d 210, 225 (Md. 2013) ("While our case concerns an uncompleted nomination, rather than an uncompleted appointment . . . or a contract, the principle holds true: one who has the

power to nominate or offer has the inherent power to rescind that nomination or offer until it has been accepted.").

Nothing in the Delaware Constitution or any statute prohibits this, and without license to withdraw nominations, the Governor's control over appointments would be severely restricted, undermining the Governor's role in scrutinizing potential appointees. *See In re Governorship*, 603 P.2d 1357, 1365 (Cal. 1979) ("The withdrawal power prolongs gubernatorial scrutiny of the appointment, furthering the confirmation's ultimate purpose of assuring thorough consideration of the candidate's qualifications."); *Hall*, 64 A.3d at 224 ("[T]he ability to rescind a nomination that has not been acted upon furthers the goal of ensuring that the process is a deliberative one."). For example, the Governor could be forced to proceed with a candidate whom he no longer deems appropriate for the position at issue, undermining effective governance and executive accountability.

The State Senate itself recognizes that, when a branch of government is given the express authority to take an action subject to the approval of another branch, it retains the authority to withdraw the proposed action before such approval is given. Rule 40(b) of the Delaware Rules of the Senate, adopted by the passing of Senate Resolution 2 on December 16, 2024, provides that when a bill or resolution has been approved by the State Senate and communicated to the Governor for potential signing into law, the State Senate can move to reconsider the bill or resolution and

request that the Governor return it. Del. S. Res. 2, 153rd Gen. Assem., Reg. Sess. (2024) ("When a bill or joint resolution on which a vote has been taken has gone out of the possession of the Senate and been communicated to the Governor, the motion to reconsider must be accompanied by a motion to request the Governor to return it."). The logic underlying this rule is clear: the legislative branch maintains a degree of control over its own work product until it is acted upon by the executive branch. If the Governor were to ignore such a request and proceed to sign a bill that the Senate had formally withdrawn for reconsideration, that would likely constitute a significant breach of legislative authority.

This principle extends to the judiciary as well. *See* Delaware Supreme Court Internal Operating Procedures § XVII(4) ("If a majority of the active justices of the Court vote for rehearing *en banc*, the named author or ranking active Justice of the majority enters an order which grants rehearing, vacates the panel's opinion and the judgment entered thereon, and assigns the case to the calendar for rehearing *en banc* on a priority basis."). If the Supreme Court were to issue a panel opinion stating that the Governor or State Senate had the authority to take a particular action, but later vacated that opinion, the Governor or State Senate could not continue to rely on the now-withdrawn opinion as the basis for its actions. Courts can issue opinions and then reconsider their rulings through rehearing or vacatur, recognizing that their authority over withdrawing a decision persists.

This continued exercise of the State Senate's discretion over unsigned legislation, and the Courts' discretion to vacate opinions, is similar to the Governor's continued discretion over the potential appointment of directors to the DSPC Board: having communicated a nomination to the State Senate, the Governor may reconsider the nomination and request the State Senate to withdraw it. Each branch of government has an implicit authority to reconsider its own proposals before they become final. The opposing argument—that the Governor's power over a nomination ends once it is submitted to the Senate for "advice and consent"—ignores the broader governmental practice of allowing reconsideration before final action by the authorized branch of the government.

Further on this point, the State Senate has acknowledged the Governor's authority to replace nominees submitted for State Senate consent with other nominees. The January 21, 2025 letter to Governor Meyer from the President Pro Tempore stated that it was "well within [Governor Meyer's] rights as Governor" to "advance his own nominees" for the DSPC Board "for Senate consideration." (A75.) The submission of different nominees for the DSPC Board—an acknowledged "right" of the Governor—necessarily infers that prior nominees are withdrawn from consideration and replaced with the Governor's new nominees. *See Gebelein*, 454 A.2d at 744 (explaining Chief Justice Taney's 1832 "justification of a recess appointment" as observing that the "President could not nominate another

person for the same office until [the nomination] . . . was either withdrawn by him or finally acted on by the Senate"); *McBride v. Osborn*, 127 P.2d 134, 137 (Ariz. 1942) ("The law does not contemplate . . . that [the governor] could appoint a second person and submit his name to the senate for confirmation while the name of his first appointee was still before it. There was only one office to fill and if [the governor] could submit two names to the senate for it he could submit . . . any other number and by so doing say in effect, to that body: . . . Take your choice. . . . Such a course as this would make the senate the sole appointing power . . . and enable a governor, disposed to do so, to avoid his responsibility.").

2. Case Law In Other Jurisdictions Supports the Conclusion that Governor Meyer Has the Power to Withdraw Nominees Prior to State Senate Consent.

Although the Governor's authority to withdraw nominations appears to be an issue of first impression for Delaware courts, other jurisdictions have considered it. When interpreting the Delaware Constitution or otherwise evaluating constitutional questions, Delaware courts often look to decisions by courts analyzing similar issues in other jurisdictions. *See, e.g.*, *Request of Governor*, 722 A.2d at 312 (looking at decisions applying Indiana and Kansas law in determining whether police officers are public officers); *Johnson v. Delaware Dep't of Corr.*, 1983 WL 473278, at *2 (Del. Super. July 25, 1983) ("[I]t has been the practice of the Delaware courts to interpret the Constitution of Delaware consistently with the federal courts'

interpretation of the United States Constitution."). In the more than two hundred years since *Marbury* was decided, courts in other jurisdictions have consistently held that, where a governor is empowered to appoint officers, subject to the consent of the senate or a similar body, the governor has the authority to withdraw nominations:

- *Governorship*, 603 P.2d at 1365-66 ("Past governors appear to have withdrawn appointments from commission consideration without challenge of their power to do so. There are good reasons, for upholding the power. The fact that the appointee has not yet acquired any rights eliminates the objection that withdrawal constitutes removal from office. . . . Finally, the general rule in other states is that 'where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested.' Therefore we conclude that Governor Brown's withdrawal of the Arabian appointment was valid.") (citations omitted).

- *In re Advisory Opinion to the Governor*, 247 So.2d 428, 433 (Fla. 1971) ("[T]he only appointments over which the Senate has confirmation jurisdiction are those submitted by [the Governor] and those made by [the Governor's] predecessor and not recalled by [the Governor]. Upon [the Governor] recalling any of the appointments the confirmation jurisdiction of the Senate ceases and that body is under a lawful obligation to return them to [the Governor].").

- *Burke v. Schmidt*, 191 N.W.2d 281, 284 (S.D. 1971) ("It is sometimes claimed . . . that if the action of the Governor is deemed an 'appointment' the Governor may not withdraw it, but if it is a 'nomination' the Governor may withdraw it. We do not believe the nomenclature used ought to be that test, but rather whether the action of the executive is final and complete and places the appointee in office without further action.") (citations omitted) (holding that the state senate's approval of candidates for state office was invalid because the governor had withdrawn their nominations).

- *Mitchell v. Missouri State Highway Patrol*, 809 S.W.2d 67, 70 (Mo. Ct. App. 1991) ("That appointment was withdrawn from consideration by the senate. There was no appointment that remained before the senate upon

which it could give its advice and consent. The governor's withdrawing the appointment . . . prevented the senate from either giving its advice and consent or failing to do so.").

- *State ex rel. Todd v. Essling*, 128 N.W.2d 307, 312 (Minn. 1964) ("[I]n cases where the appointment process is initiated by a nomination, with no power vesting in the appointee to exercise the functions of the office until confirmation, the rule laid down in the *Marbury* case has no application until the senate confirms and the appointing authority issues a commission to the officer. Such was the case under the applicable Federal appointive process in the *Marbury* case.").

- *McBride*, 127 P.2d at 137-38 (finding that the "action of the senate in voting approval of the appointment of petitioner after his name had been withdrawn from its consideration was ineffective" because the governor could "for any reason he thought proper change his mind and withdraw petitioner's name from the consideration of the senate any time before that body completed the appointment and made it final and effective by approving it").

- *McChesney v. Sampson*, 23 S.W.2d 584, 587 (Ky. 1930) ("Furthermore, in cases where the nomination must be confirmed before the officer can take the office or exercise any of its functions, . . . nominations may be changed at the will of the executive until title to the office is vested.").

- *Harrington v. Pardee*, 82 P. 83, 84 (Cal. Ct. App. 1905) ("Plaintiff has presented no authority which, in our opinion, tends even in the slightest degree to show that the governor has exhausted his discretionary power when he nominates a man for office and sends the name to the senate.").

Nothing in the Delaware Constitution (or any other aspect of Delaware law) suggests that Delaware should reject this common understanding that governors retain the discretionary power to rescind nominations prior to state senate consent.

3. The Separation of Powers Requires Preserving Executive Control Over Appointments.

The Governor's authority to withdraw nominations furthers the separation and balance of powers between the executive and legislative branches that are enshrined in Delaware's constitutional structure. *See Request of Governor*, 722 A.2d at 314 (emphasizing the necessity to analyze Delaware constitutional principles "through the prism of fundamental principles of separation of powers"). As the Delaware Supreme Court explained in *Oberly*:

> [T]he separation of powers . . . is deeply ingrained in the jurisprudence of the State and of the nation. Broadly stated, the doctrine stands for the proposition that the coordinate branches of government perform different functions and that one branch is not to encroach on the function of the others. Separation of powers is intended to make the three separate departments of government independent within the scope of their constitutionally conferred fields of activity, "subject to any constitutional restrictions, whether express or necessarily implied." "Each of the three branches has been assigned certain powers and must respect the power given to the other two branches."

526 A.2d at 904 (citations omitted). Because separation of powers is "fundamental" to Delaware constitutional law, one branch "may not encroach upon the field of either of the others." *Request of Governor*, 722 A.2d at 318.

This separation of powers is implicated by the appointment process. *Barron*, 550 A.2d at 326 ("We agree that the appointment process implicates the doctrine of separation of powers to the extent that Senate confirmation is required before the

Governor's power of appointment, to an office requiring confirmation, takes effect[.]"). The Delaware Constitution divides the appointment power between the executive and legislative branches, with the Governor empowered to initiate appointments (as provided by the Constitution and/or by statute) and the State Senate granted the role of providing consent, followed by a final commission from the Governor appointing the candidate to office. Del. Const. art. III, §§ 9, 12. Maintaining this balance requires that the Governor be "allowed to exercise a freedom of choice in selecting those appointees whom he feels are qualified, as the people look to him for leadership in the operation of their government[,]" and that the Governor remain accountable for the appointments made under executive authority. *Advisory Opinion*, 247 So.2d at 433.

The State Senate's role in the appointment of DSPC Board members is limited to "advice and consent" to or rejection of the Governor's nominations, not compelling or controlling the appointment of nominees. Del. Const. art. III, § 9; 29 *Del. C.* § 8781(b); 3 Charles G. Guyer & Edmond C. Hardesty, *Debates and Proceedings of the Constitutional Convention of the State of Delaware* (1958) (William Spruance: "That is the object of the confirmation by the Senate—to turn down unsuitable men; and in the practical working of it the Governors, in making appointments are more careful to see that suitable men are sent in."); 4 *id*. at 2725 (Ezekiel Cooper: "I submit that [State Senate consent] is only intended to put a check

upon the Governor. That is all. It is only to make the Governor feel that with this check he must be a little more careful in the selection" of officers).

The State Senate "reserve[d] unto itself" *only* the power to advise and consent to the prospective appointment of officers the Governor is authorized by law to appoint; thus, the Governor must retain control over the nomination of candidates for appointment to preserve the balance between the two branches. *Opinion of the Justices*, 380 A.2d 109, 113-14 (Del. 1977) ("The [separation of powers] Doctrine, dividing government among the three separate branches, is deemed a basic concept in the theory, history, and development of constitutional government . . . to safeguard the independence of each branch of the government and protect it from domination and interference by the others.").

Plainly stated, the Senate has no power to compel the Governor to appoint withdrawn nominees:

> [T]he General Assembly's power in some instances to define the offices to which the governor may make appointments *does not carry with it the right to indicate exactly whom the governor may appoint*. The courts were quick to protect the executive prerogative when *the legislature tried to constrain the governor's discretion in selecting appointees* by requiring the governor to appoint officers nominated by a third party.

William B. Chandler, III & Pierre S. DuPont IV, Rights and Separation of Powers-Executive Article III, *The Delaware Constitution of 1897: The First One Hundred*

Years 107 (1997) (Randy J. Holland, Editor-In-Chief) (citing *State ex rel. James v. Schorr*, 65 A.2d 810 (Del. 1948)) (emphasis added).

The Delaware Constitution having "authorized" the Governor "by law to appoint" DSPC Board members, the State Senate cannot compel the Governor to maintain or proceed with a specific nomination over the Governor's objection. Otherwise, after having reserved for itself only the power to advise and consent, it would effectively limit the Governor's control over the appointment process and infringe upon the separation of powers.

4. These Principles Are Not Affected By a Change In the Person Serving As Governor

To be clear, a Governor's power to withdraw nominees for appointment applies regardless of whether the individual serving as Governor when the nomination is made is the same individual serving when the nomination is withdrawn. "The office of the Governor is a continuing one, irrespective of the person who occupies it, and a succeeding Governor has the same power over an appointment as the predecessor Governor would have had if he continued in office." *Burke*, 191 N.W.2d at 283 (noting this is the "general rule"). If former Governor Hall-Long had the authority to withdraw the names of nominees she submitted to the State Senate (which she did), Governor Meyer retains that same authority to withdraw nominees notwithstanding that they were submitted by Governor Hall-Long.

IV. THE GOVERNOR HAS AUTHORITY TO NOT SIGN A COMMISSION FOR ANY NOMINEE, EVEN IF THAT NOMINEE HAS RECEIVED THE "CONSENT" OF THE SENATE.

A. Question Presented

Assuming the answer to Question 3 is negative and the State Senate votes to confirm the nominations, does Governor Meyer have the discretion to withhold commissions for confirmed nominees to the Diamond State Port Corporation?

B. Scope of Review

See Section I.B., *supra*.

C. Merits of the Argument

Yes, even assuming (contrary to fact and law) that Governor Meyer could not withdraw from consideration a nominee submitted for State Senate consent while the nominee is still under consideration, Delaware constitutional principles provide the Governor with discretion to withhold commissions from nominees, even those to whom the State Senate has consented.

1. The Appointment Process Is Not Complete Until the Governor Grants the Commission Following State Senate Consent.

The consent of the State Senate is not the final step in the appointment of a state officer. Article III, Section 12 of the Delaware Constitution provides that commissions for appointed officers "shall be sealed with the great seal and signed by the Governor," signifying that the final and distinct act of appointment to office

is the issuance of a commission from the Governor. Del. Const. art. III, § 12. This is not a mere formality or ministerial act; it officially vests the appointee with legal authority to assume office. *See Oberly*, 526 A.2d at 899 (indicating that State Senate consent "constitutionally authoriz[es] the Governor to issue valid full-term commissions to his nominees"); 29 *Del. C.* § 2316 ("Whenever the Governor commissions to office any person, whom the Governor is or may be authorized [i.e., not "required"] by the Constitution or by law to commission and whose appointment is required to be confirmed by the Senate, the Secretary of State shall collect from every such person as fee for the commission[.]").

The language in Article III, Section 9 reinforces the commonly understood meaning that the issuance of a commission by the Governor is an act of discretion, not a ministerial act. Section 9 states that the Governor has the power to fill vacancies during the Senate's recess "by granting Commissions which shall expire at the end of the next session of the Senate." This wording makes it clear that the actual granting of a commission by the Governor is the act that effectuates an appointment under section 9. Nothing in section 9 requires the Governor to issue a commission, or gives the legislative or judicial branches the authority to compel the Governor to seal and "sign" a commission. *See* Oberly, 526 A.2d at 905 ("The Senate's action, or inaction, on gubernatorial appointments rests on its constitutional authority to confirm gubernatorial appointments and even if, arguendo, such power

is deemed administrative, it is not a ministerial duty which can be judicially enforced.").

Without the public act of a signed commission, the nominee lacks legal authority to take office and the proposed appointment remains subject to reconsideration by the Governor. This was eloquently explained by an 1843 Attorney General opinion on the analogous federal process:

> "To constitute an appointment[,] . . . it is necessary—1st, that the President should nominate the person proposed to be appointed; 2d, that the Senate should advise and consent that the nominee should be appointed; and, 3d, that, in pursuance of such nomination and such advice and consent, the appointment should be actually made.
>
> The nomination is not an appointment; nor is that nomination followed by the signification of the advice and consent of the Senate, that it should be made sufficient of themselves to confer upon a citizen an office under the constitution. They serve but to indicate the purpose of the President to appoint, and the consent of the Senate that it should be effectuated; but they do not divest the executive authority of the discretion to withhold the actual appointment from the nominee. To give a public officer the power to act as such, an appointment must be made in pursuance of the previous nomination and advice and consent of the Senate, the commission issued being the evidence that the purpose of appointment signified by the nomination has not been changed."

Dysart, 369 F.3d at 1311 (quoting *Lieutenant Coxe*).

The 1843 Attorney General opinion illustrates that it was well understood at the time of the 1897 Delaware Constitutional Convention that the President or a

governor had discretion to refuse appointing a nominee even after senate consent. *See also Marbury*, 5 U.S. at 157 (emphasizing that issuing a commission is the final step in the appointment process and the President retains discretion over the appointment until this step is completed); *Lane v. Commonwealth*, 103 Pa. 481, 485 (Pa. 1883) ("Before [the Governor] completes the appointment the senate shall consent to his appointing the person whom he has named. . . . If it consent [sic] he may or may not, at his option, make the appointment. If for any reason his views as to the propriety of the proposed appointment change, he may decline to make it. That option is not subject to the will of the senate. Until the governor executes the commission, the appointment is not made. Prior to that time at his mere will, he may supersede all action had in the case[.]").

Unsurprisingly, over the decades since, numerous courts and authorities in various jurisdictions have continued upholding the President's and governors' discretion with respect to post-Senate-consent appointment power:

- *Dysart,* 369 F.3d at 1316 ("The Constitution contemplates that, after confirmation, the President may refuse to execute the appointment. All Presidential appointments . . . involve a discretionary decision.").
- *Harris v. United States*, 102 Fed. Cl. 390, 405-06 (Fed. Cl. 2011) (appointment requires nomination, Senate confirmation, and a commission, and the President may refuse to issue the commission even after confirmation).
- *In D'Arco v. United States*, 441 F.2d 1173, 1175 (Ct. Cl. 1971) ("Chief Justice Marshall's reasoning [in *Marbury*] teaches that . . . the executive

could still refuse to complete the appointment, after Senate confirmation, by failing to prepare or sign the commission.").

- *Harrington*, 82 P. at 84 ("The 'appointment' is not made until the 'commission' is issued, and issuing the same is the last act, and in issuing the commission the Governor is performing an executive, and not a ministerial, act, and is therefore acting under his discretionary powers, and may or may not issue the commission, although the Senate may have advised it and consented that he should make the appointment. Plaintiff has presented no authority which, in our opinion, tends even in the slightest degree to show that the governor has exhausted his discretionary power when he nominates a man for office and sends the name to the senate.").

- *State ex rel. Johnson v. Hagemeister*, 73 N.W.2d 625, 631 (Neb. 1955) (The "Constitution of Nebraska, provides: 'The governor shall nominate and by and with the advice and consent of the senate[,] . . . appoint all officers[.] . . . This constitutional provision contemplates a nomination, confirmation by the Legislature, and pursuant thereto, appointment by the Governor. In such instances the appointment, which would include the commission, is the third and final act in the appointive procedure.").

- *1999 Counsel Opinion* ("It has long been established that the President, until he takes the final public act necessary to complete the appointment, retains the full discretion not to appoint a nominee. The appointment is the voluntary act of the President, and the consent of the Senate does not place him under any legal obligation. Accordingly, until the President makes the appointment, which in the case of a Senate-confirmed official is customarily evidenced by the President's signing a commission, the Constitution commits to the President's sole discretion whether to appoint the nominee.").

Had the drafters of the Delaware Constitution intended for Delaware to tread a path in the opposite direction, they would have made that clear. Yet, they did not. *See Harrington*, 82 P. at 84 ("[A] principle established so long ago"—that a governor may withhold a commission from a candidate despite senate consent—"so closely

adhered to, and so unanimously sanctioned by all the courts, must be too well engrafted into our system of government to be disturbed now.").

2. Senate Consent Is a Necessary Prerequisite to Final Appointment, But Is Not a Command to Issue a Commission.

Instead, the language that the drafters of the Delaware Constitution did use evidences their intent to follow the post-Senate-consent principles established in *Marbury* and described in the 1843 Attorney General opinion.

Under Article III, Section 9 of the Delaware Constitution, the Governor appoints officers "by and with the consent of the Senate," demonstrating that State Senate consent is required before a nominated candidate can ever take office. But neither Section 9, nor any other provision of the Delaware Constitution, suggests that State Senate consent is the final step of the process giving the candidate the right to office and compelling the Governor to issue a commission. Instead, State Senate consent is only a condition precedent to the Governor's exercise of discretion in making the appointment final by issuing a commission.

This conclusion is supported by drafter's use of the term "consent" in providing that state officers are to be appointed by the Governor with the "consent" of the State Senate. The plain meaning of the word "consent" is a "voluntary yielding to what another proposes[.]" *Black's Law Dictionary* (12th ed. 2024); *see also* N. Webster, *An American Dictionary of the English Language* (1828),

https://webstersdictionary1828.com/Dictionary/consent (same). Consent means only that one is not opposed to an action; it is not a command that the action take place. *Mitchell v. Del Toro*, 2024 WL 4891906, at *6 (D.D.C. Nov. 26, 2024) (explaining that Senate consent does not automatically appoint the officer because appointment is a voluntary presidential act and a "congressionally mandated act is not a voluntary presidential act").

In other words, before the Governor can appoint and commission a nominee, the State Senate must first indicate that it is willing to "yield[] to what [the Governor] proposes." *See* Consent, *Black's Law Dictionary* (12th ed. 2024). That does not mean, however, that the Governor is bound by such consent, any more than a police officer would be legally required to proceed with searching a vehicle if the driver gave consent.

3. Separation of Powers Principles Support Continuing Discretion to Issue Commissions.

As described above, Delaware constitutional principles embrace the separation and balance of powers between the branches of state government, and those principles apply to the issuance of a commission for the same reasons previously discussed. *See,* Section III.C.3, *supra*. The balance between the Governor's discretion to appoint state officers and the State Senate's right to consent to those appointments is best maintained by ensuring that legislative authority is limited to precisely what the Delaware Constitution, and Section 8781 provide—the

power to advise and consent—and that the State Senate cannot compel the Governor to appoint specific persons.

Moreover, it is undisputed that Article III, Section 9 of the Delaware Constitution "does not provide for a judicial remedy for prolonged senatorial inaction on nominations submitted to the Senate by the Governor." *Oberly*, 526 A.2d at 906. Similarly, Section 9 provides no remedy for a Governor's inaction on signing a commission, even if the nominee received the "consent" of the State Senate.

4. Cases In Some Jurisdictions Suggesting Commissions Are Ministerial Do Not Apply.

In evaluating whether a governor can refuse to commission a state officer after receiving consent from the state senate, some courts in other states have found that, under the law of those states, executive discretion ends with state senate approval and the subsequent commission is a mere ministerial act. *See, e.g., McBride*, 127 P.2d at 137-38 (recognizing "there are a number of decisions sustaining" the view that a governor has discretion whether to issue a commission, but that under Arizona law, the appointee is entitled to office after senate approval and the commission is merely a "ministerial act").

Such cases are not applicable here. In Delaware, the Governor exercises discretion in determining whether the appointment is in the public interest before issuing the commission. Article III, Section 9 provides that the Governor "shall have

power" to appoint certain state officers, indicating that the Governor is authorized to act but without mandating any action. Thus, the decision to finalize an appointment by issuing a commission remains within the Governor's discretion and is not merely ministerial. Those cases suggesting otherwise do not apply here.

CONCLUSION

For the foregoing reasons, the undersigned counsel respectfully submit the position of the Governor that all four questions be answered in the affirmative.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ Martin S. Lessner
Martin S. Lessner (No. 3109)
Richard J. Thomas (No. 5073)
Elisabeth S. Bradley (No. 5459)
M. Paige Valeski (No. 6336)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Attorneys for the Position of Governor Meyer

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