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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 IN SUPPORT OF POSITION OF THE GENERAL ASSEMBLY

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NATURE OF PROCEEDINGS

This action arises from separate requests for an "Opinion of the Justices" from Governor Matthew Meyer and the Delaware State Senate of the 153rd General Assembly (the "Senate") related to the validity of then-Governor Bethany Hall-Long's appointments (the "Appointees" and the "Appointments") to the Diamond State Port Corporation ("DSPC") board of directors (the "DSPC Board") and Governor Meyer's attempt to withdraw those Appointments after they had been submitted to the Senate for confirmation.

The undersigned counsel herein provides the position of the General Assembly on the questions issued by the Court.

SUMMARY OF ARGUMENT

1. We respectfully submit that the Supreme Court should exercise its discretion and accept the invitation to respond to the questions from the General Assembly. An opinion of the Court will not provide mere advice on the "issue of the right to hold public office," *see Opinion of the Justices*, 424 A.2d 663, 664 (Del. 1980), but will instead provide important guidance regarding the proper construction of the Delaware Constitution.[1]

2. Upon Governor John C. Carney, Jr.'s resignation as Governor, the complete authority of the office of the Governor devolved upon then-Lieutenant Governor Hall-Long pursuant to Article III, Sections 19 and 20 of Delaware Constitution, including the right to appoint (i) officers pursuant to Article III, Section 9 of the Constitution and (ii) DSPC Board members pursuant to 29 *Del. C.* § 8781(b).

3. Governor Hall-Long had the authority to, and did, appoint DSPC Board members as Governor, which Governor Meyer could not withdraw because the Appointees had been submitted to the Senate for confirmation. Although Governor Meyer and the General Assembly presented questions to this Court characterizing the Governor's Appointments as "nominations," that term is semantically incorrect in describing the Governor's constitutional and statutory authority to make

[1] Unless otherwise stated, references herein to the "Constitution" or the "Delaware Constitution" refer to The Delaware Constitution of 1897, as amended.

appointments. Under state constitutions—like Delaware's—where an appointment right is subject only to later Senate confirmation, the executive branch's only, and therefore final, act is to appoint. At that time, the Governor's authority over the appointment process ends and authority vests in the legislative branch, which has the right to consent to, or reject, the appointee. Once the appointment has been submitted to the Senate for consideration, separation of powers considerations mandate that jurisdiction over the appointment process vests exclusively in the Senate, and that the Governor is without authority to withdraw a lawful appointee or otherwise interfere in Senate proceedings.

4. Governor Meyer asked the Court whether he could withhold commissions for the Appointees after Senate confirmation. We respectfully submit that this does not require an advisory opinion of the Court. The issuance of a commission is not necessary for the Appointments, is ministerial, and operates as mere evidence of an appointment. However, even if the Governor purported to withhold commissions, the Appointees could seek a writ of mandamus to compel the Governor to issue the commissions, providing the Appointees an adequate remedy at law.

STATEMENT OF FACTS

A. The Diamond State Port Corporation

The DSPC was created by statute as a public instrumentality of the State with the purpose of owning, operating, and maintaining the Port of Wilmington and related facilities.[2] Section 8781(b) provides for certain designated DSPC Board members by law and that "[t]he remaining 7 directors shall be appointed by the Governor with the advice and consent [of] the Senate."[3]

B. The Dispute

On January 7, 2025, Governor Carney resigned. Lieutenant Governor Hall-Long became Governor by operation of law.[4] On or about January 16, 2025, Governor Hall-Long issued letters appointing five candidates to fill vacancies on the DSPC Board pursuant to 29 *Del. C.* § 8781(b) (i.e., the Appointments).[5] Each letter stated that the Appointee was "to be appointed 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."[6] The Senate was in session at the time of the

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[2] 29 *Del. C*. § 8781(a).

[3] 29 *Del. C*. § 8781(b).

[4] Del. Const. art. III, § 20; A86 ("The Lieutenant Governor, Bethany Hall-Long, became Governor by operation of law.").

[5] A55–59.

[6] *Id.* The Appointment letters, the questions propounded to the Court, and the Court's questions to the parties use the terms "nominate" and "nominations." As

Appointments, having convened the 153rd General Assembly on January 14, 2025.[7] According to the website of the Delaware General Assembly,[8] the Appointments were filed in the Senate by the President Pro Tempore on January 20, 2025.[9]

Governor Meyer succeeded Governor Hall-Long on January 21, 2025.[10] The same day, Governor Meyer issued a letter to the Senate purporting to withdraw the Appointments.[11] The Senate President Pro Tempore responded to Governor Meyer's letter expressing the Senate's opinion that the Appointments were viable.[12]

On January 29, 2025, the Senate issued a Meeting Notice for a Senate Executive Committee session to be held the following morning to consider at least four of the Appointments.[13] On January 30, 2025, Governor Meyer wrote again to the Senate, stating that if the Appointments were considered by the Senate, the

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discussed *infra* n.78, this is semantically incorrect and the parties' use of the term has no legal significance.

[7] Del. Const. art. II, § 4; A86.

[8] The website says the Appointees were "Read In" on January 20, 2025, but we understand the Appointments were filed in the Senate on that date, and then formally "Read In" on the Senate floor on January 21, 2025.

[9] *See* A60–69.

[10] A86.

[11] *Id.*

[12] *Id.*; A75.

[13] A76. The five Appointees were: James V. Ascione, William B. Ashe Jr., Jeffrey W. Bullock, Curtis D. Linton, and Robert G. Medd. Mr. Medd, who reportedly withdrew his name from Senate consideration, was not listed on the meeting notice agenda. *See id*.

Governor would "secure clarity through the courts."[14] Also on January 30, 2025, "the Senate Executive Committee held a hearing on the Nominations, during which the Senate Executive Committee noted the legal basis for hearing the Nominations, received testimony on the qualifications of the nominees, and reported the Nominations out of committee in preparation for consideration by the full State Senate[.]"[15]

C. The Requests to the Supreme Court

On January 30, 2025, Governor Meyer requested an Opinion of the Justices, pursuant to 10 *Del. C.* § 141 and 29 *Del. C.* § 2102, as to the following questions:

> (1) Did I have the discretion to withdraw the nominations prior to Senate confirmation?
>
> (2) 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?[16]

On January 31, 2025, the Senate issued Senate Concurrent Resolution No. 16, whereby a majority of each of the members of each house of the General Assembly requested, pursuant to 10 *Del. C.* § 141, "an Advisory Opinion of the Justices of the Delaware Supreme Court Regarding the Validity of Gubernational Nominations

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[14] A84.

[15] A94.

[16] A87.

before the Delaware State Senate."[17] Senate Concurrent Resolution No. 16 requested that the Supreme Court answer the following questions:

> (1) Did the Delaware Constitution, Article III, Section 9 therefore, 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 therefore, and separation of powers considerations imbued therein, permit Governor Matthew Meyer to withdraw Nominations lawfully before the Senate for consideration?[18]

By Order of February 6, 2025, this Court appointed Prickett, Jones & Elliott, P.A., pursuant to 10 *Del. C.* § 141(b), to brief the position of the General Assembly in response to the following questions:

> 1. Given Supreme Court precedent, should the Court respond to the questions from the Governor and the General Assembly through 10 *Del. C.* § 141?[19]
>
> 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,

[17] A94.

[18] A95.

[19] The Court's February 6 Order contained a typographical error citing to 8 *Del. C.* § 141.

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?

ARGUMENT

I. THE SUPREME COURT SHOULD ANSWER THE GENERAL ASSEMBLY'S QUESTIONS

A. Question Presented

Should the Supreme Court answer the questions from the General Assembly through 10 *Del. C.* § 141?

We respectfully submit that, yes, the Court should answer the questions propounded by the General Assembly.[20]

B. Scope of Review

"Delaware law permits, but does not require, the Justices to give their opinions on questions propounded to them by the Governor or by resolutions of both Houses of the General Assembly 'touching the proper construction' of the Constitution of Delaware."[21] In exercising its discretion, the Court considers, *inter alia*, whether the question presented is important, raises an issue of first impression, and is in the public interest to timely answer.[22]

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[20] The first question propounded by the Court was whether the Court should respond to the questions from the Governor and the General Assembly. On behalf of the General Assembly, we respectfully submit that the Court should answer the General Assembly's questions. We take no position on the Court's consideration of the Governor's questions, which we understand are being separately addressed by counsel appointed for the position of the Governor.

[21] *In re Request of Governor for Advisory Opinion*, 722 A.2d 307, 309 (Del. 1998) (citations omitted).

[22] *See id.*

C. Merits of the Argument

The questions propounded by the General Assembly raise important issues of first impression in this Court relating to the interpretation of Article III, Section 9 of the Delaware Constitution. The questions implicate both the Governor's and General Assembly's abilities to "discharge their duties"[23] and their respective authority and roles under the Delaware Constitution related to the appointment and confirmation of gubernational appointees. And because the Appointments are pending before the Senate, it is in the public interest that the General Assembly and Governor receive a timely answer.

This Court has previously accepted questions that touch on the construction of the Delaware Constitution, including questions that contemplate an expedited response because the Senate was scheduled to hold hearings on appointments.[24]

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[23] *See* 10 *Del. C.* § 141(a).

[24] *See, e.g.*, *Opinion of the Justices*, 274 A.3d 269, 272 (Del. 2022) (accepting question related to Governor's removal powers); *In re Request of Governor for an Advisory Opinion*, 950 A.2d 651, 652 (Del. 2008) (accepting question related to qualifications to hold office); *Opinion of the Justices*, 320 A.2d 735, 736–38 (Del. 1974) (accepting question related to the timing of the Governor's submission of appointees to office); *In re Request of the Governor for an Advisory Opinion*, 905 A.2d 106 (Del. 2006) (accepting question related to the Governor's appointment power); *Opinion of the Justices*, 647 A.2d 1104, 1105–09 (Del. 1994) (accepting question related to whether accepting an appointment would violate the Delaware Constitution).

Further, the questions before the Court are not hypothetical.[25] They instead "bear[] upon a present constitutional duty requiring . . . action"[26]—the Appointments have been submitted, voted on by the Executive Committee of the Senate, and will soon be before the full Senate. Whether the Senate has the power under the Delaware Constitution to consent to the Appointments submitted by Governor Hall-Long bears on this present constitutional duty, and this Court should aid the General Assembly's discharge of that duty by responding to the questions.

Additionally, the questions do not pertain to whether any Appointee has the "right to hold public office" and regular legal proceedings are unavailable.[27] Whether the Appointees have a "right" to hold public office has not been raised by either the Governor or the General Assembly in the requests they made to this Court. Rather, the submitted questions relate to the Governor's appointment powers, constitutional checks and balances on that power under Article III, Section 9, and the independent standing of the executive and legislative branches of the government to fulfill their constitutionally designated roles and authority. These questions

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[25] *Cf. Opinion of the Justices*, 200 A.2d 570, 571 (Del. 1964) (declining to answer hypothetical question that had "no bearing upon a present constitutional duty requiring" action).

[26] *Id.*

[27] *Cf. Opinion of the Justices*, 424 A.2d at 664 (declining to advise on "the issue of the right to hold public office" because regular legal proceedings were available).

directly implicate the separation of powers doctrine.[28] As such, we respectfully submit that the questions from the General Assembly that are before the Court present important issues of first impression and merit the Court's consideration.

[28] *State ex rel. Oberly v. Troise*, 526 A.2d 898, 905 (Del. 1987) ("[T]he Senate represents a coordinate branch of government to which the constitution has assigned a task consistent with a constitutional pattern of 'checks and balances.'").

II. GOVERNOR HALL-LONG HAD THE CONSTITUTIONAL AND STATUTORY AUTHORITY TO APPOINT DIRECTORS TO THE DSPC BOARD

A. Question Presented

Did Governor Hall-Long have the constitutional and statutory authority to make the DSPC Board Appointments between January 7, 2025 and January 21, 2025?

The plain and unambiguous text of the Delaware Constitution confirms that yes, a Lieutenant Governor obtains all powers of the office of Governor upon, *inter alia*, the sitting Governor's resignation. There is no distinction in the powers held by Governor Hall-Long based upon the fact that she filled the Governor position due to Governor Carney's resignation.

B. Scope of Review

Pursuant to 10 *Del. C.* § 141, 29 *Del. C.* § 2102, and Supreme Court Rule 44, this Court has original jurisdiction.

C. Merits of Argument

Settled principles of constitutional construction require the Court to first analyze whether the provisions at issue are unambiguous. If so, the Court need not turn to interpretative principles. Here, the unambiguous language of Article III,

Sections 9,[29] 19, and 20 of the Delaware Constitution, read together, provide that the Lieutenant-Governor obtained all gubernatorial authority between January 7, 2025 and January 21, 2025, including the authority to make official appointments. Even if the Court considers interpretative principles, the drafting of the Delaware Constitution of 1897 confirms that the position of the General Assembly is correct.

1. Principles of Constitutional Construction

Where the language of the Delaware Constitution is "clear and unequivocal," then there is "no room for judicial interpretation, construction, or search for intent."[30] If possible, constitutional phrases must be given their ordinary, plain meaning.[31]

Additionally, unless the language of the Constitution is obscure or doubtful in its meaning, the Court does not need to look at other evidence of intent.[32] If the Constitution is ambiguous, this Court will consider other sections of the Constitution to give meaning to the provision at issue.[33] In interpreting Delaware's Constitution, it is often necessary to understand the "context and evolution of any phrase that

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[29] Article III, § 9 of the Delaware Constitution provides the gubernatorial appointment power and is discussed *infra* Argument Section III.

[30] *Opinion of the Justices*, 290 A.2d 645, 647 (Del. 1972); *accord Troise*, 526 A.2d at 902 (same).

[31] *Troise*, 526 A.2d at 902.

[32] *See id.*

[33] *Opinion of the Justices*, 274 A.3d at 272. The Court in *Troise* also explained that it may consider other sources, like the Delaware Constitutional Debates of 1897, if it determines that it is "advisable" to do so. *Troise*, 526 A.2d at 902.

appears in the present Delaware Constitution."[34] Where, as here, the provisions were adopted in 1897, the Court may consider the Delaware Constitutional Debates of 1897, which reflect the robust discussions of the adopted sections.[35]

2. The Lieutenant Governor Unambiguously Obtains the Complete Power of the Office of Governor Upon the Governor's Resignation

First adopted in 1897, Article III, Section 19 remains substantively similar today and provides:

> A Lieutenant-Governor shall be chosen at the same time, in the same manner, for the same term, and subject to the same provisions as the Governor; he or she shall possess the same qualifications of eligibility for office as the Governor; he or she shall be President of the Senate, but shall have no vote unless the Senate be equally divided.
>
> The Lieutenant-Governor, for his or her services as President of the Senate, shall receive the same compensation as the Speaker of the House of Representatives; the Lieutenant-Governor, for his or her services as a member of the Board of Pardons and for all other duties of the said office which may be provided by law, shall receive such compensation as shall be fixed by the General Assembly.[36]

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[34] *Request of the Governor*, 905 A.2d at 108. When there are such changes, this Court has noted that "the reason for the modification has been identified clearly." *Id.* at 107.

[35] *Opinion of the Justices*, 274 A.3d at 272; *Dorcy v. City of Dover Bd. of Elections*, 1994 WL 146012, at *4 (Del. Super. Ct. Mar. 25, 1994) ("The debates of the 1897 Constitution drafters can be important authority to interpret our constitution.").

[36] Del. Const. art. III, § 19.

Section 19 was amended in 1951 (to amend the second paragraph) and again in 1999 to make pronouns gender neutral.[37] Otherwise, the first paragraph of Section 19 has remained substantively unchanged since 1897.

Article III, Section 20 was adopted in 1897 and likewise remains substantively similar today. Only Section 20(a) is pertinent to the issues before the Court and today provides:

> (a) In case the person elected Governor shall die or become disqualified before the commencement of his or her term of office, or shall refuse to take the same, or in case of the removal of the Governor from office, or of his or her death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Lieutenant-Governor; and in case of removal, death, resignation, or inability of both the Governor and Lieutenant-Governor, the Secretary of State, or if there be none, or in case of his or her removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his or her removal, death, resignation, or inability, then the President pro tempore of the Senate or if there be none, or in case of his or her removal, death, resignation, or inability, then the Speaker of the House of Representatives shall act as Governor until the disability of the Governor or Lieutenant-Governor is removed, or a Governor shall be duly elected and qualified.
>
> The foregoing provisions of this section shall apply only to such persons as are eligible to the office of Governor under this Constitution at the time the powers and duties of the office of Governor shall devolve upon them respectively.

[37] 48 Del. Laws, c. 110 (1951); 72 Del. Laws, c. 136 (1999).

> Whenever the powers and duties of the office of Governor shall devolve upon the Lieutenant-Governor, Secretary of State, or Attorney-General, his or her office shall become vacant; and whenever the powers and duties of the office of Governor shall devolve upon the President pro tempore of the Senate, or the Speaker of the House of Representatives, his or her seat as a member of the General Assembly shall become vacant; and any such vacancy shall be filled as directed by this Constitution; provided, however, that such vacancy shall not be created in case either of the said persons shall be acting as Governor during a temporary disability of the Governor.[38]

Section 20 in its original form did not have subsections (a)-(c) delineated, which were added by amendment in 1969.[39] Section 20(a) was further amended in 1999 to provide gender neutral pronouns.[40] Otherwise, Section 20(a) has remained substantively unchanged since 1897.

On January 7, 2025, Governor Carney resigned. Article III, Section 20 expressly provides that in the case of "resignation," the powers of the Governor "shall devolve on the Lieutenant-Governor."[41] Governor Meyer has confirmed that

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[38] Del. Const. art. III, § 20.

[39] 56 Del. Laws, c. 403 (1967); 57 Del. Laws, c. 295 (1969).

[40] 72 Del. Laws, c. 136 (1999).

[41] Unless there is reason to find a contrary meaning, the word "shall" is mandatory. *See Del. Citizens for Clean Air, Inc. v. Water & Air Res. Comm'n*, 303 A.2d 666, 667 (Del. Super. Ct. 1973), *aff'd*, 310 A.2d 128 (Del. 1973) ("While the words 'shall' and 'may' do not always by themselves determine the mandatory or permissive character of a statute, it is generally presumed that the word 'shall' indicates a mandatory requirement."); *Gow v. Consol. Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933) ("[W]here a question of constitutionality is not dependent on the

upon Governor Carney's resignation, "[t]he Lieutenant Governor, Bethany Hall-Long, became Governor by operation of law."[42]

In Governor Meyer's January 30, 2025 correspondence to this Court requesting an advisory opinion, Governor Meyer did not claim that Governor Hall-Long lacked authority to make the Appointments,[43] which provides further confirmation that there is no constitutional challenge to the Appointments on this basis.[44] Thus, the Court does not need to resort to interpretive principles to conclude that Governor Hall-Long had all of the powers of the Governor between January 7, 2025 and January 21, 2025, including the power and authority to make the Appointments.

However, the answer is the same even if the Court considers historical context. The delegates to the 1897 Delaware Constitutional Convention considered whether a Lieutenant Governor elevated to Governor would have the full power of the office, or, rather, would become only an "acting" Governor.[45] The issue was definitively

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construction, it is ordinarily the rule that 'shall' is presumed to have a meaning of command rather than of permission.").

[42] A86 (citing Del. Const. art. III, § 20).

[43] Neither Governor Meyer nor the General Assembly question the authority of the Governor to make DSPC Board appointments pursuant to 29 *Del. C.* § 8781(b). *See also* A86 (describing the Governor's authority to make DSPC Board appointments).

[44] This was a question propounded by the General Assembly. A95.

[45] I Charles G. Guyer & Edmond C. Hardesty, *Debates and Proceedings of the Constitutional Convention of the State of Delaware* 302 (Milford Chron. Publ'g Co.

resolved by having the Lieutenant Governor obtain the full power of the office of Governor upon elevation, due to, *inter alia*, resignation.[46]

Thus, we respectfully submit on behalf of the General Assembly that, yes, Governor Hall-Long had the constitutional and statutory authority to make the DSPC Board Appointments between January 7, 2025 and January 21, 2025.

1958) (1897) ("Constitutional Debates") ("Mr. Chairman, there is one other point in connection with the provision for Lieutenant-Governor, that I hope will be made plain by this Convention, and that is that when the Lieutenant-Governor shall be called upon to exercise the office of Governor, it will be plain in the Constitution that he shall be Governor in fact, not merely exercising the office.").

[46] I Constitutional Debates 319 ("We have agreed to a proposition for Lieutenant-Governor. On the death of the Governor, the Lieutenant-Governor becomes Governor."); *id.* at 320 (similar); *id.* at 323 ("I think it is very essential that this Constitution shall provide clearly and definitely that when the Lieutenant-Governor succeeds to the office of Governor, upon . . . resignation . . . he (the Lieutenant-Governor) becomes Governor absolutely."); *id.* at 324 ("[U]pon the death of the Governor, his resignation, or anything which terminates entirely his occupancy of the office, the Lieutenant-Governor fills the office for the remainder of the term."); II Constitutional Debates 787 ("Of course in case of a vacancy in the office of Governor, then the Lieutenant-Governor becomes Governor . . . and possess[es] all the powers that the Governor would[.]"); III Constitutional Debates 1958 (similar).

III. GOVERNOR MEYER DOES NOT HAVE THE AUTHORITY TO WITHDRAW APPOINTMENTS

A. Question Presented

Can Governor Meyer withdraw the lawful Appointments?

No, the Appointments are now subject only to Senate (i.e., legislative) consent, divesting the executive branch of unfettered removal power under the Delaware Constitution, including pursuant to the separation of powers doctrine.

B. Scope of Review

Pursuant to 10 *Del. C.* § 141, 29 *Del. C.* § 2102, and Supreme Court Rule 44, this Court is the Court of original jurisdiction.

C. Merits of Argument

The ability of the Governor to remove an appointee who is subject to Senate consent is not unambiguously provided for in the Delaware Constitution, nor has this Court answered the question. The question, however, is not novel—tracing its roots back to *Marbury v. Madison*, 5 U.S. 137 (1803). To analyze this issue under the Delaware Constitution, we first discuss the history of the Governor's appointment power in Delaware, including the important changes made during the 1897 Delaware Constitutional Convention. Next, we analyze important distinctions between the President's appointment power pursuant to the United States Constitution and state constitutions—like Delaware's—that omit a nomination phase and instead provide only a direct appointment right. From that distinction, we explain why the

appointment right, when subject to legislative consent, divests the executive branch of the power of unfettered removal (i.e., the unilateral withdraw of an appointment), including because of the separation of powers doctrine. Finally, we explain why the Governor's responsibility to subsequently issue a commission to a confirmed appointee does not provide the Governor with the power to prevent the appointee from assuming office.

1. The History of Article III, Section 9

The delegates who drafted the Delaware Constitution of 1792 believed that the Delaware Constitution of 1776 made the legislature too strong and the executive too weak.[47] In providing the executive branch greater authority, the 1792 Delaware delegates adopted the more commonly used title of Governor (rather than President)[48] and provided the Governor the power to appoint officers:

> He shall appoint all officers whose offices are established by this constitution, or shall be established by law, and whose appointments are not herein otherwise provided for; but no person shall be appointed to an office within a county who shall not have a right to vote for representatives, and have been an inhabitant therein one year next before his appointment, nor hold the office longer than he continues to reside in the county . . . .[49]

[47] *Request of the Governor*, 905 A.2d at 109 (citation omitted).

[48] *See id.* (citation omitted).

[49] Del. Const. art. III, § 8 (1792).

This provision "gave to the Governor full and uncontrolled power of appointments[.]"[50] The language was unchanged substantively in the Delaware Constitution of 1831.[51]

But 1897 Delaware delegates rebalanced the power of government in significant respects.[52] The Governor's appointment power was significantly amended at the 1897 Delaware Constitutional Convention in what is now Article III, Section 9, which provides that:

> He or she shall have power, unless herein otherwise provided, 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.[53]

This shifted power from the executive branch to the legislative branch in two ways. First, it subjected the Governor's appointments to Senate confirmation.[54] Second, it limited the Governor's appointment power only as authorized by "this

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[50] *State ex rel. Morford v. Emerson*, 8 A.2d 154, 156 (Del. Super. Ct. 1939).

[51] *See Request of the Governor*, 905 A.2d at 110 (explaining that the "long sentence providing for gubernatorial appointments that originally appeared in the 1792 Constitution [] was retained as section 8 in Article III of the 1831 Constitution."); *Emerson*, 8 A.2d at 156–57 ("The Constitution of 1831 retained in substantial entirety the appointing power of the Governor as theretofore existing . . . .").

[52] The 1897 Delaware delegates had two primary goals: modify the balance of power between the three branches of government and make the Constitution more democratic. *Request of the Governor*, 905 A.2d at 110.

[53] Del. Const. art. III, § 9 (as amended in 1999 to make pronouns gender neutral).

[54] *Request of the Governor*, 905 A.2d at 111.

Constitution or by law," rather than continuing to empower the Governor to appoint any office that was established by law.[55] Thus, the Governor can now only make appointments when he or she is specifically authorized by the Constitution or statute.[56]

2. Governor Hall-Long's Appointments to the DSPC Board

29 *Del. C.* § 8781(b) confers appointment power to the DSPC Board on the Governor: "The remaining 7 directors shall be appointed by the Governor with the advice and consent the Senate." Thus, the Constitution (*see supra* Argument II) and 29 *Del. C.* § 8781(b) conferred the authority on Governor Hall-Long to make the Appointments to the DSPC Board.

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[55] *Id.*; *see also Emerson*, 8 A.2d at 157 (explaining that the 1897 Delaware Constitution "circumscribed the Governor's absolute power of appointment by the requirement, in many cases, that the appointment be made with the consent of the majority of the Senate"); *see also State ex rel. Craven v. Schorr*, 131 A.2d 158, 164 (Del. 1957) (the changes to Del. Const. art. III, § 9 "represented a deliberate decision of the Constitutional Convention to curb the Governor's appointing power.").

[56] *Request of the Governor*, 905 A.2d at 113; Randy J. Holland, *The Delaware State Constitution* 136 (2d ed. 2017) ("The Governor's power to make appointments is a grant rather than a limitation on an inherent power of the Governor. . . . Accordingly, the Governor must rely on an express or implied constitutional or statutory authority as the basis for the right to appoint."); *see also Emerson*, 8 A.2d at 156 ("There is no inherent right in the Executive to make appointments which the Constitution may not alter or remove entirely, and these periodic changes have been evidenced by the Constitution of every state.").

3. Governor Meyer Cannot Withdraw the Appointments

On January 21, 2025, Governor Meyer purported to "withdraw the . . . nominations" from Senate confirmation.[57] But the Governor's use of the term "nominations" is not the correct terminology. Article III, Section 9 of the Constitution and 29 *Del. C.* § 8781(b) both use the term "appoint," rather than "nominate." The distinction is important and compels a conclusion that Governor Meyer cannot withdraw Governor Hall-Long's Appointments.

a. Uses of "Appoint" and "Nominate" in Delaware's Constitutions

Delaware adopted Constitutions in 1776, 1792, 1831, and 1897. The Delaware Constitution of 1776 contained three references to variations of the word "nominate," two of which are informative here. Article 12 of the Delaware Constitution of 1776 contained the following provision for nominations and appointments for justices of the peace:

> The justices of the peace *shall be nominated by the house of assembly*; that is to say, *they shall name twenty-four persons for each county*, of whom the *president, with the approbation of the privy council, shall appoint twelve*, who shall be commissioned as aforesaid, and continue in office during seven years, if they behave themselves well; and in case of vacancies, or if the legislature shall think proper to increase the number, *they shall be nominated and appointed in like manner*. The members of the legislative and privy councils shall be justices of the peace for the whole State, during their continuance in trust; and

[57] A74.

> the justices of the courts of common pleas shall be conservators of the peace in their respective counties.[58]

The foregoing provision demonstrates a clear distinction in the use of nominate by the assembly and then appointment by the President (now the Governor).[59] The nominations were submitted names; the appointments by the President were final.

Delaware's 1792 and 1831 Constitutions did not contain any reference to nominations. They did, however, continue to provide clear appointment power, including, *inter alia*, the Governor's authority to appoint officers.

Two variations of the word "nominate" re-appeared in Delaware's Constitution of 1897, both in Article V.[60] If the drafters of the 1897 Constitution

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[58] Del. Const. art. 12 (1776) (emphases added).

[59] In 1776, the president of the State of Delaware held the position of what is now the office of the Governor. *See Request of the Governor*, 905 A.2d at 109.

[60] *See* Del. Const. art. V, § 7 ("Every person who either in or out of the State shall receive or accept, or offer to receive or accept, or shall pay, transfer or deliver, or offer or promise to pay, transfer or deliver, or shall contribute, or offer or promise to contribute, to another to be paid or used, any money or other valuable thing as a compensation, inducement or reward for the giving or withholding, or in any manner influencing the giving or withholding, a vote at any general, special, or municipal election in this State, or at any primary election, convention or meeting held for the purpose of *nominating* any candidate or candidates to be voted for at such general, special or municipal election; . . .") (emphasis added); *id.* art. V, § 9 ("The enumeration of the offenses mentioned in Section 7 of this Article shall not preclude the General Assembly from defining and providing for the punishment of other offenses against the freedom and purity of the ballot, or touching the conduct, returns or ascertainment of the result of general, special or municipal elections, or of primary elections, conventions or meetings held for the *nomination* of candidates to be voted for at general, special or municipal elections.") (emphasis added).

intended for the Governor to have a "nomination" right, they would have expressly so provided.[61] The drafters of the Delaware Constitution instead maintained the Governor's appointment right. The distinction has a difference. A nomination right, such as that found in the United States Constitution, provides a framework that maintains executive discretion during the confirmation process, which permits *nominees* to be withdrawn.

b. The Delaware Constitution of 1792 Differed Materially From the 1787 United States Constitution as to the Appointment Process

Delaware's 1792 Constitution was drafted on the heels of the 1787 ratification of the United States Constitution.[62] The United States Constitution contains a Presidential appointment right that differs in material respects from Delaware's 1792, 1831, and 1897 Constitutions.

Article II, Section 2 of the United States Constitution provides, in pertinent part that the President

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[61] *Opinion of the Justices*, 225 A.2d 481, 484 (Del. 1966) ("The applicable rules of construction require that effect be given, if possible, to the whole Constitution and to every word thereof. If different portions of the Constitution seem to conflict, they must be harmonized if possible. That construction must be favored which will render *every word of the instrument operative*; and that construction must be avoided which would make any provision idle and nugatory.") (emphasis added; citation omitted).

[62] *See Request of the Governor*, 905 A.2d at 109; *Emerson*, 8 A.2d at 156 ("The second Constitution of 1792 came into being after the Federal Constitution of 1787 and formed a model utilized by sister states.").

> *shall nominate*, *and by and with the Advice and Consent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[63]

The United States Constitution thus contemplates a three-step nomination and appointment process: (1) the President nominates a candidate; (2) the United States Senate confirms the nominee; and (3) the President then makes the appointment.[64]

Delaware's delegates might have adopted a similar process in 1792, 1831, or 1897, but chose not to.[65] They instead vested the complete appointment authority *first* in the Governor (since 1792), later subjected to Senate confirmation (in 1897).

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[63] U.S. Const. art. II, § 2 (emphasis added).

[64] *Dysart v. U.S.*, 369 F.3d 1303, 1311 (Fed. Cir. 2004) (citing *Marbury*, 5 U.S. at 155–56); *Barrett v. Duff*, 217 P. 918, 920–21 (Kan. 1923) ("Under the Constitution of the United States the President sends his nominations to the Senate. If the Senate consents the President then appoints.").

[65] *See Troise*, 526 A.2d at 903 (discussing the drafters' decision to omit a provision requiring senatorial action on gubernational appointments: "[t]he delegates, men of wisdom and experience, looked to the United States Constitution and constitutions of other states for guidance in the course of their work. It may be presumed that they were aware of the practice of senatorial inaction at the federal level.").

c. The Governor's Appointment Power Under the Delaware Constitution, Once Exercised, Is Final

Important to the third question presented in the Court's February 6 Order is whether the Governor's appointment power in Article III, Section 9 (and when authorized by statute), is final once exercised, such that the remaining step (i.e., Senate confirmation or rejection) is purely a function of the legislative branch. If it is a purely a legislative function, the separation of powers doctrine precludes interference by the executive branch. Delaware does not appear to have confronted this question, but other jurisdictions provide a framework for the conclusion that after the Governor's appointment, the power then shifts to the legislature to confirm, leaving the Governor without the ability to withdraw appointees.

On the limited record before the Court, we submit, on behalf of the General Assembly, that the Appointments made on January 16, 2025 were the final act required by the executive branch for the Appointments to be valid. There is no nomination process in Delaware for DSPC Board members. Thus, the Governor performs one act: making the appointment. The requirement of later Senate consent does not change that the Governor committed its only, and final, appointment act.[66]

The question of precisely when an executive appointment, subject to legislative consent, is final, is not novel. Indeed, it was the focus of *Marbury v.*

[66] As discussed *infra* pp. 38–40, the later issuance of a commission is, at most, a ministerial step that does not compel a different conclusion.

Madison in 1803.[67] Since *Marbury*, the general rule that has developed is that an appointment to office "is complete when the last act required of the person or body vested with the appointing power has been performed."[68]

Where states provide a governor with appointment power subject to senate confirmation, the question of finality typically depends on whether any steps are required beyond senate confirmation. Given the differences in appointment powers under the various state constitutions and statutes, there is not a clear line of cases deciding this issue to which the Court can look for guidance. However, there is persuasive authority holding that an appointment by a governor constitutes the final act of the executive branch.

For example, in *Barrett v. Duff*, Kansas's Governor appointed three officers during his term, which were subject to later Kansas Senate confirmation.[69] Prior to

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[67] *See Marbury*, 5 U.S. at 157 ("Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised.").

[68] *See id.*; *see also* 67 C.J.S. Officers § 63 ("[A]n appointment to office is complete when the last act required *of the person or body* vested with the appointing power has been performed.") (emphasis added).

[69] The controversy in *Barrett* concerned recess appointments. Article III, § 9 of the Delaware Constitution provides a separate gubernatorial appointment power for recess appointments not subject to Senate confirmation. *See* Del. Const. art. III, § 9 ("He or she shall have power to fill all vacancies that may happen during the recess of the Senate, in offices to which he or she may appoint, except in the offices of Chancellor, Chief Justice and Judges, by granting Commissions which shall expire at the end of the next session of the Senate."). The distinction is not critical here, as the Kansas Senate had to confirm the appointments. *See Barrett*, 217 P. at 919 ("On

Senate confirmation, Governor Allen was replaced by Governor Davis, who transmitted three different individuals to the same offices Governor Allen had previously purported to fill and sent notices to the prior appointees that their appointments had been canceled.[70] Despite the new Governor's purported withdraw, the Kansas Senate confirmed the original appointees.

The Kansas Supreme Court held that the original appointments could not be withdrawn prior to senate confirmation. The court first considered whether the actions taken by Governor Allen were nominations or appointments.[71] In holding that Governor Allen did not make nominations, the court contrasted the United States Constitution (which required nominations, confirmation, and then appointment) to Kansas's Constitution and statutes (which required appointment and then confirmation) and concluded that "[i]t is apparent that appointments are made in two entirely different ways."[72] While the United States Constitution required the President to send nominations to the United States Senate, there was no

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January 9, 1923, the Legislature convened, and on January 16 following, in regular session of the Senate, a motion was adopted that the Senate consider recess appointments."); *see id.* ("On March 7, the Senate, in executive session, confirmed the appointments, respectively, of Messrs. Duff, Crawford, and Greenleaf to the offices, and for the terms for which they had been appointed.").

[70] 217 P. at 919.

[71] *Id.*

[72] *Id.* at 920.

constitutional provision in Kansas, nor any statute applicable to that controversy that, "first requires a nomination by the Governor."[73]

In Kansas, there was just an appointment power. The Kansas Supreme Court concluded that once the appointment "power of the Governor" had been exercised, "he had no further control over the respective offices unless and until the appointees had been rejected by the Senate."[74] In other words, once the Governor made a lawful appointment, the appointee was before the legislature for confirmation or rejection and was no longer subject to unqualified removal by the executive, including through withdraw of the appointment.

In *McChesney v. Sampson*, the Court of Appeals of Kentucky considered whether an appointment could be withdrawn prior to Kentucky Senate consideration, and reached the same result as in *Barrett* by contrasting appointment power that begins with nominations, and those that do not.[75] Where, as was the case in Kentucky, the Governor has appointment power, an appointee's status "is not that

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[73] *Id.* at 920–21.

[74] *Id.* at 925. The court also held that "there is no provision in our Constitution or laws requiring a nomination of the defendants by the Governor to the Senate before appointment[.]" *Id.* at 926. The same year, the Kansas Supreme Court again re-affirmed that if the Senate does not act on appointments, those appointments cannot be withdrawn. *See State v. Matassarin*, 217 P. 930, 934 (Kan. 1923) ("The attempted revocation of these appointments and the appointment of their successors must be held to be without effect.").

[75] 23 S.W.2d 584 (Ky. 1930).

of a nominee awaiting confirmation, but that of an officer invested with the powers, privileges, and responsibilities of the position until the Senate acts."[76] That court further explained that once the executive's action is complete it is "not subject to reconsideration or recall."[77]

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[76] *Id.* at 587. The statute at issue in *McChesney* held that appointees "shall hold office, subject to the advice and consent of the senate, which body shall take appropriate action upon such appointments at its first session held thereafter." *Id.* at 586. While this statute does provide a clearer vested right to office upon appointment than the situation presented here, the court's rationale for distinguishing between appointment as an executive function and consent as a separate legislative function is no less compelling.

[77] *Id.* at 587; *see also id.* ("In all jurisdictions where appointment to office is regarded as an executive function, as here, an appointment to office once made is incapable of revocation or cancellation by the appointing executive in the absence of a statutory or constitutional power of removal."); *see also State ex. rel. Todd v. Essling*, 128 N.W.2d 307, 313 (Minn. 1964) ("These acts constitute the full extent of the governor's powers in the appointive process. The senate has the right and power to confirm the appointment in order to fully complete the appointive process but, under the appointment procedures followed, this power to confirm actually is more in the nature of a power to veto the appointment after the fact. Neither confirmation by the senate nor further action by the governor was necessary to vest respondent with the powers and duties of the office."). *See also* Op. Att'y Gen. Wash. 1949-51 No. 158 (1949), 1949 WL 37728; Op. Att'y Gen. Wash. 1973 No. 337 (1973), 1973 WL 21506 (providing official opinions on questions of law raised by designated public officials, the Washington Attorney General concluded the Governor may not withdraw appointments made by the previous Governor because upon submission to the legislature the "executive had completed his act and the appointment was subject only to being voided by rejection by the legislature." The Attorney General also noted, citing *Barrett*, that the appointment was more than "a mere nomination" and advised that "the jurisdiction of the senate to act upon a gubernatorial appointment requiring its consent vests when the appointment is made.").

We respectfully submit that this Court should reach the same result. Governor Hall-Long's Appointments stated that that each Appointee was "to be appointed 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*."[78] Thus, there was no further gubernatorial appointment act required and the only remaining function was entirely within the legislative branch.[79] In that scenario, it has been recognized that it is irrelevant that the "two powers do not act concurrently, but consecutively" because the "action once taken and completed by the executive is not subject to reconsideration or recall."[80]

This conclusion is further strengthened by the separation of powers doctrine, which broadly states that each branch of government performs a different function

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[78] A55–59 (emphasis added). Even where the Appointments use the word "nominate," it was to "nominate for the consideration of the Senate to confirm appointment…" and use of the word "nominate" is of no legal significance. *See, e.g.*, *People v. Shawver*, 222 P. 11, 23 (Wy. 1924) (describing how the use of the word "nominate" appears to be a custom emanating from presidential communications to the United Stated Senate and does not compel the conclusion that the Governor's action was a nomination, where the right was one of appointment).

[79] The language in the Appointment letters starting the term of office from the date of Senate confirmation is consistent with appointment letters of the prior administration. *See, e.g.*, A46–49.

[80] *McChesney*, 23 S.W.2d at 587 (holding that the appointment right is "intrinsically executive.").

and one branch shall not encroach on the functions of the other.[81] There are no inherent rights belonging to any branch of the government.[82] Rather, "[w]hen the people of a State meet in convention to form a Constitution it is for them to say in what manner the powers . . . should be weighed and decided."[83]

Here, the appointment power set forth in the Delaware Constitution of 1897 was drafted expressly to direct some power *away* from the Governor to the Senate. While the Constitution unambiguously maintained the Governor's appointment right, it made that appointment subject to Senate consent. In other words, the drafters of the Delaware Constitution of 1897 believed the Senate check on the Governor's authority was necessary to rebalance the powers among the branches of government.

It would violate both the letter and spirit of Article III, Section 9 to hold that when the appointment is complete and the appointee is presented to the Senate for confirmation or rejection, that the executive branch can still exercise its control over or terminate that purely legislative function. We submit that the result more consistent with the language and drafting context of the Delaware Constitution of

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[81] *Troise*, 526 A.2d at 904; *see also Opinion of the Justices*, 380 A.2d 109, 113 (Del. 1977) (one purpose of the separation of powers doctrine is to "safeguard the independence of each branch of the government and protect it from the domination and interference by the others.").

[82] *Emerson*, 8 A.2d at 156.

[83] *Id.*

1897 is that once an appointment is made and is subject to Senate consent, the Governor's removal power is only as set forth in Article III, Section 13.[84]

d. The Issuance of a Commission Is Not a Further Requisite Act

A further consideration is whether the subsequent act of issuing commissions to the Appointees would reflect an additional step of the executive branch that may impact the separation of powers analysis. We submit, for the General Assembly, that the answer is no.

The Delaware Constitution of 1776 provided for the issuance of commissions.[85] The language of Article III, Section 12 was adopted "without

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[84] *See* Del. Const. art. III, § 13 ("The Governor may for any reasonable cause remove any officer, except the Lieutenant-Governor and members of the General Assembly, upon the address of two-thirds of all the members elected to each House of the General Assembly."). If Delaware intended a different result, lawmakers plainly have constitutional amendment or rulemaking ability. For example, Illinois, Kansas, Maine, and Rhode Island have adopted senate rules or statutes permitting appointments to be withdrawn from senate consideration. *See* 104th Ill. Gen. Assem., Senate R. 10-2; Kan. Stat. Ann. § 75-4315(b); Me. Rev. Stat. Ann. tit. 3, § 154; R.I. Senate R. 9.6. Delaware has not enacted any such constitutional amendment or rule.

[85] Holland, *The Delaware State Constitution* 140 ("Although the exact language for Section 12 first appeared in the 1897 Constitution, the 1776 Constitution contained similar language concerning commissions in Article XX."). It appears that the process of issuing commissions derives from principles established by the English government, pursuant to which a commission was a delegation of power by the King to the agent. *See Ex parte Norris*, 8 S.C. 408, 476 (S.C. 1877); *McAllister v. U.S.*, 141 U.S. 174, 194 (1891) (noting the process by which the King of England would issue commissions to judges). We have not identified any legislative discussion of commissions from the 1776 Delaware Constitutional Convention.

legislative debate in 1897"[86] and provides that "[a]ll commissions shall be in the name of the State, and shall be sealed with the great seal and signed by the Governor."[87] We submit, for the General Assembly, that this does not provide any legal basis to conclude that the issuance of a commission is a necessary step for the appointment to the DSPC Board.

First, the drafting history of Article III leads to this result. When Article III was drafted in 1792, the appointment right existed in Section 8. At that time, the commission language existed at the end of Section 8, i.e., it existed in the same provision providing for the appointment of officers. When the Delaware Constitution was substantially revised in 1897, however, the commission provision was separately provided for in Article III, Section 12. Perhaps more importantly, when the 1897 Constitution amended the appointment power in what is now Article III, Section 9, it *did* provide for commissions to be issued to provisionally fill vacant offices,[88] but *did not provide* for commissions to be issued to finalize appointments. There is no basis to conclude that the drafters of the 1897 Delaware Constitution

[86] Holland, *The Delaware State Constitution* 140.

[87] Del. Const. art. III, § 12.

[88] *See* Del. Const. art. III, § 9 ("He or she shall have power to fill all vacancies that may happen in elective offices, except in the offices of Lieutenant-Governor and members of the General Assembly, by granting Commissions which shall expire when their successors shall be duly qualified.").

intended for commissions to be a mandatory final step for officer appointments given the clear difference in language in Article III, Section 9.[89]

Second, the statute authorizing the DSPC appointments (29 *Del. C.* § 8781(b)) does not require commissions for appointments to be effective.[90]

Third, the Appointment letters from Governor Hall-Long do not provide for a commission to be issued. Rather, the letters state that the term of office for each Appointee begins upon Senate confirmation.

As such, a commission is not required for the Appointees to become DSPC Board members. Rather, a commission is better understood as mere evidence of an appointment.[91] Thus, the only (and final) act of the Governor in this case was the Appointments to the DSPC Board made on January 16, 2025.

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[89] This conclusion is strengthened by the fact that other sections of Article III also call for commissions. *See* Del. Const. art. III, §§ 21, 22.

[90] At least one other statute does provide for commissions to be issued. *See, e.g.*, 29 *Del. C.* § 4301(d)(2) (providing that upon "compliance with this section, the Governor shall issue a commission as a notary public to an individual for the term under Section 4307(a) of this title.").

[91] *See State ex. rel. Coleman v. Lewis*, 186 S.E. 625, 637 (S.C. 1936) ("As evidenced by all of the cases herein cited, the Governor in issuing a commission acts merely ministerially; the commission does not confer the office, and neither the existence of the office nor the term or time for which it exists depends upon the commission, which is only evidence of the appointment or election."); *Shuck v. State ex. rel. Cope*, 35 N.E. 993, 995 (Ind. 1893) ("The governor's commission is nothing more than a convenient form of evidence that the title to an elective office has been vested in a person by the votes of the people. Such a commission is not conclusive evidence of anything except its own existence."); 67 C.J.S. Officers § 64 ("A certificate or commission is not an appointment but is evidence of an appointment. The

IV. THE COURT NEED NOT ADDRESS WHETHER GOVERNOR MEYER MAY WITHHOLD COMMISSIONS FOR APPOINTEES WHO ARE CONFIRMED

A. Question Presented

Does Governor Meyer have discretion to withhold commissions for confirmed appointees?

We submit that the Court does not need to reach this issue, because the issuance of a commission is not necessary for the Appointments. However, even if the Governor purported to withhold commissions, the Appointees could seek a writ of mandamus to compel the Governor to issue the commissions (a ministerial act), providing the Appointees an adequate remedy at law.

B. Scope of Review

Pursuant to 10 *Del. C.* § 141, 29 *Del. C.* § 2102, and Supreme Court Rule 44, this Court is the Court of original jurisdiction.

C. Merits of Argument

Governmental acts are generally described as discretionary or ministerial. "An act is ministerial if the 'act of the official involves less in the way of personal decision or judgment or the matter for which judgment is required has little bearing

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appointment of an officer may be evidenced by a commission, but a commission is not generally essential to the validity of an appointment, and an appointment may be made by an oral announcement of the appointing power's determination.") (citations omitted).

of importance upon the validity of the act . . . .'"[92] A discretionary act, on the other hand, requires a level of judgment by the actor.[93]

As set forth *supra* Argument III, a commission is not required to appoint DSPC Board members and it would be, at most, mere evidence of an appointment. Because the appointing act would have already occurred and Senate confirmation already provided, the issuance of a commission would most logically be considered a ministerial act outside of the Governor's discretion.[94] Indeed, a contrary conclusion would effectively provide the Governor an unfettered removal power (by withholding a commission) in contravention of Article III, Section 13 or a veto power over the Senate's consent right. No such power is provided for in the Constitution nor can it be reasonably inferred consistent with the language of Article III as discussed above.

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[92] *See Sussex Cnty., Del. v. Morris*, 610 A.2d 1354, 1359 (Del. 1992) (quoting Restatement (Second) of Torts § 895D cmt. H (1979)). The *Morris* court also described ministerial acts as "operational." *See id.* at 1359 n.8.

[93] *See id.*

[94] *See State v. Lyon*, 165 P. 419, 421 (Okla. 1917) (describing the issuance of a commission as ministerial); *State ex. rel. Johnson v. Hagemeister*, 73 N.W.2d 625, 630 (Neb. 1955) (same).

Thus, we respectfully submit that the Court does not need to reach this issue, because, if the Governor were to withhold a commission, the Appointees could seek a writ of mandamus to compel the issuance.[95]

[95] *See Facer v. Carney*, 277 A.3d 937, 2022 WL 1561444, at *1 (Del. 2022) (TABLE) (a writ of mandamus may be issued by the Superior Court to compel a public official to perform a ministerial act).

CONCLUSION

As to the positions of the General Assembly, we respectfully request that the Court exercise its discretion and respond to the questions from the General Assembly. We further respectfully submit that (i) Lieutenant Governor Hall-Long obtained all powers of the office of Governor upon Governor Carney's resignation and (ii) Governor Meyer cannot withdraw the Appointments. Finally, we submit that the Court does not need to reach the final issue of whether the Governor may withhold commissions, because the issuance of a commission is a ministerial act that is not necessary for the Appointments to be effective.

Dated: February 17, 2025

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