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

ANSWERING 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 related to the validity of Governor Bethany Hall-Long's Appointments to the DSPC Board and Governor Meyer's attempt to withdraw those Appointments after they had been submitted to the Senate for confirmation.[1]

By Court Order dated February 6, 2025, the Justices, pursuant to 10 *Del. C.* § 141(b), appointed Prickett, Jones & Elliott, P.A. to brief the position of the General Assembly and Young Conaway Stargatt & Taylor LLP to brief the position of the Governor. On February 17, 2025 the parties filed opening briefs in support of their respective positions. Oral argument is scheduled for February 26, 2025. This is the undersigned counsel's answering brief providing the position of the General Assembly on the questions issued by the Court.

[1] Unless defined herein, capitalized terms are as defined in the Opening Brief in Support of Position of General Assembly (the "Gen. Assem. Br."). The Opening Brief in Support of Position of Governor is cited herein as the "Gov. Br."

SUMMARY OF ARGUMENT

1. Admitted in part, Denied in part. Governor Meyer and the General Assembly agree that the Court may, and respectfully should, provide an opinion on the questions raised by the General Assembly.[2] The General Assembly takes no position on the Court's acceptance of the questions propounded by the Governor. As a result, the General Assembly respectfully relies upon the arguments set forth on pages 9–12 of the General Assembly's Opening Brief for its response to the first question propounded by the Court.

2. Admitted. Governor Meyer and the General Assembly agree that between January 7 and January 21, 2025, the Delaware Constitution empowered Governor Hall-Long to submit appointments to the DSPC Board. As a result, the General Assembly respectfully relies upon the arguments set forth on pages 13–19 of the General Assembly's Opening Brief for its response to the second question propounded by the Court.

3. Denied. Governor Meyer does not have the constitutional authority to withdraw the Appointees from Senate consideration. Governor Meyer's assertion for such authority rests on the premise that the Governor's appointment power under the Delaware Constitution is an analog of the President's nomination/appointment right under the United States Constitution. Under Delaware's Constitution,

[2] *See* Gov. Br. at 3, 13–17; Gen. Assem. Br. at 2, 9–12.

however, there is no "nomination" phase. As a result, most of the Governor's arguments are inapposite.

4. Denied. Governor Meyer is not correct that the issuance of commissions is necessary for the Appointees to assume office. The Appointees' terms begin when they have been confirmed by the Senate. However, even if the Governor withheld commissions from the confirmed Appointees, the Appointees could seek writs of mandamus to compel the Governor to issue commissions (a ministerial act), which provides the Appointees an adequate remedy at law.

STATEMENT OF FACTS

The General Assembly's Opening Brief includes a statement of facts, which is incorporated herein by reference.

ARGUMENT

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

A. Question Presented

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

We respectfully submit that, yes, the Court should answer the questions propounded by the General Assembly and take no position on those propounded by the Governor.

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 the Argument

Governor Meyer and the General Assembly agree that the Court may, and respectfully should, provide an opinion on the questions raised by the General Assembly.[3] As a result, the General Assembly respectfully relies upon the arguments set forth on pages 9-12 of the General Assembly's Opening Brief for its response to the first question propounded by the Court.

[3] *See* Gov. Br. at 3, 13–17; Gen. Assem. Br. at 2, 9–12.

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 the sitting Governor'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

Governor Meyer and the General Assembly agree that Governor Hall-Long was Governor between January 7 and January 21, 2025, and that the Delaware Constitution empowered her to submit appointments to the DSPC Board.[4] As a result, the General Assembly respectfully relies upon the arguments set forth on pages 13–19 of the General Assembly's Opening Brief for its response to the second question propounded by the Court.

[4] Gov. Br. at 3, 18; Gen. Assem. Br. at 13–19.

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 Governor asserts that after the gubernatorial appointment power is exercised, the Governor maintains the power to withdraw the Appointees at any time before the Senate gives its consent.[5] The Governor reaches that conclusion in four steps. First, the Governor asserts that the Governor's appointment power under the Delaware Constitution is an analog of the President's nomination/appointment right under the United States Constitution.[6] Second, the Governor argues that the appointment power includes an implicit authority to withdraw appointments.[7] Third,

[5] Gov. Br. at 19.

[6] *Id.* at 21–23.

[7] *Id.* at 24–28.

the Governor asserts that case law from other jurisdictions supports the prior conclusions.[8] Fourth, the Governor argues that the separation of powers doctrine requires preserving executive control over appointments still subject to Senate consent.[9] In support of the position of the General Assembly, we address these arguments in that same order, and submit that the Delaware Constitution and relevant authorities support the opposite conclusion.

1. The 1897 Delegates Rejected the Three-Step Appointment Process Set Forth in the United States Constitution

The Governor's constitutional argument begins by stating that the Delaware Constitution does not expressly provide for withdraw of an appointment.[10] The General Assembly agrees that the ability to withdraw gubernatorial appointments is not expressly provided for in the Constitution.[11]

From there, the Governor argues that Delaware's constitutional appointment provision is "analogous" to that of the United States Constitution and there is no

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[8] *Id.* at 28–30.

[9] *Id.* at 31–34.

[10] The Governor uses the terms "nominee" and "nomination." *See, e.g.*, *id.* at 3, 4, 6, 14, 18, and 21. The General Assembly previously explained why that nomenclature is semantically incorrect and without legal significance. Gen. Assem. Br. at 2, 4 n.6, and 33 n.78. Thus, the General Assembly continues to use the term appointment, which is the correct term under the Delaware Constitution.

[11] *See* Gen. Assem. Br. at 20.

evidence that the drafters of the Delaware Constitution of 1897 intended a different result.[12] That is not correct.

The Delaware Constitution and the United States Constitution each set forth different appointment rights and processes.[13] The United States Constitution 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 appoints the confirmed nominee.[14] Delaware's delegates might have adopted a similar process in 1792, 1831, or 1897, but chose not to.[15] The Delaware Constitution provides the Governor an appointment right—not a

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[12] Gov. Br. at 21–23.

[13] The Governor's erroneous comparison of the appointment powers under the Delaware and United States Constitutions is compounded by his argument that "federal precedent interpreting Article II, Section 2 of the U.S. Constitution is persuasive authority when considering questions about the Governor's appointment power." *Id.* at 22. The Governor cites *State ex. rel. Gebelein v. Killen*, 454 A.2d 737, 740–41 (Del. 1982), but that case involved the interpretation of Delaware's "recess appointment provision," which tracked the United States Constitution "almost verbatim." The issue here concerns the Governor's general appointment power, and the two constitutions use materially different language for that executive authority. Gen. Assem. Br. at 26–27.

[14] Gen. Assem. Br. at 27 (citing *Dysart v. United States*, 369 F.3d 1303, 1311 (Fed. Cir. 2004) and *Barrett v. Duff*, 217 P. 918, 920–21 (Kan. 1923)).

[15] *See State ex rel. Oberly v. Troise*, 526 A.2d 898, 903 (Del. 1987) (discussing the drafters' decision to omit a provision requiring senatorial action on gubernatorial appointments: "The 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.").

nomination 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. But in Delaware, the Governor's appointment power is complete once the appointment is presented to the Senate for its consent.

The Governor is also wrong to suggest that the drafting history of the Delaware Constitution supports its view that the United States and Delaware Constitutions should be presumed to provide identical appointment rights.[16] The drafters of the Delaware Constitutions of 1776 and 1897 both used variations of the term "nominate," although not in the context of the Governor's appointment power.[17] Indeed, all four of Delaware's Constitutions provided for appointments without the preceding step of nominations. We respectfully submit that the Court should reject the Governor's attempt to grant to himself a nomination power that is unsupported by the plain language of the Delaware Constitution.[18]

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[16] *See* Gov. Br. at 19, 21–23.

[17] Gen. Assem. Br. at 24–26. The Constitutions of 1792 and 1831 contained no such references. *Id.*

[18] *See 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).

The specific purposes behind the changes to the Delaware Constitution of 1897 further support the position of the General Assembly. At the Constitutional Convention of 1897, the delegates rebalanced the power of government in significant respects. The 1897 delegates had two primary goals: to modify the balance of power between the three branches of government and to make the Constitution more democratic.[19] One way the 1897 delegates accomplished this was to limit the Governor's appointment power. Prior to adoption of the 1897 Constitution, Delaware's Governor had an absolute power of appointment, and in a single step the Governor could appoint an individual to office who then would automatically assume that office.[20] The 1897 delegates determined to add a second step to the

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[19] *In re Request of Governor for an Advisory Opinion*, 905 A.2d 106, 110 (Del. 2006).

[20] *Id.*; *see also State ex. rel. Morford v. Emerson*, 8 A.2d 154, 157 (Del. Super. Ct. 1939) (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."). The Governor argues that "without license to withdraw nominations the Governor's control over appointments would be severely restricted, undermining the Governor's role in scrutinizing appointments. For example, the Governor could be forced to proceed with a candidate whom he no longer deems appropriate for the position as issue, undermining effective governance and executive authority." Gov. Br. at 21. The Governor's executive function, however, is to scrutinize appointees *before* submitting their names to the Senate. His argument for permanent control over appointees is contrary to the separate of powers doctrine.

process: consent by a majority of the Senate. The language the 1897 delegates drafted for Section 9 of Article III to implement this second step placed Senate consent between the act of gubernatorial appointment and the appointee's assumption of office.

The delegates might have adopted the three-step process found in Section 2 of Article II of the United States Constitution: a nomination by the executive, Senate approval, and the subsequent appointment by the executive. But Delaware's 1897 delegates took a different approach.

The unambiguous language of the Delaware Constitution and its drafting history both demonstrate that the power of the Governor to make appointments is different from the nomination and appointment powers of the President of the United States. Ample authority recognizes that a practical difference between such distinct appointment provisions is the inability of the executive to withdraw appointees.[21]

The Governor's authorities illustrate the difference. For example, the Governor relies on a 1999 memorandum from the Office of Legal Counsel, in which Acting Deputy Assistant Attorney General Dan Koffsky concluded that, under the United States Constitution, after the Senate consented to a nominee, the President

[21] Gen. Assem. Br. at 29–35.

had discretion not to make the appointment.[22] Quoting a 1931 Attorney General opinion, the Acting Deputy Assistant Attorney General wrote:

> [T]he Appointments Clause contemplates three steps. There is, first, the nomination, which is a mere proposal. Next comes action by the Senate consenting or refusing to consent to the appointment. Finally, if the Senate consents to the appointment there follows the executive act of appointment. It has long been recognized that the nomination and the appointment are different acts, and that the appointment is not effected by the Senate's so-called confirmation of the nomination. After the Senate has consented to the appointment, the nominee is not entitled to the office until the consent is followed by the executive appointment. After a nomination is sent to the Senate and has received the approval of that body, the President may, having changed his mind, decline to make the appointment.[23]

This highlights the infirmity of the Governor's argument.[24] The Governor is not making a nomination (i.e., a "mere proposal"), nor does Delaware's Constitution give the Governor any power to send a nomination to the Senate. The Governor is

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[22] *Appointment of a Senate-Confirmed Nominee*, 23 Op. O.L.C. 232 (1999) (cited in Gov. Br. at 22).

[23] *Id.* at *2.

[24] The Governor also cites *Mimmack v. United States*, 97 U.S. 426, 430 (1878) (Gov. Br. at 22), which merely recites the three-step process pursuant to the United States Constitution and is therefore distinguishable for the same reasons discussed above.

making an appointment at the beginning of the process, not as the final, discretionary act under the federal system.[25]

Finally, building on the erroneous assertion that the Delaware Governor's appointment power effectively operates like the three-step nomination and appointment process set forth in United States Constitutions, the Governor claims he has the power to withdraw an appointee until the candidate "has a vested right to office" upon the issuance of a commission.[26] As discussed *infra* 25–30 an 66appointee's right to office under the Delaware Constitution does not turn on the issuance of a commission. Rather, under state constitutions with language like Delaware's, the executive branch's appointment power is complete once the appointment is made. At that time, it becomes a purely legislative function for the Senate to confirm the appointment. The separation of powers doctrine forbids executive interference with that function.[27]

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[25] *Cf. Appointment of a Senate-Confirmed Nominee*, 23 Op. O.L.C. 232, at *3 ("We therefore conclude that even after the Senate gives its advice and consent, the President lawfully may decline to appoint a nominee.").

[26] Gov. Br. at 23 (citing *Appointments to Off.—Case of Lieutenant Coxe*, 4 Op. Atty's Gen. 217, 219 (1843), which concerned nominations under the United States Constitution and is therefore inapplicable to the present issues before the Court).

[27] *See Barron v. Kleinman*, 550 A.2d 324, 326 (Del. 1988) ("[W]e agree that the appointment process implicates the doctrine of separation of powers . . . ."). The Governor asserts that Senate "advice" is only meaningful if the Governor can withdraw candidates after receiving such advice. Gov. Br. at 21. But the "advice and consent" function refers to the legislature's deliberative process that culminates in a confirmation or rejection, not a back-and-forth exchange with the Governor

2. The Governor Does Not Have "Implicit Authority" to Withdraw Appointees Submitted to the Senate for Confirmation

Next, the Governor asserts that because he has the constitutional power to appoint officers, he necessarily also has an implied power to withdraw appointees.[28] The Governor's position is not supported.

The Governor relies on a single case from outside of Delaware for the proposition that a Governor has an implied right to withdraw appointments: *Hall v. Prince George's County Democratic Central Committee*, 64 A.3d 210, 224–25 (Md. 2013).[29] *Hall* involved a provision in section 13(a)(1) of Article III of Maryland's Constitution permitting legislative vacancies to be filled by a two-step nomination/appointment process, with the nomination coming from a political party's central committee and the appointment subsequently made by Maryland's governor.[30] The *Hall* court found that since the procedure involved a nomination by the central committee that could not result in an actual appointment, the central

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providing an opinion. *See* Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 Harv. J.L. & Pub. Pol'y 103, 140 (2005) (the historical texts suggest "advice" was not a synonym for "opinion," but rather, it was a synonym for "approval").

[28] Gov. Br. at 24.

[29] *Id.* at 24–25. The Governor also cites *McCulloch v. Maryland*, 17 U.S. 316, 316 (1819), which discusses implied powers but does not concern the appointments clause and *In re Governorship*, 603 P.2d 1357 (Cal. 1979), which does not discuss implied powers.

[30] *Hall*, 64 A.3d at 223–24.

committee had the power to withdraw a nomination before the governor acted on the appointment.[31] The *Hall* situation is far different from the questions before this Court. First, the constitutional procedure at issue in *Hall* involved a nomination step which is absent from the Delaware Constitution's appointment provision. Second, the nomination at issue in *Hall* was not made by a branch of government, and therefore did not implicate separation of powers concerns. And third, the *Hall* court emphasized that the central committee's implied power to withdraw a *nomination* was dependent on whether or not the governor's *appointment* had been made.[32] The right to withdraw ended at the point that the governor exercised the appointment power. Here, the Governor advocates for an implied power of withdrawal *after* he has exercised his appointment power. *Hall* is inapplicable to the questions before this Court, and the Governor has otherwise failed to cite any persuasive legal basis to infer an implied right to withdraw the Appointees under the Delaware Constitution.

The Governor's citations to Senate and Supreme Court rules likewise do not support the Governor's implied powers argument.[33] Both Rule 40(b) of the

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[31] *Id.* at 224.

[32] *Id*.

[33] *See* Gov. Br. at 25–28. The Governor also cites a letter from the Senate President Pro Tempore inviting the Governor to advance his "own nominees" as purported support for his position. *Id.* at 27–28 (citing A75). A letter exchanged between

Delaware Rules of the Senate and Supreme Court Internal Operating Procedure § XVII(4) concern specific procedures adopted by distinct branches of government. They do not deal with the issue presently before the Court—the Governor's attempt to wrest power properly belonging to the legislature.

Senate Rule 40(b) makes this clear. The Governor acknowledges that Senate Rule 40 only permits the Senate to *request* that the Governor return a bill or resolution already submitted to the Governor.[34] This procedural Senate rule does not purport to, and indeed cannot, override the separation of powers doctrine. In such a case where the General Assembly has already presented a bill to the Governor, the General Assembly may, of course, request it back. It cannot, however, demand it back. Likewise, when a gubernatorial appointment is transmitted to the Senate, the Governor might *request* that the Senate not confirm the appointment, but Delaware's Constitution does not provide the *power* to demand it.[35]

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branches of government does not supersede or affect the Delaware Constitution analysis.

[34] *See id.* at 25–26 (explaining that Senate Rule 40(b) provides a procedure by which the Senate may "request" that a bill presented to the Governor for signature into law be returned).

[35] The Governor appears to concede the point. *See id.* at 27 (explaining that as to DSPC appointees submitted to the Senate, "the Governor may reconsider the nomination and request the State Senate to withdraw it."). The Governor can request it; he is, however, constitutionally barred from demanding it.

3. The Governor's Non-Delaware Cases Are Distinguishable

Next, the Governor cites to case law from other jurisdictions that he claims supports the argument that appointees can be withdrawn.[36] Two of the Governor's eight cases support the General Assembly's position. The other six are distinguishable, because they either involve statutory or constitutional provisions that differ materially from Delaware's Constitution, or adopt an approach that clashes with the intent of the drafters of the Delaware Constitution to shift power away from the Governor and to the General Assembly.

(1) Cases That Support the General Assembly's Position

a. *McChesney v. Sampson*, 23 S.W.2d 584, 587 (Ky. 1930)

In its Opening Brief, the General Assembly explained that the *McChesney* court discussed the distinction between appointments and nominations, and concluded that gubernatorial appointments, once complete, are "not subject to further consideration or recall."[37] The Governor quotes a sentence from *McChesney* discussing nominations, not appointments.

b. *State ex rel. Todd v. Essling*, 128 N.W.2d 307 (Minn. 1964)

Essling likewise supports the General Assembly's position.[38] The Governor quotes a portion of *Essling* discussing circumstances "where the appointment

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[36] *Id.* at 29–30.

[37] Gen. Assem. Br. at 31–33 & nn. 76–77.

[38] *See id.* at 32 n.77.

process is initiated by a nomination[.]"[39] The *Essling* court highlighted the distinction between nominations and appointments and concluded that the Governor's appointment could not be withdrawn:

> The procedure contemplated by s270.01 is an appointment to the board rather than a mere nomination by the governor. Under this statute, the governor's part of the appointive process is to appoint a person to the board, to issue him a commission, and to submit his name for confirmation to the senate. These acts constitute the full extent of the governor's power in the appointive process . . . 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. . . . The record before us clearly shows that the appointment of respondent by Governor Andersen was complete when reported to the senate and beyond his pleasure to revoke or rescind[.][40]

(2) Cases that Clash with the Intent of the Delaware Constitution

a. *McBride v. Osborn*, 127 P.2d 134 (Ariz. 1942)

In *McBride*, the Arizona Supreme Court held that the Governor could "for any reason he thought proper change his mind and withdraw [a] name from the consideration of the senate any time before the body completed the appointment[.]"[41] The court also distinguished *McChesney* and others, holding that those authorities turned on a vested right to office.[42]

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[39] Gov. Br. at 30 (citing *Essling*, 128 N.W.2d at 312).

[40] *Essling*, 128 N.W.2d at 313.

[41] 127 P.2d at 137.

[42] *Id.* at 136–37.

The *McBride* court ignored the critical issue in this case: when does the separation of powers doctrine preclude executive interference in the legislative process. That court held, without analysis, that the executive function did not end upon appointment.[43] For the reasons discussed in the General Assembly's Opening Brief at 21–23, the Delaware Constitution was drafted to avoid the Governor's interference with the Senate and the separation of powers doctrine precludes the conclusion reached in *McBride.*

b. *Harrington v. Pardee*, 82 P. 83 (Cal. Ct. App. 1905)

In *Harrington*, the court discussed that "nominate" and "appoint" are not synonymous, but concluded that, under California's provisions, an "appointment" is not made until a commission is issued. In holding that the Governor had the discretion not to issue a commission, the court endorsed a three-step process mirroring the federal appointment process.[44]

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[43] *Id.* at 137.

[44] California reached the same result in *In re Governorship*, 603 P.2d 1357 (Cal. 1979), which is inapposite for the same reason. *Governorship* is further distinguishable because that case did not involve separation of powers issues. Rather, the body constitutionally required to confirm judicial appointees was made up of members of both California's executive branch and judicial branch. *Id*. at 1360 n.2. The panel was not acting as a separate branch of government and, therefore, *Governorship* did not involve interference with one branch of government by another.

The Delaware Constitution contemplates a two-step process with only one mandatory step from the Governor—the appointment—after which the power shifts entirely to the legislative branch. Further, as discussed *infra* pp. 25–30, the issuance of a commission is a ministerial act under the Delaware Constitution.

c. *Burke v. Schmidt*, 191 N.W.2d 281 (S.D. 1971)

In *Burke*, the court acknowledged the view 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."[45] The court, however, rejected the argument under the South Dakota Constitution, and instead adopted a test of "whether the action of the executive is final and complete and places the appointee in office without further action."[46] Because senate confirmation was a requisite to place the appointee in office, the court concluded the governor had a right to unqualified withdraw. Dissenting, South Dakota Supreme Court Justice Winans stated his view that where "the Senate had the right to confirm . . . the Governor ha[s] no right to withdraw the appointments once made[.]"[47] The majority's decision is inconsistent with the separation of powers doctrine inherent in the 1897 Delaware Constitution and the intent behind its drafting.

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[45] *Burke*, 191 N.W.2d at 284.

[46] *Id*.

[47] *Id.* at 288 (Winans, J., dissenting).

d. *Mitchell v. Missouri State Highway Patrol*, 809 S.W.2d 67 (Mo. Ct. App. 1991)

In *Mitchell*, the question before the court was whether a Missouri State Highway Patrol Trooper was effectively discharged for misconduct. The trooper questioned the power of the superintendent of the Missouri State Highway Patrol, Colonel Ford, who had been appointed during a senate recess, to terminate him. The governor had appointed Colonel Ford during recess, then submitted Colonel Ford's name for senate consideration before the senate reconvened—but withdrew Colonel Ford's name from Senate consideration. Without significant analysis, the court concluded that Colonel Ford had the power to terminate the trooper as acting superintendent and, as a recess appointee, did not need to wait for the advice and consent of the senate to exercise the power of his office.

Other Missouri authorities, however, indicate that Missouri takes the position that recess appointments may not be withdrawn because the appointment there is "the last official act" of the Governor, while gubernatorial action while the Senate is

in session is a "mere nomination[]."[48] Thus, Missouri has seemingly adopted the position of the General Assembly here.[49]

4. The Separation of Powers Doctrine Supports the General Assembly's Position

The Governor and General Assembly agree that this contested withdrawal issue implicates separation of powers concerns, but the respective parties reach opposite conclusions. In two-step constitutional appointment jurisdictions, we submit, on behalf of the General Assembly, that the separation of powers doctrine compels the conclusion that the appointment power, once exercised, is complete. At that point, all that remains is Senate confirmation, which is an entirely legislative function. As the respective actions happen "consecutively," the separation of powers doctrine dictates that the Governor cannot withdraw an appointed official.[50] This is the result most aligned with the language and drafting intent behind Article III, Section 9 of the Delaware Constitution.[51]

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[48] Op. Att'y Gen. Miss. No. 226 (Nov. 22, 1977); Op. Att'y Gen. Miss. No. 203 (Nov. 22, 1977), *available at* https://ago.mo.gov/other-resources/ag-opinions/1979-opinions/1977-opinions/.

[49] The Governor also cites to a Florida opinion discussing "recalls," which seems to be a procedure unique to Florida, rendering that authority irrelevant. *See In re Advisory Opinion to the Governor*, 247 So.2d 428, 433 (Fla. 1971).

[50] *See* Gen. Assem. Br. at 33 (quoting *McChesney*, 23 S.W.2d at 587).

[51] *Id.* at 34–35.

To suggest the opposite result, the Governor cites to *Barron v. Kleinman*, 550 A.2d at 326.[52] *Barron* principally concerned the holdover provision of Article XV, Section 5 of the Delaware Constitution, not the appointments clause. The language quoted by the Governor (i.e., that "Senate confirmation is required before the Governor's power of appointment, to an office requiring confirmation, takes effect") is merely an acknowledgement of the interaction between Article XV, Section 5 and Article III, Section 9. The General Assembly does not dispute that, prior to Senate confirmation, the holdover provision of the Delaware Constitution requires the incumbent to maintain office to ensure the continuity of government.[53] The existence of the holdover provision does not, however, affect the conclusion that the executive has a single function affecting the right of an appointee to office: make an appointment. After that, the power to place the appointee in office is entirely within the province of the legislature.[54]

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[52] Gov. Br. at 31–32.

[53] *See Opinion of the Justices*, 189 A.2d 777, 778 (Del. 1963) ("Section 5 of Article 15 was apparently enacted for the very purpose of preventing a possible vacancy or interregnum in an office . . . .") (internal quotes omitted). The General Assembly also agrees with the Governor that the arguments made by each side here are unaffected by a change in the person serving as Governor. *See* Gov. Br. at 34.

[54] The Governor asserts that a contrary result would result in the Senate "compel[ling] the Governor to appoint withdrawn nominees." *See* Gov. Br. at 32–34. This misstates the circumstances before the Court. The Senate is not compelling the Governor to take any action. The executive branch has already acted. It is now the Senate's function alone to confirm or reject the Appointees.

IV. THE COURT NEED NOT REACH THE ISSUE OF 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?

The issuance of a commission is not necessary for the Appointments. Thus, even if the Governor purported to withhold commissions, the Appointees could seek writs of mandamus to compel the Governor to issue commissions (a ministerial act), which provides the Appointees each 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

1. A Commission Is Not Required

The Governor relies on Article III, Section 12 of the Constitution and foreign case law to assert that the appointment process is not complete until the Governor grants a commission.[55] The Governor's arguments fail.

First, nothing in Delaware's Constitution expressly requires a commission to be issued. Article III, Section 12 merely states that a commission shall be sealed and

[55] *Id.* at 35–41.

signed. By its terms Article III, Section 12 makes no mention of a process by which the commission is issued, when, or how. The drafting history of Article III, Section 12, however, makes clear that it was removed from the provision providing for the Governor's general appointment power, and, more importantly, was maintained in Article III, Section 9 specifically as to recess appointments.[56] The conclusion that a commission is not required to complete the appointment process is further strengthened by the fact that the statute authorizing DSPC Board appointments does not require commissions, and the Appointment letters likewise do not require commissions for the Appointees' terms of office to begin (only Senate consent).[57]

The Governor's reliance on *State ex rel. Oberly v. Troise,* 526 A.2d 898, is also misplaced.[58] The Governor asserts that the portion of *Oberly* merely providing the "question presented" indicates that Senate consent "authorizes" the Governor to issue commissions.[59] The Governor's reliance on the "question presented" is not a holding or even dicta, but in any event, does not even support his position. *Oberly* did not address the possibility of the governor withdrawing an appointee. Rather, the Court was asked whether senate inaction was constructive consent to an

[56] Gen. Assem. Br. at 36–37.

[57] *Id.* at 37.

[58] Gov. Br. at 36–37.

[59] *Id.* at 36.

appointment, thereby "authorizing" the Governor to issue a commission. In other words, the issue was whether the governor could bypass Senate consent. The Court held that constructive consent was not possible, so the Governor could never issue a commission in those circumstances. Thus, the portion of *Oberly* quoted by the Governor merely confirms that after Senate confirmation, the Governor is then legally able to issue a commission. But that is beside the point, because if the Governor refuses to act in furtherance of his ministerial duty to issue commissions, he can be judicially compelled to fulfill that duty.[60]

Second, the Governor's reliance on seven non-Delaware authorities does not change the conclusion under the Delaware Constitution.[61] Five of the Governor's commission cases were applying the three-step *nomination* process pursuant to the

[60] The Governor also cites *Oberly* to suggest that the issuance of a commission is discretionary, not ministerial. *Id.* at 36 (quoting *Oberly*, 526 A.2d at 905). However, the sentence cited in *Oberly* was specifically commenting that the *Senate*'s duty in this process was not ministerial. *Oberly*, 526 A.2d at 905 ("The Senate's action, or inaction, on gubernatorial appointments . . . is not a ministerial duty which can judicially enforced."). That logic does not extend to the issuance of a commission by the Governor. Nor does the Governor's citation to 29 *Del. C.* § 2316 change the result, as that statute merely authorizes the collection of a fee for a commission; it does not indicate a commission is a necessary or discretionary step. *Cf.* Gov. Br. at 36.

[61] Gov. Br. at 38–39.

United States Constitution (i.e., nomination, confirmation, then appointment),[62] rendering those authorities irrelevant to the issue before the Court here.[63]

The Governor's fifth authority—*State ex rel. Johnson v. Hagemeister*—analyzed an appointment under the two-step process (appointment, then confirmation), and held that "upon confirmation of the appointment by the Legislature, the issuance of the commission would be merely ministerial."[64] The court distinguished this from the three-step nomination process (nomination, confirmation, then appointment) and held that "[t]his 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."[65] The

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[62] *Dysart,* 369 F.3d 130; *Harris v. United States*, 102 Fed. Cl. 390 (Fed. Cl. 2011); *D'Arco v. United States*, 441 F.2d 1173 (Ct. Cl. 1971); *Appointment of a Senate-Confirmed Nominee*, 23 Op. O.L.C. 232; *Mitchell v. Del Toro*, 2024 WL 4891906 (D.D.C. Nov. 26, 2024). The fifth, interpreting Pennsylvania's Constitution, has the same three-step process. *See Lane v. Commonwealth*, 103 Pa. 481, 484 (Pa. 1883) (Article IV, Section 8 of the Pennsylvania Constitution declares that the Governor shall nominate, and with Senate consent, then appoint).

[63] Gen. Assem. Br. at 26–27, 41.

[64] *State ex. rel. Johnson v. Hagemeister*, 73 N.W.2d 625, 630 (Neb. 1955).

[65] *Id.* at 631 ("The 'appointment' is not made until the 'commission' is issued, and issuing the same is the last act, and in issuing the commission the Governor is performing an executive, and not a ministerial act, and is, therefore acting under his discretionary powers.").

Delaware Constitution creates the two-step process, and, thus, *Hagemeister* further supports the General Assembly's position.[66]

2. The Issuance of a Commission Is a Ministerial Act Subject to a Writ of Mandamus

The Governor is not correct that the issuance of a commission is discretionary, rather than ministerial.[67] Under regimes, like Delaware's, with a two-step appointment process, the final act (to the extent even necessary) of issuing a commission is ministerial, provides mere evidence of an appointment, and can be compelled through a writ of mandamus.[68] The Governor's arguments for discretion fail.

First, the Governor relies on a dictionary definition of the word "consent" to mean a "voluntary yielding to what another proposes," which "means only that one is not opposed to an action; it is not a command that the action take place."[69] But this argument ignores the plain language of the Delaware Constitution and the Appointment letters at issue, which provide that the terms of the Appointees begin at the time of Senate confirmation.[70] Indeed, Governor Meyer has since issued

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[66] The Governor's sixth authority—*Harrington*—misapplied the two-step process and is distinguished *supra* p. 20–21.

[67] *Cf.* Gov. Br. at 40–43.

[68] Gen. Assem. Br. at 35–40.

[69] Gov. Br. at 40–41.

[70] A60–69.

similar appointment letters that do not require any further executive action after Senate confirmation.[71]

The Senate's confirmation authority does not need to "command that the action take place." Under the two-step appointment process set forth in section 9 of Article III, confirmation itself is the action that empowers the appointee to hold office. The Senate does not need to "command" that any further action occur to fill the office

Second, the Governor argues that cases holding that the issuance of a commission is ministerial do not apply.[72] The Governor's analysis begins and ends with the assertion that the executive branch maintains control over the appointment throughout the entire process, which, as explained above, is wrong under Delaware's two-step process.[73]

[71] B1–2.

[72] Gov. Br. at 42–43.

[73] The Governor also proffered a separation of powers argument, which is identical to the earlier separation of powers argument in Argument III and fails for the same reason. *See id.* at 41–42.

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 24, 2025

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