EFiled: Feb 24 2025 03:12PM EST
Filing ID 75698766
Case Number Multi-Case

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ANSWERING BRIEF IN SUPPORT OF THE POSITION OF GOVERNOR MEYER

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Dated: February 24, 2025

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NATURE OF PROCEEDING

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?

[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?

On February 17, 2025, undersigned counsel filed its opening brief of the position of Governor Meyer on these questions (the "Governor Brief" or "GB"). This is the answering brief responding to the opening brief of the position of the General Assembly (the "GA Brief" or "GAB"). For the reasons set forth in the Governor Brief and below, the Justices should answer all four questions in the affirmative.

SUMMARY OF ARGUMENT

1. Admitted. Both sides agree, respectfully, that the Justices should exercise their discretion and accept the questions from the General Assembly. Although the GA Brief does not take a position on the questions submitted by the Governor, the Justices should accept the Governor's questions for the same reasons described in the Governor Brief and the GA Brief.

2. Admitted in Part, Denied in Part. Both sides agree that Governor Hall-Long was Governor between January 7 and 21, 2025 and that, as Governor, she could exercise the appointment powers provided in Article III, Section 9 of the Delaware Constitution. The GA Brief attempts to rewrite the question that the General Assembly itself submitted, now posing it as whether Governor Hall-Long had authority to "make the DSPC Board Appointments[.]" (GAB 13.) But Governor Hall-Long did not (and could not, without State Senate consent) make any appointments, but merely submitted nominations to the State Senate, which Governor Meyer has withdrawn and to which the State Senate has not consented.

3. Denied. Governor Hall-Long did not make any appointments to the DSPC Board, as appointments require a nomination, State Senate consent, and a commission. The GA Brief's central premise—that because the word "nomination" does not appear in Article III, Section 9, a Governor has "appointed" a candidate merely by submitting the candidate's name for State Senate consent and cannot

withdraw it—fails for many reasons. First, it is contradicted by the plain language of the Delaware Constitution. Second, it is belied by Delaware constitutional history, statements by the Constitutional Delegates, and even statements by the General Assembly. Finally, the supposed distinction is irrelevant, because whether the Governor may withdraw a candidate depends not on whether the word "nomination" or "appointment" is used, but rather whether the candidate has a vested right to office. Until that occurs—which, in Delaware, requires nomination, State Senate consent, and a commission—the Governor has discretion to withdraw a candidate from consideration.

4. Denied. Delaware constitutional principles provide the Governor with discretion to withhold commissions from nominees even after State Senate consent. 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 make the appointment and issue the commission. State Senate consent is merely a prerequisite to, not the culmination of, the appointment. 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 (including that cited by the GA Brief) 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

The relevant facts have been set forth in the Governor Brief and are incorporated herein by reference. (*See* GB 5-12.)

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

Although the GA Brief takes no position with respect to the Governor's questions, GAB 9, and incorrectly references "appointments" as already having been made, both parties agree that the issues relating to the Governor's authority to withdraw candidates from consideration for the DSPC Board merit responses from the Justices in light of the active controversy concerning constitutional issues of first impression about the powers and duties of the Governor and the State Senate, the precedent supporting advisory opinions in similar cases, and the public interests at issue. (GB 13-17; GAB 10-12.)

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

The Governor Brief explained that Governor Meyer does not dispute that Bethany Hall-Long was Governor of Delaware between January 7 and 21, 2025, or that the Delaware Constitution and state statutes empower a Delaware governor, including Governor Hall-Long, to appoint members to the DSPC Board. The Governor Brief explained, however, that the nominations submitted by Governor Hall-Long during her tenure were subject to withdrawal by Governor Meyer at any time prior to consent from the State Senate and formal commissions. (GB 18.)

The GA Brief agrees that former Governor Hall-Long was Governor between January 7 and 21, 2025, and that a Governor (including Governor Hall-Long and Governor Meyer) has appointment power under Article III, Section 9 of the

Delaware Constitution. But the GA Brief substantively restated the question that the General Assembly itself submitted to the Justices, and which the Justices repeated in the February 6 Order. The General Assembly's request for an opinion asked:

> 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?

(A114.) Yet, the GA Brief now restates the question as:

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

(GAB 13.) The GA Brief defines "Appointments" as the "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)[.]" (GAB 4.)

The GA Brief likely amended the question to avoid the overwhelming authority, described in the Governor Brief, that a governor can withdraw a nomination prior to senate consent and a commission. To the extent that the GA Brief asserts that the submission to the State Senate of the names of candidates for the DSPC Board constituted an "appointment," that is incorrect as a matter of both fact and law, for the reasons described in the sections below.

III. DELAWARE'S APPOINTMENT PROCESS INCLUDES A NOMINATION, STATE SENATE CONSENT, AND A COMMISSION, AND THE GOVERNOR HAS THE AUTHORITY TO WITHDRAW A PROPOSED CANDIDATE AT ANY POINT BEFORE THOSE STEPS ARE COMPLETED, INCLUDING PRIOR TO STATE SENATE 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

The Governor Brief described how, when the Delaware Constitution was drafted in 1897, it was well understood that federal and state systems requiring senate consent of Presidential or gubernatorial appointments permitted the President or governor to withdraw a candidate from consideration before (and even after) senate consent. (GB 21-22.) Cases and authorities subsequent to 1897 have continued to reach the same conclusion. (GB 28-30.) This authority to withdraw a candidate applies even when the candidate was proposed by a prior governor. (GB 34.) Otherwise, the prior governor would effectively restrict the discretion of the subsequent one. *Cf. State v. Reeves*, 316 A.3d 408, 434 (Del. Super. 2024) ("It is

axiomatic that one legislative body (here one General Assembly) cannot bind a future one absent the enactment of a constitutional amendment."). The GA Brief does not even attempt to dispute any of this.

Instead, the GA Brief seeks to avoid it by asserting that the Delegates who drafted the Delaware Constitution rejected this well-established approach (apparently without discussion at the debates), adopting instead the contrary position that, when a Delaware governor selects and submits the name of a candidate to the State Senate, it constitutes an "appointment" that the governor is powerless to alter. The GA Brief's entire foundation for that conclusion is that the United States Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" officers, while the Delaware Constitution states only that the Governor is empowered "to appoint [officers] by and with the consent" of the State Senate, thereby (according to the GA Brief) "omit[ting] a nomination phase and instead provid[ing] only a direct appointment right." (GAB 20.)

This assertion is fatally flawed for numerous reasons. First, it ignores the plain language of the Delaware Constitution providing for appointments "by and with the consent" of the State Senate—indicating that no appointment is made before the State Senate confirms its lack of objection to the proposed action of the appointment (and, as explained in Section IV, a commission is issued). Second, it

ignores Delaware constitutional history and the 1897 Delaware constitutional debates, both of which demonstrate a clear intent by the Delegates that the Delaware appointment process, like the federal one, would include a nomination, senate consent, and a commission, with the governor free to exercise discretion over the identity of the candidate (including his or her withdrawal) at any point in that process. Third, the GA Brief's entire premise fails to recognize that whether the President or a governor can withdraw a potential candidate from consideration hinges not on whether the term "nomination" or "appointment" is used, but rather on whether the candidate has a vested right to office, which does not occur in Delaware until after the State Senate has provided its consent and the Governor has agreed to commission the candidate. Finally, the assertion that the Governor has no power over appointments after submitting a proposed name to the State Senate violates the separation and balance of powers established by Article III, Section 9.

1. The GA Brief's Arguments Ignore the Plain Language of the Delaware Constitution and Section 8781.

The central premise underlying all of the arguments in the GA Brief about withdrawal of candidates—that a Governor's submission of a name to the State Senate is itself the "appointment" described in Article III, Section 9 and Section 8781, thereby ending the Governor's involvement—disregards the plain language of the Delaware Constitution and the statute.

Article III, Section 9 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. Section 8771 provides that the seven non-*ex officio* members of the DSPC Board "shall be appointed by the Governor with the advice and consent the Senate." 29 *Del. C.* § 8781(b). And, as explained in Section IV below, 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.

Read together, these provisions make clear that an "appointment" to the DSPC Board does not occur until (i) a nomination is submitted to the State Senate for consent (how else, after all, would the Senate know to whom it is consenting?), (ii) the State Senate provides consent, and (iii) the Governor makes the appointment and signs and seals a commission. The GA Brief's contrary argument that an "appointment" is made when the Governor submits a candidate's name to the Senate disregards the express consent and commission requirements established in the Delaware Constitution.

Article III, Section 9 plainly mandates that "appointments" be made "by and with" State Senate consent. Logically, such consent cannot have been given at the

time a proposed candidate's name is submitted to the State Senate for consent. Yet, according to the GA Brief, the Governor's submission of the name to the State Senate is, itself, the appointment described in Section 9. The GA Brief does not attempt to explain how an "appointment" can be made by the Governor prior to—and thus *without*—State Senate consent, when Article III, Section 9 and Section 8781 expressly requires appointments to be made *with* Senate consent. *See Harrington v. Pardee*, 82 P. 83, 84 (Cal. Ct. App. 1905) ("[B]y no process of reasoning can it be true that in 'nominating' to the Senate the Governor is 'appointing' the person to the office, because he cannot appoint without the advice and consent of the Senate.").

Moreover, as explained in the Governor Brief, the word "consent" itself means a "voluntary yielding to what another *proposes*[.]" *Black's Law Dictionary* (12th ed. 2024) (emphasis added); *see also* N. Webster, *An American Dictionary of the English Language* (1828), https://webstersdictionary1828.com/Dictionary/consent (same). Stated differently, the word "consent" is future looking; it reflects a lack of opposition to a proposed action not yet taken. This is reinforced by Section 8781's admonition that the State Senate provide "*advice* and consent" with respect to candidates for appointment to the DSPC Board; such advice would be meaningless if the action for which the advice is to be provided already has taken place.

Had the Delegates intended for the submission of a candidate's name to the State Senate to be the appointment referenced in Article III, Section 9, thereafter final and binding on the Governor unless and until the State Senate rejected it, they would have said so, instead of requiring appointments to be made "by and with the consent" of the State Senate. (As described below, they also would have omitted the references to commissions). In short, the language of the Delaware Constitution itself, in conjunction with Section 8781, contradicts the GA Brief's assertion that nominations, State Senate consent, and commissions are not part of the appointment process and that an "appointment" is already made even before the State Senate considers whether to give its consent.

2. Delaware Constitutional History and the 1897 Debates Evidence the Delegate's Intent that Appointments Would Require Nomination, State Senate Approval, and a Commission.

That conclusion is further supported by Delaware constitutional history and statements from the Delegates drafting the 1897 Delaware Constitution. That history and those statements do not, as the GA Brief asserts, suggest that the concept of "nomination" was rejected from the Delaware appointment process. To the contrary, they demonstrate that appointments in Delaware follow the same three steps required in the federal context and in most other jurisdictions: nomination, senate consent, and a commission.

The GA Brief correctly explains that, prior to the 1897 Delaware Constitution, an appointment consisted of only two steps: the selection of a candidate by the Governor and the execution of a commission to appoint the candidate. (GAB 21-22.) The GA Brief also correctly recites that the Delegates drafting the 1897 Delaware Constitution wished to add an additional step—State Senate consent—solely, as Delegate Ezekiel Cooper explained, to "put a check upon the Governor" by making the "Governor feel that with this check he must be a little more careful in the selection" of officers. 4 Charles G. Guyer & Edmond C. Hardesty, *Debates and Proceedings of the Constitutional Convention of the State of Delaware* 2725 (1958) (hereafter "*Debates*"). (*See* GAB 22-23.) The GA Brief also correctly states that, pursuant to Article III, Section 9 and Section 8781, the Governor is given the authority to make appointments to the DSPC Board. (GAB 23.)

Where the GA Brief goes awry is in asserting that, because State Senate consent was added in 1897 as a required step in the Governor's appointment process, the Delegates must have intended to limit or replace the two already-existing steps: selection of a candidate (i.e., nomination) and a commission. But there is nothing in the Delaware Constitution or in the 1897 debates to suggest such was the intent.

Indeed, in direct contradiction to the GA Brief's underlying premise, statements from the Delegates confirm their understanding and intent that appointments would begin with the Governor's "nomination" of the candidate,

followed by State Senate consent and a commission. For example, Woodburn Marin explained "that certain officers in this State, *before* they shall be qualified to exercise the duties of the office for which they have been *nominated by the Governor*, shall be confirmed by the Senate." 3 *Debates* at 2070-71 (emphasis added). William Spruance similarly reported that, in what is now Article III, Section 9, "power is given the Governor, to fill vacancies that may happen during the recess of the Senate in all offices to which he may appoint . . . by issuing commissions which shall expire at the end of the next session of the Senate. Therefore it is his duty at that session to *nominate* and the Senate to confirm the appointment."). *Id.* at 1902 (emphasis added).

They and other Delegates made many similar statements confirming their intention that the appointment process would begin with a "nomination" by the Governor. *See, e.g.*, *id*. at 2081-82 (William Saulsbury: "If any check is introduced upon the appointing power of the Governor, it certainly is desirable that in that Senate which is to pass upon the *Governor's nominations*, there shall be some man of the opposite political party from his own.") (emphasis added); *id*. at 1922 (Joshua Ellegood and William Spruance noting that the Governor would "have to *nominate*" the Secretary of State prior to State Senate consent) (emphasis added); *id*. at 1923 (Andrew Johnson discussing his views on "sending all the *nominations* to the Senate for confirmation"); *id*. at 2054 (Woodburn Martin discussing the risk that, if senators

from New Castle County had a greater say over consent than those in the other counties, they might "simply say to the Governor, 'We want that office, and if you don't give it to us we will not confirm any man that you *nominate*.'") (emphasis added); 2 *id*. at 1303 (William Spruance discussing what percentage of the State Senate should be required to consent to officers "*nominated* by the Governor of this State") (emphasis added); 4 *id*. at 2759 (Robert Harman discussing whether a majority vote of the State Senate should be required to consent to the Governor's "*nomination*" of judges) (emphasis added).

The concept that, under the 1897 Delaware Constitution, appointments in Delaware begin (rather than end) with a "nomination" by the Governor, followed by State Senate consent and a commission, is hardly novel. Since 1897, Delaware courts have consistently referred to the Governor "nominating" candidates to office by submitting their names for State Senate consent. *See*, *e.g.*, *Oberly v. Troise*, 526 A.2d 898, 899 (Del. 1987) ("This case presents the question whether the Senate's prolonged failure to act on gubernatorial *nominations* is to be deemed constructive consent thereto, thereby constitutionally authorizing the Governor to issue valid full-term commissions to his *nominees*.") (emphasis added); *State ex rel. Gebelein v. Killen*, 454 A.2d 737, 739 (Del. 1982) ("Relator DiMondi was *nominated* on January 10, 1979, by the Governor as successor to Defendant.") (emphasis added); *Guy v. City of Wilmington*, 2020 WL 2511122, at *3 (Del. Super. May 15, 2020)

(referencing the Senate's "fail[ure] to act on the Governor's *nominations*") (emphasis added). *See also* Randy J. Holland, *The Delaware State Constitution* 136 (2nd ed. 2017) (referring to "nominations submitted by the Governor" and "nominees" subject to State Senate consent).

The General Assembly itself has recognized that the Governor "nominates" candidates. Indeed, its joint resolution requesting an opinion of the Justices in this matter used the word "nomination" more than a dozen times in describing the issue as the "validity of gubernatorial *nominations* before the Delaware State Senate," including whether the Delaware Constitution "empower[ed] Governor Bethany Hall-Long to submit *nominations* to the State Senate" and whether it "permit[ted] Governor Matthew Meyer to withdraw the *Nominations* lawfully before the Senate for consideration[.]" (A94-95) (emphasis added).

Moreover, in the State Senate's letter to the Governor dated January 21, 2025, the Senate referenced the "*nominations* made by your predecessor for appointment to" the DSPC Board, and invited the Governor "to advance your own *nominees* for Senate consideration—a step that is well within your rights as Governor." (A75) (emphasis added). That invitation would be nonsensical if, as the GA Brief now contends, Governor Hall-Long's submission of the name of candidates for the DSPC Board to the State Senate for consent was an "appointment" that concluded the executive branch's role. If that were true, Governor Meyer would not be "well

within [his] rights as Governor" to submit his "own nominees" for consideration, because the appointments for DSPC Board would already have been made and the executive branch's appointment power exhausted. That obviously is not the case, as the Senate clearly understood when the letter was written. Only after it became clear that there is overwhelming legal support for the proposition that governors may withdraw a "nomination" was it determined that everyone in Delaware, including the Delegates themselves, must have been misusing that word.

The GA Brief claims that use of the word "nominate" in Article V of the 1897 Delaware Constitution, but not in Article III, Section 9, evidences the intent of the Delegates to reject the federal model for appointments by abolishing nominations. But the two contexts are materially different. The term "nominate" appears in provisions of Article V addressing vote buying in various electoral contexts, and in order to cast as wide a net as possible, the list of prohibited behaviors include vote buying at conventions held to nominate candidates for election. *See* Del. Const. art. V, §§ 7, 9. Unlike appointments under Article III, Section 9, which consists of a process in which the Governor both nominates and appoints (with State Senate consent), conventions for nominating candidates and general elections are different processes that involve different individual making the decisions at issue. This bifurcation of nomination and appointment duties was also the case with the use of the word "nominate" in the 1776 Delaware Constitution, which provided that the

House of Assembly would nominate 24 individuals for justice of the peace and the president would appoint and commission 12 of them. (GAB 24-25) (citing Del. Const. art. 12 (1776)).

Nothing about the uses of the word "nominate" in those different contexts suggests that the Delegates intended to reject—again, without apparent discussion of the matter—the well-known three-step process for appointments subject to senate consent and memorialized that intent solely by not expressly adding the word "nomination" to Article III, Section 9.

3. The GA Brief's Attempt to Distinguish the Words "Nomination" and "Appointment" Is Irrelevant Because the Governor's Appointment Authority Ends Only When the Candidate has a Right to Office, which in Delaware Requires Submission of a Name to the State Senate, Senate Approval, and a Commission.

The GA Brief's position that the Governor's appointment power ends when the name of a candidate is submitted to the State Senate hinges entirely on its assumption that the Governor has only the power to "appoint," and not to "nominate." As explained above, that premise itself is demonstrably false, but the GA Brief's attempt to draw a distinction between "nomination" and "appointment" is irrelevant to the questions at issue here because numerous cases, including those cited in the GA Brief, make clear that the pertinent question in ascertaining whether the executive branch has continuing discretion over an appointment is whether the

candidate has a vested right to hold office, not whether the word "nomination" or "appointment" is used. As the South Dakota Supreme Court explained:

> 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.**

Burke v. Schmidt, 191 N.W.2d 281, 284 (S.D. 1971) (emphasis added) (holding that the senate's approval of candidates for state offices was invalid because the governor had withdrawn their names). The Arizona Supreme Court similarly held:

> It occurs to us that the language of the court in *McChesney v. Sampson* [a case heavily relied on by the GA Brief, distinguished below] . . . that "in cases 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," states the law correctly and applies to the facts of this case**. And this is true, whether sending the name to the senate for confirmation be treated merely as a nomination or as an appointment, because in neither instance would the act of the governor alone entitle his appointee to the office.**

McBride v. Osborn, 127 P.2d 134, 136–37 (Ariz. 1942) (citations omitted) (emphasis added). In other words, until a candidate for appointment has a right to office, the executive branch continues to have discretion over who is appointed and can withdraw the candidate at any time.

This was the conclusion of the United States Supreme Court in 1803, when it held in *Marbury v. Madison* that the President continued to have discretion over appointments until after the U.S. Senate provided its consent and the President signed a commission, the latter being the last act required for the appointee to have the right to take office. 5 U.S. 137, 157 (1803).

This was recognized by a United States Attorney General opinion in 1843, which explained that that "nomination followed by the signification of the advice and consent of the Senate" are not "sufficient of themselves to confer upon a citizen an office under the constitution." *Appointments to Office—Case of Lieutenant Coxe.*, 4 Op. Atty's Gen. 217, 219 (1843) ("*Lieutenant Coxe*"). Instead, the Opinion explained, "[t]hey 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."). *Id.*

This was echoed by the Pennsylvania Supreme Court in 1883. In *Lane v. Commonwealth*, the Court noted that the Pennsylvania Constitution provided that the Governor "shall nominate, 'and by and with the advice and consent of two thirds of all the members of the senate appoint,"' certain officers therein named, while a statute at issue "omits the word 'nominate' and declares that the [officer at issue] shall be 'appointed' by the governor by and with the advice and consent of the

senate[.]" 1883 WL 13429, at *3 (Pa. 1883). After stating that the omission of the word "nominate" from the statute "in no wise attempt[ed] to narrow" the "power relating to the appointment[,]" the Court explained that under the state constitution, until the state senate provided its consent and the "governor executes the commission, the appointment is not made" and "[p]rior to that time at his mere will, [the Governor] may supersede all action had in the case[.]" *Id*.

Thus, it was well understood in 1897 when the Delaware Constitution was debated and drafted that executive discretion over an appointment continued until the candidate for office was actually "appointed," meaning that all actions necessary for the person to validly hold office had been taken: nomination, consent, and commission. And this has been reiterated by numerous subsequent cases, in addition to the South Dakota and Arizona Supreme Court cases discussed above. *See, e.g., In re Governorship*, 603 P.2d 1357, 1365 (Cal. 1979) ("[T]he 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.'") (citations omitted); *Todd v. Essling*, 128 N.W.2d 307, 312 (Minn. 1964) (explaining that discretion over appointment power continues until "power vest[s] in the appointee to exercise the functions of the office"); *Bd. of Educ. of Boyle Cnty. v. McChesney*, 32 S.W.2d 26, 28 (Ky. Ct. App. 1930) ("An appointment to office

may be revoked, of course, at any time before the act becomes final."); 67 C.J.S. *Officers* § 63 ("[A]n appointment to office may be revoked at any time before the appointment becomes final and complete . . . . If a constitutional, statutory, or other legal provision requires that certain steps be taken to make an effective appointment, the appointment becomes complete beyond the possibility of recall when the last of the prescribed steps is taken.").

This principle is not contradicted, but rather embraced, by the cases cited in the GA Brief. As the Arizona Supreme Court explained, the "appointment in each [of those cases] had the effect of vesting the appointee with the office," such that their holdings have no "application at all where[,]" as is the case with Governor Hall-Long's nominations of the DSPC Board members, the governor's action "does not have the effect of vesting the appointee with the office." *McBride*, 127 P.2d at 136.

In *Barrett v. Duff*, Governor Allen of Kansas named *and commissioned* three officials to their respective offices during a recess of the legislature. 217 P. 918, 919 (Kan. 1923). Each of the three officials entered upon and performed the duties of their respective offices starting at the time of their commission. *Id*. Pursuant to the Kansas statutes that empowered the Governor to name such officials, the recess appointments remained subject to confirmation by the Senate. *Id*. at 920. Prior to such confirmation, Governor Davis, who replaced Governor Allen, transmitted the names of three different individuals to the Senate and purported to cancel the recess

appointments made by Governor Allen. *Id*. The Supreme Court of Kansas held that, "[u]nder the Kansas Constitution and statutes[,] the appointments to the offices in controversy are made by the Governor before the Senate Acts." *Id*. at 921.

The Court distinguished the Kansas Constitution from the Constitution of the United States, holding that, unlike the U.S. Constitution, "[t]here is no constitutional provision in Kansas, and no statute which applies to the offices in controversy, which first requires a nomination by the Governor." *Id*. at 920-21. But, the Court also noted that absent from the Kansas Constitution and statutes was the language from the U.S. Constitution that provides that the President with the power to fill vacancies that arise during a recess of the Senate "by granting commissions which shall expire at the end of their next session." *Id*. Like the U.S. Constitution, Delaware's Constitution provides that the Governor "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 . . . *by granting Commissions* which shall expire at the end of the next session of the Senate." Del. Const. art. III § 9 (emphasis added).

The GA Brief argues that the fact the Delaware's Constitution contains this provision in Article III, Section 9, while Kansas' Constitution does not, "is not critical here, as the Kansas Senate had to confirm the appointments." (GAB at 29 n. 69.) This is wrong. The Kansas Supreme Court noted that, in the absence of a provision concerning recess appointments like the U.S. Constitution, if

appointments during a Senate recess were "mere nominations," then an incumbent whose term expired during a recess could hold over until a successor was confirmed. *Barrett* at 921.[4] Delaware's Constitution eliminates this concern by giving the Governor the authority to "grant Commissions" prior to Senate consent when the Senate is in recess. If the intent of the Delaware Constitution was for the Governor's submission of names to the Senate to be an "appointment" before Senate consent and the Governor's granting of a commission, then there would be no need for Article III, Section 9 to explicitly grant the Governor the power to grant commissions while the Senate is in recess. And it also suggests that, except for the recess appointment power in Article III, Section 9, the Governor does not have the authority to grant commissions until State Senate confirmation has taken place. (*See* GB at IV.C.1.)

McChesney v. Sampson concerned the power of the Kentucky Governor to remove or recall an unconfirmed appointee where there had been no session of the Senate following the appointment. 23 S.W.2d 584 (Ky. 1930). In *McChesney*, the appointee was issued a commission on September 12, 1928 and "accepted the appointment, qualified, and exercised the functions of the office" until an executive order was entered approximately one year later purporting to remove him from

[4] Another case cited in the GA Brief, *State v. Matassarin*, similarly involved the inapposite question of whether a governor could remove appointees already holding office via recess appointments. 217 P. 930 (Kan. 1923).

office. *Id*. at 585. The Court of Appeals of Kentucky held that the Governor did not have the power of removal of an appointee who had not yet been confirmed by the Senate. Importantly, the relevant Kentucky statute (Ky.St. § 3750) provided: "Unless otherwise provided, all persons appointed to an office by the governor, whether to fill a vacancy, or as an original appointment, ***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 (emphasis added). The Kentucky court stated that this language "is necessarily exclusive and means that such appointees are subject to no other power or authority than the Senate and *hold office until rejected by the Senate*." *Id*. (emphasis added).

Critically, the Court drew a distinction between the unique process defined in the Kentucky statute and appointment processes in the federal context and in Delaware where senate confirmation is required before the appointment is actually made, and explained that in the latter, the executive branch was free to withdraw candidates from consideration:

> [I]n cases 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*. But under our system the appointee of the Governor takes the office, enters upon the performance of its duties, and is charged with responsibility. He holds then subject alone to the action of the Senate. His status is not that of a nominee awaiting confirmation, but that of an officer invested with the

> powers, privileges, and responsibilities of the position until the Senate acts.

Id. (emphasis added). Unlike in *McChesney*, the individuals nominated by Governor Hall-Long have not taken office or exercised any of its functions.

In *People v. Shawver*, a gubernatorial appointee was not confirmed by the Senate until the expiration of the term of the Governor who had made the appointment. 222 P. 11, 22 (Wy. 1924). The appointing Governor, Governor Carey, issued a commission *at the time of the appointment*, and the appointee presented the commission to the Senate for confirmation without the knowledge of the next Governor, Governor Ross. *Id*. The question before the Supreme Court of Wyoming concerned *the Senate's authority to act* in the absence of an executive communication from Governor Ross submitting the appointment to the Senate. *Id*. at 23. The court held that although the executive custom had been to use a form of communication "stating that the Governor nominates for the described office and term, and requesting consent or confirmation of the Senate[,]" the custom did not require the court to consider the effect of the word "nominate" in such communication where a "nomination" was not required under the relevant statute for the office in question. *Id*. Therefore, the meaning of the word "nominate" was irrelevant to determining the right of the Senate to exercise its confirmation power. *Id*. The court held that although the appointment had not been communicated to the Senate by Governor Ross, the Senate did have the authority to act. *Id*. The court

also noted that the appointment did not become effective until it was confirmed by the Senate, specifically noting that "[i]f the appointment might legally have been withdrawn by Governor Carey during his term, or by Governor Ross after he succeeded to the office, and before confirmation, that was not done." *Id*.

In *Todd v. Essling*, the Supreme Court of Minnesota found that, under Minnesota law, the governor appoints a candidate to a position and issues a commission, and that "[n]either confirmation by the senate nor further action by the governor was necessary to vest respondent with the powers and duties of the office." 128 N.W.2d 307, 313 (Minn. 1964). The Court found the senate confirmation power to be "more in the nature of a power to veto the appointment after the fact." *Id*. Under those circumstances, the Court found that the Governor could not remove the appointee from the office that had already vested. Importantly, the Court distinguished this from jurisdictions where, like Delaware, "no power vest[s] in the appointee to exercise the functions of the office until confirmation[.]" *Id*. at 312. In those situations, the Court explained, the governor's appointment power remains until the "senate confirms and the appointing authority issues a commission to the officer." *Id*.

The GA Brief also cites two Washington Attorney General Opinions, asserting that they suggest a governor may not withdraw appointments made by the previous governor after submission to the legislature. (GAB 32 n.77.) But those

opinions (one of which involved a recess appointment) were clear that "in this state the governor's act of appointment entitles the appointee to assume office immediately and perform the functions thereof, subject only to the possibility of later divestment by senatorial rejection." *See* 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.[5]

In short, all of these authorities cited in the GA Brief support the conclusion that it is the point at which a candidate has the right to take office, and not whether the constitution uses the word "nomination" and/or "appointment," that determines when an appointment has been made and the executive branch's discretionary appointing authority extinguished.

In Delaware, a candidate for appointment has no right to office before the entire process, including submission of a name to the State Senate, the consent of the Senate, and the issuance of a commission, has been completed. *See Oberly*, 526 A.2d at 899 (explaining that the appointment power "depends on Senate consent and results in the issuance of full-term commissions," and holding that the express consent of the State Senate was required for non-recess appointments); *Debates* at

[5] The GA Brief also notes that some states have statutes and senate rules providing the procedure for the withdrawal of a nomination. (GAB 35 n.84.) But those only demonstrate that it is commonly accepted that a governor's appointment power includes the power of withdrawal until the candidate has a right to office.

2070-71 (Woodburn Marin explaining that Senate consent was required "*before* [officers] shall be qualified to exercise the duties of the office for which they have been nominated by the Governor") (emphasis added).

Thus, the appointment process in Delaware begins with the submission of a name to the State Senate for its consent, whether that is called a "nomination" or something else, but that does not give the candidate a right to office. *Oberly*, 526 A.2d at 899. And this appointment process does not end until, in accordance with Article III, Section 12 of the Delaware Constitution, the Governor demonstrates appointment by executing a commission. Only then does the candidate have a right to office, and only then does the Governor no longer have discretion to withdraw the candidate's consideration.

4. Separation and Balance of Power Considerations Do Not Support the GA Brief's Position.

The GA Brief does not dispute that separation and balance of power principles are a consideration in determining whether the Governor can withdraw a potential candidate from consideration. The Governor Brief explained in detail how the Delaware Constitution creates a careful balance between the Governor's appointment power and the State Senate's power of consent. (GB 31-34.)

The GA Brief, on the other hand, offers little to explain how the executive branch's authority to withdraw candidates from consideration after submission for State Senate consent (or at any other stage of the appointment process) would upset

the separation and balance of powers between executive and legislative branches. (GAB 34.) The best the GA Brief can offer is that if consent is "purely a legislative function, the separation of powers doctrine precludes interference by the executive branch." (GAB 28; *see also* GAB 34 (same).) But the GA Brief does not explain how the withdrawal of a candidate would interfere with the States Senate's right to consent to or reject a proposed candidate before that candidate is finally appointed, which is the sole power given to the State Senate in Section III, Article 9. *See* 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) (General Assembly's authority "does not carry with it the right to indicate exactly whom the governor may appoint.").

IV. THE GOVERNOR HAS AUTHORITY TO NOT APPOINT AND 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

The Governor Brief explained how, pursuant to Article III, Sections 9 and 12 of the Delaware Constitution, the final step in the appointment of a state officer is a commission signed by the Governor, and that the Governor maintains discretion to alter a proposed appointment to an office until the appointment is finally made by issuing a commission. (*See* GB 35-40.) It cited in support numerous federal and state cases and other authorities, including authorities prior to 1897. (GB 37-40.) It also pointed out that the Delegates drafting the Delaware Constitution would have used much different language had they intended State Senate "consent" to be a mandate that a proposed appointment occur, rather than an indication of a lack of objection to the proposal (i.e., "consent"). (GB 40-41.)

The GA Brief makes no effort to grapple with the overwhelming federal and state authority holding that a President or governor can, in their discretion, decide not to appoint a candidate to whom the senate has consented and withhold a commission. (GB 37-40.) The GA Brief simply asserts that a commission is not necessary for an appointment, and that even if it were, it is a mere ministerial act that could be compelled through a writ of mandamus. (GAB 38-39.)

That position reads out of the Delaware Constitution Article III, Section 12, which mandates that commissions "shall be sealed with the great seal and signed by the Governor." *See Opinion of the Justices*, 225 A.2d 481, 484 (Del. 1966) ("[C]onstruction must be avoided which would make any provision idle and nugatory."). This provision previously existed in the 1831 Delaware Constitution, which, in Article III, Section 8, empowered the Governor to appoint officers without the need for State Senate consent by issuing them a commission "in the name of the State[,] sealed with the great seal, and [] signed and attested by the Governor." 1831 Del. Const. art. III, § 8. Although the sentence about commissions was moved to its own separate section in the 1897 Constitution, nothing about that (or anything from the 1897 debates) suggests that this was done to eliminate the requirement for commissions.

The GA Brief recognizes that Article III, Section 9 itself references the need for commissioning officers but asserts that it only applies for "commissions issued

to provisionally fill vacant offices," arguing that this demonstrates an intent of the Delegates that, nonsensically, commissions would be required for recess appointments but not for regular appointments. (GAB 36.) Not so. The GA Brief also points out that commissions are specifically required in Article III, Sections 21 and 22 (GAB 37 n.89), but those sections deal with commissions of elected officials. Nothing about that suggests an intent that commissions would not be required for appointed officials.

There was no need to provide for recess appointments in prior constitutions, since legislative consent was not required, and the process consisted only of the Governor selecting a candidate and giving a commission satisfying the specified requirements. When State Senate consent was added to the appointment process in 1897, the Delegates had to account for a situation where a vacancy needed to be filled but the State Senate was not in session. They resolved this by granting the Governor power to fill such vacancies during a recess with an appointment, but qualified that the commissions for such recess appointments had to "expire at the end of the next session of the Senate." Del. Const. art. III, § 9. In other words, the reason for a specific reference to commissions with respect to recess appointments was not made because, without it, commissions would not be required, but to clarify

that the commissions required for recess appointments (unlike those required for regular appointments) had to expire at the end of the next Senate session.[6]

The authorities cited in the GA Brief do not support a conclusion that commissions are optional or merely ministerial. *State v. Lyon* ruled only that a secretary of state's duty to deliver commissions to appointed officers was ministerial, not that the governor's execution of commissions was ministerial. 165 P. 419, 422 (Okla. 1917). And *Coleman v. Lewis*, 186 S.E. 625, 637 (S.C. 1936) and *Shuck v. Cope*, 35 N.E. 993, 995 (Ind. 1893) actually addressed questions about the need for elected officials to receive a commission from the governor in order for their appointments to be effective, not whether a commission from the governor is a necessary step in an appointment *by the governor*.

The case *Johnson v. Hagemeister* actually refutes the GA Brief's position. 73 N.W.2d 625 (Neb. 1955). In that case, the Nebraska Supreme Court described two different procedures: one for recess appointment and one for general appointment, the latter of which is the type at issue here. The governor had appointed Robert Crosby to fill a vacancy. *Id*. at 627. The legislature later confirmed his appointment to fill the term of the vacancy. *Id*. A few months before the term was to expire, the governor appointed Crosby to a full six-year term. *Id*. at 628.

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[6] Similarly, 29 *Del. C.* § 4301(d)(2) specifically references commissions to indicate a duration, stating that they should be "for the term under Section 4307(a) of this title.").

A few months later, after the original term had ended, the legislature confirmed the six-year appointment. *Id*. Shortly thereafter, however, the legislature withdrew the confirmation. *Id*. The subsequent governor nominated Bruce Hagemeister for the position, who was approved by the legislature and commissioned by the governor. *Id*. A dispute arose as to who held title to the office.

Crosby argued that "when the Legislature confirmed [him], . . . the appointment was complete and beyond recall and the Legislature thereafter could not reconsider what it had done." *Id*. at 630. The Nebraska Supreme Court disagreed, explaining that a "point of time which is final can only be said to have been reached when the constitutional power of appointment has been fully exercised." *Id*.

The GA Brief points out that the Nebraska Supreme Court noted that Crosby's appointment contained his commission, which the Court held was proper "since it was [the governor's] final executive act in regard to the appointment as, upon confirmation of the appointment by the Legislature, the issuance of the commission would be merely ministerial." *Id*. Importantly, however, the GA Brief fails to acknowledge that the Court continued:

> The foregoing should not be confused with the procedure provided in Article IV, section 10, Constitution of Nebraska, under which the Governor apparently proceeded in nominating [Hagemeister]. Article IV, section 10, Constitution of Nebraska, provides: "The governor shall nominate and by and with the advice and

> consent of the senate[,] . . . appoint all officers whose offices are established by the constitution, or which may be created by law, and whose appointment, or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature." 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.

Id. at 631. The Court then quoted *Harrington* in explaining that an "'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[.]" *Id*. (quoting *Harrington*, 82 P. at 84.)

The need for a post-consent commission is not belied by Governor Hall-Long's statement that her nominees were to be appointed members of the DSPC Board "to serve a term to expire 3 years from the date of Senate confirmation." (A55-59.) Notably, Governor Hall-Long did not state that the appointments would *begin* upon State Senate consent, only that their terms would *expire* three years after that time. And even if Governor Hall-Long had suggested that the appointments would be effective immediately upon State Senate consent, it would be of no legal effect because it would not alter the Constitutional requirement for a commission.

The GA Brief asserts that a commission must be considered a ministerial act because 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." (GAB 39.) Both assertions are wrong. First, because a commission is a necessary step in the appointment process, withholding a commission would not be a "removal" because the candidate for appointment would not yet have any right to office. *In re Governorship*, 603 P.2d at 1365. Second, as explained above, the plain meaning of "consent" is an absence of objection to a proposed course. *See*, *supra*, at 13. The State Senate has only the right to say no to a particular candidate, it does not have the authority to mandate that a specific candidate be appointed, and the exercise of the Governor's discretion in whether to appoint a candidate who has received Senate consent therefore is not a "veto." *Mitchell v. Del Toro*, 2024 WL 4891906, at *6 (D.D.C. Nov. 26, 2024) (explaining that Senate consent does not appoint the officer because appointment is a voluntary presidential act and a "congressionally mandated act is not a voluntary presidential act"); *Dysart v. U.S.*, 369 F.3d 1303, 1316 (Fed. Cir. 2004) ("[A]fter confirmation, the President may refuse to execute the appointment. All Presidential appointments . . . involve a discretionary decision."); *Appointment of A Senate-Confirmed Nominee*, 23 Op. O.L.C. 232 (1999) ("The appointment is the voluntary act of the President, and the consent of the Senate does not place him under any legal obligation.").

The GA Brief also asserts that a commission is not required because it is "mere evidence of an appointment." (GAB 37.) But that is precisely the point. A commission is a required step in the process precisely because it evidences that, following State Senate consent, the Governor has exercised his discretion and proceeded with appointing the proposed candidate to office. *See Marbury*, 5 U.S. at 157 ("[T]he commission and the appointment seem inseparable; it being almost impossible to shew an appointment otherwise than by proving the existence of a commission[.]"); *Dysart*, 369 F.3d at 1311 (quoting *Lieutenant Coxe*) ("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. . . . [A]n 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."); 67 C.J.S. *Officers* § 64 (suggesting that an "oral announcement of the appointing power's determination" could be given in lieu of a formal commission). The Delaware Constitution provides that the evidence of the Governor's final decision should be in the form of a commission sealed and signed by the Governor. Del. Const. art. III, § 12.

Even if (*arguendo*) the issuance of a formal commission were not an essential part of an appointment, the critical point of the great weight of legal authority is that a governor retains the discretion after the State Senate has given its consent to decide whether or not to actually make the proposed appointment. Until the Governor makes the post-consent decision to finalize the appointment, the proposed appointment remains subject to the Governor's discretion and his authority to withdraw it.

CONCLUSION

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

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Dated: February 24, 2025

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Multi-Case Filing Detail: The document above has been filed and/or served into multiple cases, see the details below including the case number and name.

Transaction Details

Court: DE Supreme Court

Document Type: Answering Brief

Transaction ID: 75698766

Document Title: Answering Brief of the Position of Governor Meyer (eserved) (jkh)

Submitted Date & Time: Feb 24 2025 3:12PM

Case Details

Case Number	Case Name
35,2025C	In re: Requests for an Advisory Opinion of the Justices
38,2025C	In re: Requests for an Advisory Opinion of the Justices