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In the Supreme Court of Pennsylvania

110 MAP 2016

DAVID W. SMITH and DONALD LAMBRECHT,

Appellees,

v.

GOVERNOR THOMAS W. WOLF, in his official capacity as Governor of the Commonwealth of Pennsylvania, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HUMAN SERVICES,

Appellants.

BRIEF OF APPELLEES

Appeal as of Right from an Order of the Commonwealth Court (177 MD 2015) dated October 14, 2016.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW 1

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED 1

COUNTERSTATEMENT OF THE CASE 1

I. PROCEDURAL HISTORY 2

II. FACTS 5

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. THE COMMONWEALTH COURT DID NOT ERR IN DETERMINING THAT THE EXECUTIVE ORDER WAS "*DE FACTO* LEGISLATION," NOT A MERE COMMUNICATION TO SUBORDINATE OFFICIALS 12

A. The Executive Order Does Not Resemble a Valid Executive Order Communicating to Subordinates 14

1. The Executive Order Directs Those Who Are Not Subordinate Officials. 14

a. *The Executive Order directs all DCWs and Participants, none of whom are subordinate officials.* 14

i. *The Executive Order subjects DCWs to an election procedure.* 14

ii. *The Executive Order empowers an employee organization to speak for all DCWs.* 15

iii. *The Executive Order enables policies that bind and result in job loss for DCWs.* 17

iv. *The Executive Order prohibits DCWs from removing the DCW Representative.* 18

v. *The Executive Order binds DCWs to the same election process in the future* 19

b. *The Executive Order directs a government contractor, which is not a subordinate official.* 20

c. *The Executive Order directs the DCW Representative, which is not a subordinate official.* 21

d. *The Executive Order directs the AAA, which is not a subordinate official.* 23

2. The Executive Order is Not in the Nature of Requests or Suggested Directions. 23

3. The Executive Order's Directives Do Not Relate Solely to Execution of the Duties of the Executive Branch. 26

4. Even if compliance with the Executive Order were optional, it remains invalid. 28

B. Instead, the Executive Order is "*De Facto* Legislation" 30

II. THE COMMONWEALTH COURT DID NOT ERR IN DETERMINING THAT THE EXECUTIVE ORDER CONFLICTED WITH STATE LAW GUARANTEEING TO THE DISABLED AND ELDERLY THE RIGHT TO DIRECT THEIR OWN CARE 35

A. The Executive Order Conflicts with Act 150 and the Public Welfare Code by its Express Terms 36

B. The Executive Order Conflicts With Act 150 and the Public Welfare Code Because the General Assembly Has Occupied the Field 41

III. THE COMMONWEALTH COURT DID NOT ERR IN DETERMINING THAT THE EXECUTIVE ORDER CONFLICTED WITH STATE LAW GOVERNING ORGANIZED LABOR 42

A. The Executive Order Conflicts with the NLRA, PLRA, and PERA Because It Provides Organizational Rights to Workers Specifically Prohibited from Organizing 42

B. The Executive Order Conflicts with the NLRA, PLRA, and PERA Because It Mandates an Organizational Process at Odds with Those Mandated by Law. 46

C. The Executive Order Conflicts With the NLRA, PLRA, and PERA Because the General Assembly Has Occupied the Field.. 48

CONCLUSION 51

TABLE OF AUTHORITIES

CASES

Butcher v. Rice,
153 A.2d 869 (Pa. 1959) 31

Cloonan v. Thornburgh,
519 A.2d 1040 (Pa. Cmwlth. 1986) 24, 29, 36, 49, 51

Commonwealth v. Wilsbach Distribs., Inc.,
519 A.2d 397 (1986).. 49

Dep't of Envtl. Prot. v. Cumberland Coal, Res.,
102 A.3d 962 (Pa. 2014) 31

Glenn Johnston, Inc. v. Commonwealth, Dep't of Rev.,
726 A.2d 384 (Pa. 1999) 31

Kinder v. Holden,
92 S.W.3d 793 (Mo. App. W. Dist. 2002) 34

Markham v. Wolf,
147 A.3d 1259 (Pa. Cmwlth. 2016) .... *passim*

NLRB v. Allis-Chalmers Mfg. Co.,
388 U.S. 175 (1967).. 15

Pennsylvania Med. Soc'y v. Dep't of Pub. Welfare,
39 A.3d 267 (Pa. 2012) 1

Shapp v. Butera,
348 A.2d 910 (Pa. Cmwlth. 1975) .... *passim*

Harris v. Quinn,
573 U.S. ___, 134 S. Ct. 261840 (2014) 42, 43, 50

Nat'l Solid Wastes Mgmt. Ass'n v. Casey ("Casey I"),
580 A.2d 893, (Pa. Cmwlth. 1990) 13, 26

Nat'l Solid Wastes Mgmt. Ass'n v. Casey ("Casey II"),
600 A.2d 260 (Pa. Cmwlth. 1991) .... *passim*

Smith v. Wolf,
No. 177 MD 2015, 2016 WL 6069483 (Pa. Cmwlth. Oct. 14, 2016) 2

Swords v. Harleysville Ins. Cos.,
883 A.2d 562 (Pa. 2005) 31

STATUTES

43 P.S. §§ 1–26–7 49

43 P.S. §§ 40.1–71 49

43 P.S. §§ 101–103 49

43 P.S. §§ 165-1–165-17 49

43 P.S. §§ 211.1–211.13 42

43 P.S. § 211.3 43

43 P.S. § 211.3(f) 44

43 P.S. §§ 211.4–211.11 49

43 P.S. § 211.5 .... 43, 49

43 P.S. § 211.7 .... 46, 49

43 P.S. § 211.7(c) 46

43 P.S. §§ 221–336.10 49

43 P.S. §§ 751–919.10 49

43 P.S. §§ 920.1–920.12 49

43 P.S. §§ 932.1–932.6 49

43 P.S. §§ 951–963 49

43 P.S. §§ 1101.101–1101.2301 42

43 P.S. § 1101.101 43

43 P.S. § 1101.301(3) 43

43 P.S. § 1101.401 50

43 P.S. §§ 1101.501–1101.503 50

43 P.S. § 1101.602–1101.605 46

43 P.S. § 1101.603(a) 46

43 P.S. § 1101.605(a) 46

43 P.S. §§ 1101.701–1101.1101 50

43 P.S. § 1101.701 45

43 P.S. §§ 1101.1301–1101.1306 50

43 P.S. § 1101.1701 50

43 P.S. §§ 1301.101–1301.606 49

43 P.S. §§ 1421–1428 49

62 P.S. §§ 101–7006 41

62 P.S. § 201(1)-(2) 36, 37, 38

62 P.S. § 3052 37

62 P.S. § 3052(3) 5, 38, 40

62 P.S. §§ 3051–3058 .... 2, 36

29 U.S.C. §§ 151–169 42

5 Ill. Comp. Stat. 315/3 45

5 Ill. Comp. Stat. 315/3(o) 33

Cal. Gov. Code § 110006.. 33

Cal. Gov. Code §§ 110000–110036 45

Conn. Gen. Stat. § 17b-706b(b) 33

Conn. Gen. Stat. §§ 17b-705–17b-706d 45

Mass. Gen. Laws ch. 118E, § 73 45

Mass. Gen. Laws ch. 118E, § 73(b) 34

Md. Code, Health—General, § 15-903(b) 34

Md. Code, Health—General, §§ 15-901–15-907 45

Minn. Stat. § 179A.54 45

Minn. Stat. § 179A.54(2) 34

Mo. Rev. Stat. § 208.862(3) 34

Mo. Rev. Stat. §§ 208.850–208.895 45

Or. Rev. Stat. § 410.612(1) 34

Or. Rev. Stat. §§ 410.612–410.625 46

Vt. Stat. Ann., tit. 21, § 1640(c) 34

Vt. Stat. Ann., tit. 21, §§ 1631–1644 46

Wash. Rev. Code § 74.39A.270 46

Wash. Rev. Code § 74.39A.270(1) 34

REGULATIONS

29 CFR § 101.18(a) 46

29 CFR § 103.20 46

PENNSYLVANIA CONSTITUTION

Pa. Const. art. II, § 27 32

Pa. Const. art. II, § 1 31

OTHER AUTHORITIES

LEGISLATIVE BUDGET AND FIN. COMM., FAMILY CAREGIVERS IN PENNSYLVANIA'S HOME AND COMMUNITY-BASED WAIVER PROGRAMS S-2 (June 2015), *available at* http://lbfc.legis.state.pa.us/Resources/ Documents/Reports/527.pdf 6, 37

COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

"Where there is no dispute as to any material issues of fact, [this Court] must determine whether the lower court committed an error of law in granting summary relief." *Pennsylvania Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 277 (Pa. 2012). The scope of review is plenary. *Id.*

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Whether the Commonwealth Court erred in determining that the Executive Order was "*de facto* legislation," not a mere communication to subordinate officials.
2. Whether the Commonwealth Court erred in determining that the Executive Order conflicted with state law guaranteeing to the disabled and elderly the right to direct their own care.
3. Whether the Commonwealth Court erred in determining that the Executive Order conflicted with state law governing organized labor.

COUNTERSTATEMENT OF THE CASE

This is an appeal as of right from an order of the Commonwealth Court sitting *en banc*, which granted summary relief to Appellees David W. Smith ("Mr. Smith") and Donald Lambrecht ("Mr. Lambrecht") and denied preliminary objections raised by Appellants Governor Thomas W. Wolf ("Gov. Wolf") and the Commonwealth of Pennsylvania, Department of Human Services ("Department") (collectively, "Gov.

Wolf"). *Smith v. Wolf*, No. 177 MD 2015, 2016 WL 6069483 (Pa. Cmwlth. Oct. 14, 2016) (Opinion and Order attached as Appendix A). Specifically, the Commonwealth Court held that Gov. Wolf's Executive Order 2015-05[1] ("Executive Order") constituted "*de facto* legislation," *Markham v. Wolf*, 147 A.3d 1259, 1278 (Pa. Cmwlth. 2016),[2] and therefore exceeded the bounds of Gov. Wolf's constitutional authority. Additionally, the Commonwealth Court observed that "the Executive Order invades the relationship" between Direct Care Workers ("DCWs") and those for whom they care ("Participants"), *id.*, by "in effect grant[ing] collective bargaining rights to DCWs" and "impair[ing] [P]articipants' rights to control personal care rendered to them in their own homes," *id.* at 1277.

I. PROCEDURAL HISTORY

On April 6, 2015, Mr. Smith—a Participant under the Attendant Care Services Act (also known as "Act 150"), 62 P.S. §§ 3051–3058—and Mr. Lambrecht—his DCW—filed the underlying Petition for Review. Mr. Smith and Mr. Lambrecht alleged that the Executive Order was invalid on the grounds that it exceeded gubernatorial power permitted by the Pennsylvania Constitution and otherwise

[1] The Executive Order, issued February 27, 2015, and published in the Pennsylvania Bulletin on April 18, 2015, 45 Pa.B. 1937, appears within the record (*e.g.*, R. 56a-59a) and is attached as Appendix B. Citations to the Executive Order will take the form "EO," with the paragraph and section number following, where necessary.

[2] The Commonwealth Court in *Smith* expressly incorporated and adopted its own analysis and reasoning from *Markham*, 147 A.3d 1259, a similar case that was argued together with but decided prior to *Smith*.

conflicted with federal and state law governing labor and healthcare. (R. 20a-1104a). Mr. Smith and Mr. Lambrecht also sought a permanent injunction (R. 47a-49a) and, by separate application for special relief, a preliminary injunction (R. 1105a-1119a).

On April 14, 2015, upon learning of an election conducted pursuant to the Executive Order, EO ¶ 3a, Mr. Smith and Mr. Lambrecht requested expedited consideration of their preliminary injunction application. (R. 1120a-1131a). After prehearing submissions, which included stipulations of fact and dates of availability, on April 20, 2015, Mr. Smith and Mr. Lambrecht filed an application for emergency relief. (R. 1337a-1354a).

Then-President Judge Dan Pellegrini held a hearing on Mr. Smith's and Mr. Lambrecht's preliminary injunction request on April 22, 2015[3] (R. 1353a-1354a), ultimately enjoining Gov. Wolf from fully implementing the Executive Order (R. 1860a-1861a). Specifically, Gov. Wolf was enjoined "from entering into any memorandum of mutual understanding pursuant to Executive Order 2015-05 until this case is considered on its merits." (R. 1860a). Thereafter, Gov. Wolf filed preliminary objections (R. 1862a-1943a), and the parties filed cross-motions for summary relief, with respective supporting briefs (R. 2216a-2679a). In accordance

[3] A complete transcript of the hearing on Mr. Smith's and Mr. Lambrecht's preliminary injunction is included within Gov. Wolf's reproduced record, (R. 1355a-1624a), and the parties stipulated to a portion of the transcript, with one exception, for purposes of the merits (R. 1967a-1968a).

with Judge Pellegrini's preliminary injunction order, the case was listed for *en banc* argument before the Commonwealth Court. (R. 1861a).

On October 14, 2016, following oral argument before the Commonwealth Court sitting *en banc*, the Commonwealth Court, 4-1, ruled that the complained-of portions of the Executive Order were invalid and void *ab initio*, relying in part on its previous opinion and order in *Markham*, and permanently enjoined Gov. Wolf from implementing those portions. App'x A. The Commonwealth Court also addressed and denied, in turn, Gov. Wolf's preliminary objections. *Id.* On the same day, Mr. Smith and Mr. Lambrecht, anticipating Gov. Wolf's appeal, filed an expedited application to vacate any automatic supersedeas. (R. 2772a-2976a).

Gov. Wolf filed a notice of appeal to this Court on October 24, 2016.

The following day, Mr. Smith and Mr. Lambrecht renewed their request to vacate any automatic supersedeas by filing an application for emergency relief in the Commonwealth Court. (R. 2977a-3017a). On November 1, 2016, the Commonwealth Court granted Mr. Smith's and Mr. Lambrecht's request "on a temporary emergency basis" in the form of restoration of the permanent injunction and vacation of the supersedeas, with a decision whether to extend the temporary relief within ten days. (R. 3160a). The Commonwealth Court made clear that the Department was not precluded "from communicating with [DCWs] as is necessary to perform its duties . . . ." (R. 3161a).

Finally, on November 10, 2016, the Commonwealth Court granted Mr. Smith's and Mr. Lambrecht's request for vacation of the supersedeas, restoring the permanent injunction entered as part of the decision on the merits. (R. 3162a-3166a). And again, the Commonwealth Court made clear:

> [T]his ORDER shall not preclude [Gov. Wolf] from communicating with DCWs as is necessary to perform their duties, in the manner the parties communicated prior to issuance of Executive Order 2015-05.

(R. 3166a).

II. FACTS[4]

Mr. Smith and Mr. Lambrecht, his DCW, have had a direct employment relationship for over 26 years. (R. 1971a). In fact, Mr. Smith, like other elderly or disabled Participants,[5] has a federal employer identification number, is subject to workers' compensation and unemployment requirements, and pays relevant employer taxes. (R. 1971a). Act 150 itself makes clear that, as an employer, Mr. Smith "ha[s] the right to make decisions about, direct the provision of, and control [his] attendant care services. This includes, but is not limited to, hiring, training, managing, paying and firing of [Mr. Lambrecht]." 62 P.S. § 3052(3). The Commonwealth of Pennsylvania cannot be considered, under any logic, Mr. Lambrecht's employer. (R. 1971a).

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[4] On June 4, 2015, Gov. Wolf, Mr. Smith, and Mr. Lambrecht entered into factual stipulations for purposes of their cross-motions for summary relief. (R. 1967a-2079a).

[5] Mr. Smith suffers from muscular dystrophy, which rendered him quadriplegic. (R. 22a).

Approximately 35,000 other elderly and disabled participants have a similar arrangement with DCWs through various "Home Care Service Programs," including the Act 150 program.[6] (R. 1972a). And each of those 35,000 participants, like Mr. Smith, has the right to employ and direct their own DCWs. The "Aging Waiver Program," for instance, secures for "[a]ll [P]articipants . . . the right to make decisions about and self-direct their own waiver services" and posits Participants as "the common-law employer . . . responsible for hiring, firing, training, supervising, and scheduling their [DCW]."[7] (R. 221a). Aging Waiver Program Participants also "may choose to hire and manage staff . . . or manage an individual budget," the latter of which represents an even "broader range of opportunities for participant-direction," still including "select[ion] and manage[ment of] staff." (R. 221a).

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[6] However, many DCWs choose to employ family members:

> [T]he five . . . waiver programs operated through the Office of Long-Term Living (Aging, Attendant Care/Act 150, COMMCARE, Independence, and OBRA Waivers) had an average of 40 percent being paid family caregivers. Of these 40 percent, which represent about 15,600 caregivers, 4 percent were siblings; 5 percent were parents; 15 percent were other relatives (other than a spouse); and 16 percent were adult children of a beneficiary.

LEGISLATIVE BUDGET AND FIN. COMM., FAMILY CAREGIVERS IN PENNSYLVANIA'S HOME AND COMMUNITY-BASED WAIVER PROGRAMS S-2 (June 2015), *available at* http://lbfc.legis.state.pa.us/Resources/Documents/Reports/527.pdf

[7] Participants in the "Attendant Care Waiver," "COMMCARE Waiver," "Independence Waiver," and "OBRA Waiver" Programs can point to identical or nearly identical language. (R. 400a, 592a, 779a); [OBRA Waiver] Application for a § 1915(c) Home & Community-Based Services Waiver at 182, *available at* http://www.dhs.pa.gov/cs/groups/webcontent/documents/document/c_256394.pdf.

Within this statutory framework, in 2014, the Pennsylvania Long-Term Care Commission ("Commission") provided a recommendation to then-Governor Tom Corbett that Pennsylvania take steps to, among other policy reforms, "elevate the profession of DCWs." (R. 1217a, 1293a). More precisely, the Commission proposed that the Governor "[p]ursue a multi-step strategy to eliminate DCW shortages and turnover, *beginning with the enactment of legislation* establishing a voluntary statewide DCW certification program for DCWs in all long-term service settings." (R. 1217a, 1293a) (emphasis added).

Nevertheless, in 2015, Gov. Wolf issued an executive order in an effort to pursue his policy of, as stated on page one of the Executive Order, "improv[ing] both the quality of home care and the working conditions of [DCWs]." The Executive Order applies specifically to those DCWs who, like Mr. Lambrecht, are employees of those for whom they provide care under the Participant-directed model. EO ¶ 1c, i.

By design, Gov. Wolf's Executive Order set off a chain of events affecting individuals and entities not employed by Gov. Wolf, the Department, or the Commonwealth, including DCWs and those for whom they care. First, shortly after the Executive Order was issued, the United Home Care Workers of Pennsylvania ("UHCWP") petitioned the Secretary of the Department, EO ¶ 4b, and demonstrated that 50 out of 20,000 DCWs supported the petition, EO ¶ 4c. The Department apparently considered UHCWP an "employee organization" or "labor organization," as used by the Executive Order, eligible to "represent" DCWs. EO ¶¶ 4b, 5d-f.

Then, the Department, under the authority of the Executive Order,[8] directed Public Partnerships, LLC ("PPL")—a third-party contractor enlisted to provide financial management services support to Participants in the exercise of their employer responsibilities—to compile and provide to the Department names and contact information for all 20,000 DCWs on a document referred to as the "DCW List." Those names were then turned over to UHCWP for the ostensible purpose of further organizing, which is precisely what followed. (R. 1972a). PPL would compile as directed, and UHCWP would receive, updated DCW Lists every month for the next six months. (R. 1974a). PPL is not a subordinate official under Gov. Wolf. (R. 2047a-2048a).

Next, UHCWP apparently demonstrated to Gov. Wolf that 10% of DCWs on the DCW List generally supported UHCWP, prompting the American Arbitration Association ("AAA") to initiate an election in the manner detailed by the Executive Order. EO ¶ 3a. The Executive Order provided that, if UHCWP won the election, it would be the *exclusive* representative for all homecare workers, EO ¶ 3a(2) ("There shall only be one [DCW] Representative recognized at any time."), yet UHCWP could

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[8] The Executive Order mandates:

> Any vendor or contractor that provides financial management services for the Commonwealth in connection with any Home Care Service Program *shall assist and cooperate with the Department in compiling and maintaining the DCW List*.

EO ¶ 4d (emphasis added).

win with a mere "majority of votes cast." EO ¶ 3a(2). AAA is not a subordinate official under Gov. Wolf. (R. 2048a-2049a).

On April 7, 2015, the AAA sent to Mr. Lambrecht an "Official Secret Ballot" with "Instructions for Voting Pursuant to Executive Order 2015[-]05" and the heading "To Determine Representation for Pennsylvania Participant-Directed Home Care Workers." (R. 1977a-1980a). The ballot posed just one question: "Do you wish to have the [UHCWP] as your representative?" (R. 1980a).

UHCWP won the election with a mere 2,663 votes out of the 20,000 DCWs eligible to vote. (R. 1968a). The Department therefore recognized UHCWP as the exclusive DCW Representative for *all* DCWs, *even the roughly 87% of DCWs who did not vote or voted against UHCWP*. (R. 1968a).

At that point, Mr. Lambrecht and other DCWs became prohibited by the Executive Order from removing UHCWP for a full year, and thereafter only under the terms of the Executive Order. As stated in the Executive Order:

> [DCWs] who wish to remove the [DCW] Representative shall seek such removal in accordance with the election process set forth in this Order. [DCWs] may not seek such removal earlier than one (1) year after the organization is recognized as the [DCW] Representative.

EO ¶ 3.a(3). Neither Mr. Lambrecht nor any other DCW are subordinate officials under Gov. Wolf. (R. 2047a).

As a result of its victory, UHCWP became subject to provisions of the Executive Order that required monthly "meet and confer" sessions with the

Department. EO ¶ 3b. More specifically, UHCWP was required to discuss with the Secretary and Deputy Secretary of the Department the following aspects of Mr. Lambrecht's employment and caregiving:

> (a) The quality and availability of Participant-Directed Services in the Commonwealth, within the framework of principles of participant-direction, independent living and consumer choice.
> (b) The improvement of the recruitment and retention of qualified [DCWs].
> (c) The development of a [DCW] registry or worker-participant matching service to provide routine, emergency and respite referrals of qualified [DCWs] to participants who are authorized to receive long-term, in-home care services under one of the Home Care Service Programs.
> (d) Standards for compensating [DCWs], including wage ranges, health care benefits, retirement benefits and paid time off.
> (e) Commonwealth payment procedures related to the Home Care Services Programs.
> (f) Development of an orientation program for [DCWs] working in a Home Care Services Program.
> (g) Training and professional development opportunities for [DCWs].
> (h) Voluntary payroll deductions for [DCWs].

EO ¶ 3b(2). UHCWP is not and was not intended to be a subordinate official under Gov. Wolf. (R. 2047a).

The Executive Order envisioned that, at the end of the "meet and confer process," the parties would arrive at a written agreement—sometimes with help from Gov. Wolf himself, EO ¶ 3b(3), c(3)—and have the terms of the agreement, called a "Memorandum of Mutual Understanding" ("MOU"), grafted into Department policy,

binding on Participants and DCWs, EO ¶ 3c. It was undisputed below that any such policy changes could cause certain DCWs to lose their jobs, irrespective of the desires of the Participant. (R. 2041a-2042a). However, the Commonwealth Court prevented Gov. Wolf, first by preliminary injunction and then by permanent injunction, from entering into any MOU with UHCWP. (R. 1860a).

SUMMARY OF ARGUMENT

This Court should affirm the Commonwealth Court, which did not err in holding that the Executive Order was an invalid exercise of gubernatorial authority. First, contrary to Gov. Wolf's contentions, the Executive Order cannot be considered a mere communication to subordinates; it is rife with directives to non-subordinates and mandates compliance from non-subordinates and subordinates alike on matters that have nothing to do with executive branch duties. Instead, the Executive Order is, as the Commonwealth Court termed it, "*de facto* legislation," imposing labor organization on DCWs and Participants in a manner that can only be accomplished by statute.

Second, the Executive Order clearly conflicts with statutes governing the provision of Home Care Service Programs. Under those programs, Participants have the right to direct their own care, from hiring and firing their DCW to managing all aspects of DCWs' performance. In allowing an employee organization to bargain with the Department for new terms and conditions of DCWs' employment, the Executive Order necessarily limits Participants' rights and conflicts with those laws. And even if

there is no express conflict, Gov. Wolf has exceeded his authority by intruding into a field of law already occupied by the General Assembly.

Finally, the Executive Order conflicts with federal and state labor law in that it imposes labor organizing on workers categorically prohibited from organization, all the while stripping those same workers of protections otherwise available to employees in a unionized workforce. Yet, even if Gov. Wolf were able to, in theory, devise a new labor organizing regime without violating existing law, he will have only done what Mr. Smith and Mr. Lambrecht have accused him of doing all along: create legislation by executive fiat.

ARGUMENT

I. THE COMMONWEALTH COURT DID NOT ERR IN DETERMINING THAT THE EXECUTIVE ORDER WAS "*DE FACTO* LEGISLATION," NOT A MERE COMMUNICATION TO SUBORDINATE OFFICIALS

Gov. Wolf continues to insist, as he did below, that the Executive Order is valid because it represents a mere communication to subordinate officials. Br. of Appellants ("Appellants' Br.") 20-21. In fact, Gov. Wolf represents that he "could have directed the same officials to meet with the same individuals or representative without issuing an executive order." *Id.* at 22 (emphasis added). The truth is, the Executive Order directs individuals and entities well outside of Gov. Wolf's chain of command on matters not within his authority to direct, and the language of the Executive Order simply reflects as much. Accordingly, contrary to Gov. Wolf's assertions, the Executive Order is *not* a mere communication to subordinate officials.

In Pennsylvania, valid Executive Orders come in three types: "(1) formal, ceremonial, political orders, usually issued as proclamations; (2) orders which communicate to subordinate officials requested or suggested directions for the execution of the duties of the Executive Branch of government; (3) orders which serve to implement or supplement the constitution or statutes." *Nat'l Solid Wastes Mgmt. Ass'n v. Casey* ("*Casey I*"), 580 A.2d 893, 897-98 (Pa. Cmwlth. 1990) (quoting *Shapp v. Butera*, 348 A.2d 910, 913 (Pa. Cmwlth. 1975)); *see also Markham*, 147 A.3d at 1272-73. Here, Gov. Wolf claims that the Executive Order must be classified as the second type of executive order. Such orders must be "in the nature of requests or suggested directions for the execution of the duties of the Executive Branch of government" and, if ignored, "would carry only the implication of a penalty for noncompliance, such as a possible removal from office, an official demotion, restrictions on responsibilities, a reprimand, or a loss of favor." *Shapp*, 348 A.2d at 913.

In contrast, though, Gov. Wolf's Executive Order clearly directs individuals and entities who are not "subordinate officials," mandates compliance with those directives, and pertains to matters unrelated to execution of executive branch duties. Consequently, Gov. Wolf's Executive Order is an invalid exercise of his gubernatorial authority and, as the Commonwealth Court labeled it, "*de facto* legislation." *Markham*, 147 A.3d at 1278.

A. The Executive Order Does Not Resemble a Valid Executive Order Communicating to Subordinates

1. The Executive Order Directs Those Who Are Not Subordinate Officials.

The Executive Order directs DCWs and Participants, government contractors, the DCW Representative, and the AAA, none of which are subordinate officials. It follows that the Executive Order cannot fit the description of a valid executive order directing subordinates for the execution of executive branch duties.

a. *The Executive Order directs all DCWs and Participants, none of whom are subordinate officials.*

The most invasive aspect of Gov. Wolf's Executive Order is its direction of DCWs—*none of whom are subordinate officials.*[9] The Executive Order directs DCWs and, by extension, Participants, in at least five ways.

i. *The Executive Order subjects DCWs to an election procedure.*

First, the Executive Order subjects—indeed, *already subjected*—DCWs to an arbitrary election procedure created and given meaning by the Executive Order. EO ¶

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[9] "DCWs are not subordinates of the Governor." *Markham*, 147 A.3d at 1274. The Deputy Secretary testified below as follows:

> [Counsel for Mr. Smith and Mr. Lambrecht:]
> Q. How about [DCWs]; are they a subordinate of the Governor of Pennsylvania?
> [Deputy Secretary:]
> A. They don't work directly for the Governor, but, you know, I mean, I guess, no.

(R. 2047a).

3a. That procedure began when, pursuant to the Executive Order, UHCWP secured names and addresses of DCWs under the Executive Order and demanded that AAA orchestrate an election involving 20,000 DCWs. As a result, Mr. Lambrecht received a ballot in the mail referencing the Executive Order and purporting to determine whether UHCWP should serve as a representative *for him and all other DCWs* under the terms of the Executive Order in an election without a reference point in state law. (R. 1977a-1980a). The vote itself would be binding, not to mention systematically weighted in UHCWP's favor; the Executive Order allowed a bare majority of *those voting*—which turned out to be *just 13% of DCWs statewide*—to determine the rights of all remaining DCWs, including Mr. Lambrecht. (R. 1968a). The Executive Order thus directed DCWs to inform the Commonwealth as to whether they wanted UHCWP representation, upon pain of having their voices not heard.

ii. *The Executive Order empowers an employee organization to speak for all DCWs.*

Second, for Mr. Lambrecht and countless other DCWs, the Department's recognition of UHCWP as the DCW Representative directed an unwelcome representative relationship with an outside organization, UHCWP, entailing surrender of DCWs' and Participants' ability to order their own employment relationships. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (noting that exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to

act in the interests of all employees"). Under the authority of the Executive Order, UHCWP claimed the title of "Direct Care Worker Representative" ("DCW Representative") and the exclusive[10] right to represent 20,000 DCWs, just 13% of whom voted in favor of the relationship. (R. 1968a). As the Deputy Secretary testified below:

> [Counsel for Mr. Smith and Mr. Lambrecht:]
> Q. [DCWs] who do not wish to be represented by the union, they can vote no in the election; correct?
> [Deputy Secretary:]
> A. I believe so, yes.
> Q. What happens if, ultimately, the votes are counted up and most of them say yes?
> A. I believe that's when the Secretary --- we would acknowledge the [DCW] Representative and set up a conversation with them.
> Q. And that [DCW] becomes represented by the [DCW] Representative?
> A. I believe so. *They will speak on their behalf.*

(R. 2053a) (emphasis added). Were this forced representation not enough to invalidate the Executive Order—and it is—the Executive Order would have allowed UHCWP to use that representative status to unilaterally negotiate terms and conditions of all DCWs' employment, had the injunction below not been entered.

[10] EO ¶ 3a(2) ("There shall only be one [DCW] Representative recognized at any time.").

iii. *The Executive Order enables policies that bind and result in job loss for DCWs.*

Third, and relatedly, it is undisputed that any policy changes resulting from the MOU created by the DCW Representative and the Department would be binding on *all DCWs*, with the practical effect of DCWs losing their jobs. EO ¶ 3c; (R. 2041a-2042a). Before the Commonwealth Court, the Deputy Secretary of the Department testified as follows:

> [<u>Counsel for Mr. Smith and Mr. Lambrecht:</u>]
> Q. . . . There's also a process on changing policy [in the Executive Order]. You said if appropriate, right, a [MOU] may be incorporated into the policy of the Department?
> [<u>Deputy Secretary:</u>]
> A. Yes. Through another process.
> . . . .
> Q. So if a [DCW] violates policy, what happens?
> A. They could potentially be precluded from participating in the program. In some cases, there have been incidents where that has happened.
> Q. When you say precluded from participating in the program, do you mean that they would lose their job?
> A. *They would not be able to participate in the program. Yes.*
> Q. I'm sorry. Who are we talking about here? Are we talking about the participants under the Direct Care ---?
> A. The [DCW].
> Q. The [DCW]. So they would not be able to participate?
> A. Correct.
> Q. Would that mean that they would have to stop being the [DCW]?
> A. *Yes.*

(R. 2041a-2042a) (emphasis added). Clearly, a policy change resulting from the meet and confer process between the DCW Representative and the Department could have a direct and dramatic impact on DCWs across the Commonwealth: loss of a job. But the impact would be more profound for the elderly and disabled, like Mr. Smith, who rely on those DCWs on a daily, if not hourly, basis.

iv. *The Executive Order prohibits DCWs from removing the DCW Representative.*

Fourth, DCWs are directed by the Executive Order's *express prohibition* on removing the employee organization, presently UHCWP, for a period of one year after the election. The Executive Order states, "[DCWs] may not seek such removal earlier than one (1) year after the organization is recognized as the [DCW] Representative." EO ¶ 3.a(3). Again, the Deputy Secretary's testimony below confirms the intent of those words:

> [Counsel for Mr. Smith and Mr. Lambrecht:]
> Q. So if a . . . [DCW] wants to no longer be represented by the [DCW] Representative they'll have to follow this Executive Order; right?
> [Deputy Secretary:]
> A. Yes.
> Q. And they can't really do that for a whole year; is that also right?
> A. I believe that's what it says.

(R. 2054a). Clearly, the Executive Order directs DCWs *not* to replace their so-called "representative."

v. *The Executive Order binds DCWs to the same election process in the future.*

Finally, DCWs are directed, even after that first year has elapsed, to dismiss or replace the DCW Representative *only through the process laid out in the Executive Order*. EO ¶ 3a(3). Again, straight from the Executive Order: "[DCWs] who wish to remove the [DCW] Representative *shall seek such removal in accordance with the election process set forth in this Order*." EO ¶ 3a(3) (emphasis added). And again, the Deputy Secretary confirmed below that Gov. Wolf meant what he wrote:

> [Counsel for Mr. Smith and Mr. Lambrecht:]
>
> Q. . . . . In order to remove [the DCW Representative], we have to jump back to the beginning [of paragraph 3] and say they'd have to demonstrate at least ten percent of the providers identified on the most recent Direct Care Worker list would cho[o]se to be represented by say, some other organization or not at all, is that right?
>
> [Deputy Secretary:]
>
> A. I believe they would have to go through the election process laid out in the Executive Order.
>
> Q. How would they get access to that Direct Care Worker list?
>
> A. I think the Executive Order lays out the clear process that, you know, they bring forth a series of names to show that they have interest and represent them. And then we would provide the list in accordance with the Executive Order.

(R. 2055a).

In sum, DCWs and Participants are directed by the Executive Order despite the fact that they exist outside of the Governor's chain of command. Indeed, the Executive Order already forced UHCWP's representative status on 20,000 DCWs and

would have provided, had Gov. Wolf not been enjoined, for a change in terms and conditions of DCWs' employment and, likely, subsequent disqualification of certain DCWs.

b. *The Executive Order directs a government contractor, which is not a subordinate official.*

Just as clearly, the Executive Order directs a government contractor—*also not a subordinate official of Gov. Wolf.*[11] The Executive Order sets forth the contractor's duties as follows:

> Any vendor or contractor that provided financial management services for the Commonwealth in connection with any Home Care Service Program *shall assist and cooperate with the Department in compiling and maintaining the DCW List.*

EO ¶ 4d (emphasis added).

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[11] The Deputy Secretary testified below as follows:

[Counsel for Mr. Smith and Mr. Lambrecht:]

Q. . . . Is the financial services vendor --- you testified that it was PPL. Are they a subordinate of the Governor of Pennsylvania?

[Deputy Secretary:]

A. We have a contract with them to provide the services that we procured competitively. I don't know if that means that they're a subordinate, but they are a contracted entity with the Department.

Q. So the relationship is governed by contracts, not by, say, the Constitution?

A. You know, I guess, I mean, the Constitution is very clear for all of us. You know, I mean, I can't speak to that. I'm not an attorney.

(R. 2048a).

Not surprisingly, the words of the Executive Order *worked*. PPL, the contractor currently providing financial management services to DCWs, has already substantially performed its duties under the Executive Order and will, the parties have all recognized,[12] *continue* to perform in the event that any other employee organization seeks DCW Representative status in the future. (R. 1972a, 1974a). And it is hard to blame PPL; it is simply following Gov. Wolf's *directive*.

c. *The Executive Order directs the DCW Representative, which is not a subordinate official.*

The Executive Order directs the DCW Representative—*again, not a subordinate official under Gov. Wolf.*[13] Gov. Wolf's own words make it clear:

> The recognized [DCW] Representative shall continue to act as such for so long as such organization complies with its *responsibilities* concerning representation of [DCWs].

EO ¶ 3a(3) (emphasis added). What are those responsibilities? According to the Executive Order, at the very least, the DCW Representative "shall meet and confer"

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[12] The parties stipulated below that "Mr. Lambrecht's name and address will be made available to any other organization that, in the future, wishes to act as the DCW Representative." (R. 1974a).

[13] "UHCWP, the Designated Representative, is not a subordinate of the Governor." *Markham*, 147 A.3d at 1274. As the Deputy Secretary testified:

> [Counsel for Mr. Smith and Mr. Lambrecht:]
> Q. How about this [DCW] Representative; will they be a subordinate of the Governor of Pennsylvania?
> [Deputy Secretary:]
> A. I don't believe so.

(R. 2047a).

with the Secretary and Deputy Secretary of the Department, EO ¶ 3b, "shall meet at least monthly," EO ¶ 3b(1), and "shall discuss relevant issues," including the many issues enumerated in the Executive Order. EO ¶ 3b(2). Failure to comply would not only result in the employee organization's disqualification as exclusive representative but, taking the Executive Order on its face, would have the effect of ending any "voluntary payroll deductions" negotiated by the organization under the Executive Order. EO ¶ 3b(2)(h).

Of course, the DCW Representative may be able to maintain "compli[ance] with its responsibilities" for a period of time, particularly early in its relationship with the Department. EO ¶ 3a(3). But today's good feelings do not change the relevant fact that the Executive Order directs the DCW Representative, a non-subordinate. Moreover, the history of relationships between public-sector employee unions and employers should suffice to illustrate how the relationship between the Department and UHCWP could become strained. Perhaps that is the very reason Gov. Wolf inserted language into the Executive Order demanding that UHCWP comply with monthly meeting and discussion requirements and threatening to revoke its status if UHCWP fails to comply.[14]

[14] Gov. Wolf argues that the parties' inability to petition the Pennsylvania Labor Relations Board ("PLRB") somehow enhances the Executive Order's validity, as if unchecked labor union activity should give this Court comfort. Appellants' Br. 40-41. That argument is addressed more fully below. For the moment, however, it is enough to note that, though the PLRB is absent from the equation, the Executive Order *itself*

d. *The Executive Order directs the AAA, which is not a subordinate official.*

Finally, and briefly, the Executive Order directs the AAA, which is, *once again, not a subordinate of Gov. Wolf.*[15] Specifically, the AAA is directed in the Executive Order to conduct an election pursuant to the process set forth in the Executive Order and "shall certify the election results" when the election is over. EO ¶ 3a(2). It would be impossible, given those words, for the AAA to believe Gov. Wolf was making a mere suggestion.[16]

2. The Executive Order is Not in the Nature of Requests or Suggested Directions.

Next, as the Commonwealth Court noted, unlike valid executive orders directing subordinate officials, the Executive Order does not "*request*" but rather

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binds UHCWP by making its very representative status contingent on Gov. Wolf's evaluation of UHCWP's "compli[ance] with its responsibilities." EO ¶ 3a(3).

[15] "AAA is also not a subordinate of the Governor." *Markham*, 147 A.3d at 1274. The Deputy Secretary testified below:

[Counsel for Mr. Smith and Mr. Lambrecht:]

Q. How about the American Arbitration Association; are they a subordinate of the Governor of Pennsylvania?

[Deputy Secretary:]

A. No.

(R. 2048a-2049a).

[16] Gov. Wolf now argues that the AAA was never bound by the Executive Order but instead by "a contract between the proposed [DCW] [R]epresentative and the AAA." Appellants' Br. 30. Yet it was Gov. Wolf—not the DCW Representative—who specifically identified the AAA and *directed* it to follow a particular process: "The Secretary shall designate the [AAA] to conduct an election and certify the election outcome, pursuant to the following process[.]" EO ¶ 3a. Any such contract with AAA would have been the natural and direct result of the Executive Order.

"*mandates* actions by the Secretary and Deputy Secretary, as well as by third parties and the newly created role of DCW Representative."[17] *Markham*, 147 A.3d at 1273-74 (emphasis added); *see Shapp*, 348 A.2d at 913 ("The second class of executive orders is intended for communication with subordinate officials *in the nature of requests or suggested directions* for the execution of the duties of the Executive Branch of government.") (emphasis added).

The Commonwealth Court's determination was firmly rooted in precedent distinguishing between, for purposes of communications to subordinates, mandatory and voluntary language. In *Cloonan v. Thornburgh*, for instance, the Commonwealth Court invalidated an executive order in part because it "place[d] *mandatory* requirements on the [advisory council] and other administrative agencies to auction state stores, issue liquor licenses and, more importantly, continue the regulation of alcohol in this Commonwealth after the termination of the PLCB on December 31, 1986." 519 A.2d 1040, 1048 (Pa. Cmwlth. 1986) (emphasis added). And in *National Solid Wastes Management Ass'n v. Casey* ("*Casey II*"), the Commonwealth Court invalidated an executive order, in part, because it mandatorily "alter[ed the then-

[17] Gov. Wolf claims that he should be "free to choose the language in executive orders to issue direction to subordinates." Appellants' Br. 26. As explained more fully below, this "freedom" would obviate any restrictions on executive orders by allowing the Governor to effectively "mandate" anything he wanted and requiring everyone else to call his bluff.

Department of Environmental Resource's] responsibilities." 600 A.2d 260, 265 (Pa. Cmwlth. 1991).

Meanwhile, the executive order upheld in *Shapp* as a communication to subordinates read, in part:

> You are probably all aware that I shall shortly make full disclosure of all my financial interests and holdings. In keeping with this policy, I am [r]equesting similar disclosure by all members of my Cabinet and members of certain boards, commissions and agencies, as of the date you assumed your present position. If there has been no significant change, the disclosure can be as of the date of the disclosure.

348 A.2d at 911. The *Shapp* executive order also included "a concluding paragraph expressing hope that 'this request will not prove too burdensome.'" *Id.* at 912.

Gov. Wolf's Executive Order is an exercise in contrast. In fact, the term "shall" appears *47 times* throughout his Executive Order. Among other instances, the Secretary for the Department: (1) "*shall*" compile, with assistance from a government contractor, a list of DCW's names and addresses every month, EO ¶ 4a; (2) "*shall*" provide the list to an employee organization, EO ¶ 4c; (3) "*shall*" designate the AAA to conduct the election of an exclusive representative, EO ¶ 3a; (4) "*shall*" recognize the employee organization that wins an election, EO ¶¶ 3, 3.a(2); (5) "*shall*" meet and confer with the employee organization, EO ¶ 3b; (6) "*shall*" discuss enumerated "relevant issues," EO ¶ 3b(2); and (7) "*shall*" reduce agreements to writing, EO ¶ 3c(1). Additionally, tucked away at the end of the Executive Order, Gov. Wolf

mandates that all other "[a]gencies under the Governor's jurisdiction *shall take all steps necessary* to implement the provisions of this Executive Order." EO ¶ 6 (emphasis added).

The Executive Order, as already discussed, does not restrict its mandatory language to *actual* subordinate officials. *Non*-subordinates too, including DCWs, are the target of numerous mandates. *See*, *e.g.*, EO ¶ 3a(3) ("[DCWs] who wish to remove the [DCW] Representative *shall* seek such removal in accordance with the election process set forth in this Order. [DCWs] may not seek such removal earlier than one (1) year after the organization is recognized as the [DCW] Representative."). These mandatory and explicit commands are well beyond the executive order approved in *Shapp*.

3. The Executive Order's Directives Do Not Relate Solely to Execution of the Duties of the Executive Branch.

Relatedly, Gov. Wolf's directives are not solely "for the execution of the duties of the Executive Branch of government." *Casey I*, 580 A.2d at 897-98. Therefore, the Executive Order cannot be a valid executive order directing officials.

Indeed, Gov. Wolf has tasked Department officials and non-subordinates alike with responsibilities that have *nothing to do with executing the duties of the executive branch*. Instead, those directed by the Executive Order were tasked with collecting and providing DCWs' names and addresses to a third-party organization for the purpose of recruitment activities, then with conducting a secret ballot election to determine a

"representative" for private workers. The Department was ostensibly slated, before Gov. Wolf was enjoined, for "meet and confer" sessions *every month* with UHCWP.

Gov. Wolf now claims that all of this is necessary so that the Department can "gather information," specifically, through gathering of "stakeholder input." Appellants' Br. 11, 19. But even accepting "information gathering" as a "duty of the Executive Branch," the end cannot justify the means. As the Commonwealth Court noted, nowhere does the Executive Order include an allowance for *actual* input from DCWs or Participants. *Markham*, 147 A.3d at 1274. And none of the "relevant issues" discussed with the exclusive representative fairly describe mere "information gathering," *a term that does not even appear in the Executive Order*. More to the point, the Department's all-important "information gathering" could be done in a more narrowly tailored way; for one, Gov. Wolf could have limited the Executive Order, as he and many other governors have done in other contexts,[18] to the creation of an advisory group.

Gov. Wolf also asserts that "[t]he Governor could reasonably determine that periodic discussions with a representative democratically chosen by the [DCWs]

[18] *See*, *e.g.*, Executive Order 2015-13 (entitled "Governor's Advisory Councils for Hunting, Fishing and Conservation"); Executive Order 2015-10 (entitled "Governor's Advisory Commission on Asian Pacific American Affairs"); Executive Order 2015-09 (entitled "Pennsylvania Commission for Women"); Executive Order 2015-08 (entitled "Governor's Advisory Commission on Latino Affairs"); Executive Order 2015-07 (entitled "Governor's Advisory Commission on African American Affairs").

themselves will be more productive" and "will more likely have broad acceptance among [DCWs]." Appellants' Br. 36. Of course, Gov. Wolf has not *actually* made any such determination—perhaps because of the illegitimacy of the "democratic process" in fact afforded to DCWs. Just *13%* of DCWs actually voted to be represented by UCHWP. (R. 1968a).

4. Even if compliance with the Executive Order were optional, it remains invalid.

Finally, Gov. Wolf now submits that he issued the Executive Order with mere "hope[ ] that all parties will participate," making compliance with the Executive Order strictly "voluntary." Appellants' Br. 29. He makes much of the idea that, "[i]f the workers or their representatives choose not to participate, the Governor has no legal remedy." *Id.* at 28. Likewise, "[i]f any provider or elected representative is not satisfied with the frequency, quality or outcome of [meet and confer] discussions, there are no legal remedies." *Id.* at 41.

Previous Governors have made eerily similar arguments, without success. In *Cloonan*, the Commonwealth Court rejected then-Governor Thornburgh's argument that his reorganization of state liquor regulation was "merely an intra-executive branch plan which neither mandates nor expects official compliance by the [Pennsylvania Liquor Control Board]." 519 A.2d at 1048. And in *Casey II*, the Commonwealth Court rejected then-Governor Casey's argument that his executive order directing the then-Department of Environmental Resources was a mere "statement of policy, coupled

with directions to the executive agency to carry out the Governor's policy in the course of its regular statutory duties of permitting municipal waste landfill facilities." 600 A.2d at 265.

The main problem with Gov. Wolf's argument, of course, is that the Executive Order never actually *says* or even infers that compliance is optional. It says just the opposite. Therefore, to conclude that compliance is voluntary, DCWs and Participants would have to employ Gov. Wolf's own circular logic that, because the Executive Order cannot be enforced in court, compliance with the Executive Order *must* be voluntary. Nevermind the 47 instances of "shall" in the Executive Order.

Gov. Wolf's argument that words only sometimes mean what they say must be rejected. For one, Gov. Wolf is wrong to suggest that his Executive Order is "voluntary" for DCWs and Participants. Among other binding effects previously discussed, the Executive Order was plainly designed to result in policy changes that threaten DCWs with job loss and take employer authority from Participants. The Deputy Secretary admitted as much before the Commonwealth Court, where he testified that, if a DCW declined to follow policy, the DCW would lose his job. (R. 2041a-2042a).

And even if Gov. Wolf's mandatory language would turn out to lack the force of law if challenged in court, it is absurd to suggest that third parties should bear the responsibility of calling the Governor's bluff. Those apparently bound by the words of the Executive Order—including DCWs and Participants—would have to seek legal

counsel to determine the very questions before this Court, then either take extraordinary risks to defy the Executive Order's plain language or file their own declaratory judgment action to test its enforceability. We cannot expect those impacted by the Executive Order to divine whether Gov. Wolf could follow through on his demands.[19]

Even then, any efforts to contravene the Executive Order would make little difference if *other parties* bound by the Executive Order refuse to defect. For example, Mr. Lambrecht would accomplish nothing if, today, he rejected the language in the Executive Order restricting him to a formal election process to dismiss or replace the DCW Representative. *UHCWP would have to agree with Mr. Lambrecht* and voluntarily walk away in order for his rejection to have any meaning.

B. Instead, the Executive Order is "*De Facto* Legislation"

The same characteristics that distinguish the Executive Order from a valid "directive to subordinates" led the Commonwealth Court to determine that the

[19] Likewise, signing off on this Executive Order would encourage future Governors to issue strongly-worded orders that only *appear* to mandate compliance. Imagine, for example, that our next Governor issues a "travel ban" barring certain individuals from entering the Commonwealth and telling state troopers they "shall" interrogate those with out-of-state license plates to determine whether visitors can stay. Under Gov. Wolf's rationale, the hypothetical Governor could enjoy enforcement and then, if challenged in court, *keep* his executive order by claiming that compliance was always voluntary. After all, legally speaking, state troopers could only be subjected to "loss of favor," Appellants' Br. 27, and visitors can come and go as they please. Meanwhile, the Governor could expect some level of voluntary, if mistaken, compliance.

Executive Order was, instead, "*de facto* legislation." *Markham*, 147 A.3d at 1278. In reaching that determination, the Commonwealth Court largely focused on the conflicts between the Executive Order and existing statutes. However, a finding of conflict was unnecessary to determine that the Executive Order constituted *de facto* legislation. Gov. Wolf made law, and therefore exceeded his authority, *regardless of any such conflict*.

Under the Pennsylvania Constitution, "it is for the *General Assembly* to make basic policy choices." *Dep't of Envtl. Prot. v. Cumberland Coal Res.*, 102 A.3d 962, 978 (Pa. 2014) (emphasis added); *see Swords v. Harleysville Ins. Cos.*, 883 A.2d 562, 570 n.7 (Pa. 2005) ("[P]olicy determinations . . . are within the exclusive purview of the legislature . . . .") (quoting *Glenn Johnston, Inc. v. Commonwealth, Dep't of Rev.*, 726 A.2d 384, 388 (Pa. 1999)); *see also* Pa. Const. art. II, § 1 ("The legislative power of the Commonwealth shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives."). Meanwhile, it is for the Governor to *execute* the laws, "not to create or interpret them." *Shapp*, 348 A.2d at 914; *see also Butcher v. Rice*, 153 A.2d 869, 881 (Pa. 1959) ("Neither the President of the United States, nor the Congress, not a Governor, nor a Legislature has inherent autocratic or Constitutional absolute power, but in each case their power is authorized, limited and restricted by the Constitution—and any violation thereof will be enjoined by the Courts!!!").

Accordingly, in *Casey II*, then-Governor Casey's executive order was invalidated as a breach of the constitutional order. 600 A.2d at 265. Governor Casey's executive

order imposed a limited moratorium on new municipal waste landfills and required a state agency, the then-Department of Environmental Resources, to develop new solid waste disposal policies. Governor Casey argued, in part, that his executive order directing the state agency was a mere "statement of policy, coupled with directions to the executive agency to carry out the Governor's policy in the course of its regular statutory duties of permitting municipal waste landfill facilities." *Id.* He also pointed to the constitutional guarantee to clean air, pure water, and environmental preservation within Article II, Section 27 of the Pennsylvania Constitution. *Id.* But the Commonwealth Court ultimately determined that it was for the General Assembly, not the Governor, to weigh competing environmental and societal concerns surrounding landfills, and it declared the executive order "invalid and [ ] unenforceable, because the Governor had neither constitutional nor statutory authority to issue that executive order." *Id.*

Similarly, here, Gov. Wolf's Executive Order *makes* law because it imposes a basic policy choice on Pennsylvania, creates new legal relationships and alters existing ones, and otherwise resembles a statute, not a valid executive order. Specifically, the Executive Order: (1) adopts Gov. Wolf's basic policy choice to "reform the Commonwealth's home care programs," by addressing terms and conditions of DCWs' employment, EO at 1; (2) imposes on the Department and "state vendors or contractors" obligations not found in Pennsylvania law; EO ¶ 4a-d; (3) allows an "employee organization" to become an exclusive representative for privately-

employed DCWs and by means of an election not found in Pennsylvania law, EO ¶ 3a; (4) prohibits those privately-employed DCWs from removing the exclusive representative for a full year and then only under the terms of the Executive Order, also unheard of in Pennsylvania law, EO ¶ 3a(3); (5) requires the employee organization to "meet and confer" with the Department every month, an obligation not found in Pennsylvania law, EO ¶ 3b(1); (6) sets forth "issues" that the employee organization must discuss with Department, including terms and conditions of DCW's employment, a requirement not set forth in Pennsylvania law, EO ¶ 3b(2); and (7) requires that any mutual understandings be memorialized in a MOU, which may be implemented as binding Department policy, EO ¶ 3c.

Stated simply, *legislation* is required to convert DCWs into state employees for the purpose of collective bargaining or to otherwise provide an employee organization with the power to represent DCWs, a concept well understood across the country.[20] Other states have done just that—enacted an actual statute. *See* Cal. Gov. Code § 110006 ("For purposes of collective bargaining . . . the Statewide Authority is deemed to be the employer of record of individual providers."); Conn. Gen. Stat. § 17b-706b(b) ("Personal care attendants shall have the right to bargain collectively and shall have such other rights and obligations incident thereto . . . ."); 5 Ill. Comp. Stat.

[20] Indeed, as the Commission's report to then-Governor Tom Corbett attests, legislation would be required even to create a voluntary certification program for DCWs. (R. 1217a, 1293a).

315/3(o) ("[T]he State of Illinois shall be considered the employer of the personal assistants working under the Home Services Program . . . ."); Md. Code, Health—General, § 15-903(b) ("Independent home care providers may designate, in accordance with the provisions of this subtitle, which provider organization, if any, shall be the exclusive representative of all independent home care providers in the State."); Mass. Gen. Laws ch. 118E, § 73(b) ("Personal care attendants shall be considered public employees . . . ."); Mo. Rev. Stat. § 208.862(3) ("[P]ersonal care attendants shall be employees of the council . . . ."); Minn. Stat. § 179A.54(2) ("For the purposes of the Public Employment Labor Relations Act . . . individual providers shall be considered, by virtue of this section, executive branch state employees . . . ."); Or. Rev. Stat. § 410.612(1) ("For purposes of collective bargaining . . . the Home Care Commission is the employer of record for home care workers."); Vt. Stat. Ann., tit. 21, § 1640(c) ("Independent direct support providers shall not be considered State employees for purposes other than collective bargaining . . . ."); Wash. Rev. Code § 74.39A.270(1) ("Solely for the purposes of collective bargaining . . . the governor is the public employer . . . of individual providers, who, solely for the purposes of collective bargaining, are public employees . . . .").

For that reason, Gov. Wolf's reference to a Missouri appellate court case, *Kinder v. Holden*, 92 S.W.3d 793 (Mo. App. W. Dist. 2002), is inapposite. *Kinder* involved *executive branch* employees. *See id.* at 798-99, 812-15. Unlike Gov. Wolf, the Missouri governor did not attempt to commandeer a private workforce or foist an employee

organization on those prohibited from organizing. Gov. Wolf imposed a *new* collective bargaining regime on a *new*, privately employed workforce.

In sum, the Commonwealth Court did not err in determining that the Executive Order was "*de facto* legislation," not a valid executive order communicating directives to subordinates. The plain language of Gov. Wolf's Executive Order—and the implementation to date of that language—makes clear that Gov. Wolf was directing non-subordinates, mandating compliance from subordinates, and ordering non-subordinates and subordinates alike on matters unrelated to executive branch duties. Moreover, the Executive Order adopts a basic policy choice, creates and alters legal relationships, and otherwise resembles a statute, not a valid executive order. The Commonwealth Court must be affirmed.

II. THE COMMONWEALTH COURT DID NOT ERR IN DETERMINING THAT THE EXECUTIVE ORDER CONFLICTED WITH STATE LAW GUARANTEEING TO THE DISABLED AND ELDERLY THE RIGHT TO DIRECT THEIR OWN CARE

Gov. Wolf next argues that his Executive Order avoids conflict with state law governing provision of Home Care Service Programs. However, state law guarantees to the disabled and elderly the right to direct their own care, and the Executive Order necessarily limits that right. For that reason, the Commonwealth Court was correct in its observation that "[a]t its core, the Executive Order invades the relationship between a DCW and the employer [P]articipant who receives personal services in his or her home." *Markham*, 147 A.3d at 1278.

No executive order, not even those that qualify as valid communications to subordinates, can conflict with a statute. *Shapp*, 348 A.2d at 914 ("In no event . . . may any executive order be contrary to any constitutional or statutory provision."). To "conflict" with a statute for these purposes, the conflict need not be express; Pennsylvania courts find a conflict whenever an executive order intrudes into an area for which the General Assembly has occupied the field. *See Casey II*, 600 A.2d at 265 ("Our review of Acts 97 and 101 and the regulations promulgated pursuant thereto, indicate the General Assembly's clear intent to regulate in plenary fashion every aspect of the [disposal of solid waste].") (alteration in original) (quotation marks omitted); *Cloonan*, 519 A.2d at 1048 ("[T]he order invades the exclusive province of the General Assembly to legislate and control every phase of the alcoholic beverage industry in the Commonwealth.").

A. The Executive Order Conflicts with Act 150 and the Public Welfare Code by its Express Terms

Pennsylvania's General Assembly enacted legislation creating what are indisputably valuable Home Care Service Programs, including Act 150, 62 P.S. §§ 3051–3058, and provisions within the Public Welfare Code that empower the Department to apply for, receive, and use federal funds as well as develop and submit plans and proposals to the federal government for Department programs, 62 P.S. § 201(1)–(2). Central to the General Assembly's basic policy choice in enacting these

programs was the concept that a recipient of direct care services should have the right to direct his or her own care:

> The General Assembly declares it is the policy of this Commonwealth that:
>
> (1) The increased availability of attendant care services for adults will enable them to live in their own homes and communities.
>
> (2) Priority recipients of attendant care services under this act shall be those mentally alert but severely physically disabled who are in the greatest risk of being in an institutional setting.
>
> (3) *Recipients of attendant care have the right to make decisions about, direct the provision of and control their attendant care services. This includes, but is not limited to, hiring, training, managing, paying and firing of an attendant.*
>
> (4) Attendant care services may be provided by county governments and county human service departments.
>
> (5) Subject to available funds, attendant care programs should be developed to serve eligible individuals throughout this Commonwealth.

62 P.S. § 3052 (emphasis added);[21] *see also* LEGISLATIVE BUDGET AND FIN. COMM., FAMILY CAREGIVERS IN PENNSYLVANIA'S HOME AND COMMUNITY-BASED WAIVER PROGRAMS S-2 (June 2015), *available at* http://lbfc.legis.state.pa.us/Resources/Documents/Reports/527.pdf ("Participant-directed care provides beneficiaries with

[21] As discussed previously, Participants receiving services through the Department's various waiver programs as directed by the General Assembly through the Public Welfare Code, 62 P.S. § 201(1)-(2), could point to similar language indisputably providing them with employer authority.

the ability to self-direct who gets paid to provide their care services, including certain family members.").

Yet the Executive Order created a "meet and confer" process that was designed to introduce changes with respect to DCWs' "recruitment and retention," "wage ranges, health care benefits, retirement benefits and paid time off," "[t]raining and professional development," and "[v]oluntary payroll deductions." EO ¶ 3b(2)(b), (d), (g), (h). Such changes *necessarily* limit Participants' "right to make decisions about, direct the provision of, and control their attendant care services," including but "not limited to, hiring, training, managing, paying and firing of an attendant." 62 P.S. § 3052(3).[22]

Imagine, for the sake of argument, that the process set forth by the Executive Order accomplishes far less than what Gov. Wolf envisioned, and all the DCW

[22] For the same reason, the processes set forth in the Executive Order also conflict with the Public Welfare Code, through which the General Assembly tasked the Department with the responsibility of securing federal approval for additional Home Care Service Programs, 62 P.S. § 201(1)-(2). In imposing on DCWs a professional "representative" and allowing the representative to negotiate terms and conditions of employment for all DCWs, the Executive Order impedes on the role given to the Department by the General Assembly in applying for, receiving, and using federal funds and submitting plans and proposals to the federal government for Department programs. *See Casey II*, 600 A.2d at 265 ("Executive Order 1989-8 clearly conflicts with those acts and regulations, none of which provide the Governor with the authority to have issued such an executive order. . . . Article I, Section 27 does not give the Governor the authority to disturb that legislative scheme. *Neither does it give him the authority to alter [the agency's] responsibilities pursuant to that scheme*.") (emphasis added). Stated differently, the General Assembly did not invite an employee organization to shortcut the creation and regulation of waiver programs, let alone at the expense of Participants and DCWs.

Representative is able to secure was "paid time off," EO ¶ 3b(2)(d), for DCWs. For Mr. Smith, who requires around-the-clock care, paid time off would require that he find a new, substitute DCW to replace his current DCW on a short-term basis whenever the current DCW decides to "punch out" and go on vacation. And failure to secure the substitute—or, more accurately, failure to secure the *right* substitute—could have devastating results for Mr. Smith, whose muscular dystrophy has resulted in quadriplegia. The new paid-time-off requirement would not just limit Mr. Smith's authority; it would endanger his *life*.[23]

Unfortunately, Gov. Wolf would do far more. He complains that, under the current model, Participants and DCWs are not adopting *many* of his preferred policy solutions, a "problem" the Executive Order was apparently designed to "fix":[24]

> The Commonwealth Court failed to recognize that individual program participants lack the authority, capacity, and incentive to address many of the home care policy issues necessary to ensure the continued availability of a sufficient workforce of qualified [DCWs]. Improvements in the status of the occupation of [DCW], which has traditionally been a low-wage, no-benefits job, and the development of career ladders, registries to match workers with [P]articipants, orientations, training programs, and

[23] For this reason, it would be incredibly dangerous to adopt Gov. Wolf's suggestion that this Court *wait* to see whether the process established by the Executive Order violates Participants' rights. Appellants' Br. 32. The suggestion itself demonstrates a lack of understanding of the sensitive nature of the Participant-DCW relationships.

[24] In making this point—and generally insisting on the need for the Executive Order—Gov. Wolf undermines his insistence that the Executive Order changes nothing about DCWs and Participants' relationships.

> other systemic policy initiatives, would require action by the Commonwealth.

Appellants' Br. 35. Such "systemic policy initiatives" would have a profound effect on those relationships. *Id.*

On that note, Gov. Wolf's self-serving disclaimer within the Executive Order promising not to limit Participants' rights is impossible to believe. The very purpose of the Executive Order's "meet and confer" sessions is to introduce new requirements for DCWs and Participants. But every new requirement, big or small, would necessarily affect Participants, who today possess "the right to make decisions about, direct the provision of and control their attendant care services." 62 P.S. § 3052(3).

That unavoidable tradeoff is precisely what led the Commonwealth Court to conclude that, "[a]t its core, the Executive Order invades the relationship between a DCW and the employer participant who receives personal services in his or her home." *Markham*, 147 A.2d at 1278. An employee organization—in this case, UHCWP—should not be in the business of altering terms and conditions of employment between homecare providers and those for whom they care. If terms and conditions of employment need to be addressed, such changes should be made by those affected most: DCWs and Participants. Any lingering issues should be fixed, if necessary, with the benefit of a democratic process, that is, through *legislative* changes,

the manner suggested in the Commission's report to then-Governor Tom Corbett. (R. 1217a, 1293a).

B. The Executive Order Conflicts With Act 150 and the Public Welfare Code Because the General Assembly Has Occupied the Field

At the very least, the Executive Order conflicts with Act 150 and the Public Welfare Code because the General Assembly has expressed an intent to occupy the field with respect to the provision of services to the disabled and elderly. Title 62 of the Pennsylvania Statutes, together with their implementing regulations, embodies a comprehensive legislative scheme through which the Commonwealth provides services in defined circumstances to certain individuals. *See* 62 P.S. §§ 101–7006. Act 150 and the Public Welfare Code fit neatly within that comprehensive legislative scheme, and Gov. Wolf has no authority to disturb it.

On this point, Gov. Wolf basically admits his desire to add to the General Assembly's comprehensive legislative scheme. His Executive Order expressly claims to further his goal of "reform[ing] the Commonwealth's home care programs," EO at 1, and he now reaffirms that he "is committed to *improving*, not abrogating, the [P]articipant-directed home care model *provided by existing law*." Appellants' Br. 31 (emphasis added). Gov. Wolf is obviously not happy with the General Assembly's Home Care Service Programs.

But "reform[ing]" or "improving" laws passed by the General Assembly is not the role of the Governor, Republican or Democrat. Accordingly, even if the

Executive Order is a valid communication to subordinates, *and it is not*, the Executive Order nevertheless conflicts with law governing the provision of Home Care Service Programs. This Court should therefore conclude that the Executive Order is invalid.

III. THE COMMONWEALTH COURT DID NOT ERR IN DETERMINING THAT THE EXECUTIVE ORDER CONFLICTED WITH STATE LAW GOVERNING ORGANIZED LABOR

Lastly, the Commonwealth Court correctly determined that the Executive Order conflicted with the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151–169, Pennsylvania Labor Relations Act ("PLRA"), 43 P.S. §§ 211.1–211.13, and Public Employe Relations Act ("PERA"), 43 P.S. §§ 1101.101–1101.2301. Gov. Wolf, in protest, attempts to thread a needle between these three laws and accomplish what is clearly prohibited: the unionization of DCWs. But in arguing that he can introduce organized labor to the DCW workforce, Gov. Wolf essentially admits to what he has all along denied—he is *making* law. This Court should reject Gov. Wolf's tortured argument and affirm the Commonwealth Court's determination that the Executive Order conflicts with Pennsylvania's labor laws.

A. The Executive Order Conflicts with the NLRA, PLRA, and PERA Because It Provides Organizational Rights to Workers Specifically Prohibited from Organizing

The PLRA, like the NLRA, "reflects the fact that the organization of household workers . . . does not further the interest of labor peace." *Harris v. Quinn*, 573 U.S. ___, 134 S. Ct. 2618, 2640 (2014). After all, DCWs "do not work together in a common state facility but instead spend all their time in private homes, either the

[Participants'] or their own" and are often close friends or family members of Participants. *Id.* The General Assembly obviously recognized that labor organization would, in this context, hurt the general public, including Participants and DCWs.

Accordingly, the PLRA, like the NLRA, withholds employee organizing rights from, among others, "any individual employed . . . in the domestic service of any person in the home of such person," 43 P.S. § 211.3, even as it provides such broad rights to various other workers, 43 P.S. § 211.5 ("Employes shall have the right to self-organization, to form, join or assist labor organizations,[25] to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.").

Meanwhile, PERA was enacted to "promote orderly and constructive relationships" between government employees and employers. 43 P.S. § 1101.101. Not surprisingly, to organize under PERA, workers must be employed by a "public employer":

> the Commonwealth of Pennsylvania, its political subdivisions including school districts and any officer, board, commission, agency, authority, or other instrumentality thereof and any nonprofit organization or institution and any charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local, State or Federal governments but shall not include employers covered or presently subject to coverage under the [PLRA or NLRA].

[25] The Executive Order specifically refers to the DCW Representative as a "labor organization." EO ¶ 5d-f.

43 P.S. § 1101.301(1).

Yet Gov. Wolf's Executive Order invites DCWs to organize *against Participants*, contrary to the NLRA, PLRA, *and* PERA. It also authorizes a "*labor* organization" to represent all DCWs as the exclusive representative to effect a change in terms and conditions of employment. EO ¶ 5d-f (emphasis added). The Executive Order confers on DCWs the right to self-organization, EO ¶ 3a, the right to form, join, or assist a labor organization, EO ¶¶ 3a, 5d-e, to bargain collectively, EO ¶ 3b-c, and, functionally, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, EO ¶ 3b-c. These are the *hallmarks* of labor organizing.

Gov. Wolf argues that his arrangement is nevertheless permitted because neither the NLRA, PLRA, nor PERA "forbids the Governor or Secretary from meeting with [DCWs] as a stakeholder group to discuss policy issues, whether those meetings are with individual workers or groups representing [DCWs]." Appellants' Br. 38-39. But Gov. Wolf is clearly underselling his Executive Order. For one, the DCW Representative is not a mere "stakeholder group." It is, by the Executive Order's own rendering, a "labor organization," EO ¶ 5d-f, or "employee organization," EO ¶¶ 1-5,[26] empowered to do what *no other voluntary organization is permitted to do: speak on behalf*

[26] These terms happen to be the same terms used by the General Assembly to describe labor unions in the PLRA, 43 P.S. § 211.3(f) ("labor organization"), and PERA, 43 P.S. § 1101.301(3) ("employe[e] organization").

of those who want no part, EO ¶ 3. No stakeholder business, club, membership group, or trade association has that power.

Moreover, Gov. Wolf and the Department are not merely discussing "policy issues" with the DCW Representative. As the Commonwealth Court observed, "[t]he Executive Order provides the Secretary, the Deputy Secretary and the Designated Representative 'shall meet and confer'[27] regarding *terms and conditions of employment, including recruitment, wages, benefits, payment procedures and voluntary deductions, and training*." *Markham*, 147 A.3d at 1276 (emphasis altered). The Executive Order itself makes clear that it was drafted to address Gov. Wolf's perceived "need to improve both the quality of home care *and the working conditions of* [*DCWs*]." EO at 1 (emphasis added).

Gov. Wolf also objects that his "meet and confer" process is different because he never invited the employers—Participants—to the proverbial bargaining table. Appellants' Br. 41-42. However, Gov. Wolf cannot convert this obvious inequity, which itself violates the terms of Home Care Service Programs, into a feature. Other states allowing DCWs to organize in a similar manner have found it necessary to enact a statute. *See* Cal. Gov. Code §§ 110000–110036; Conn. Gen. Stat. §§ 17b-705–17b-706d; 5 Ill. Comp. Stat. 315/3; Md. Code, Health—General, §§ 15-901–15-907; Mass. Gen. Laws ch. 118E, § 73; Mo. Rev. Stat. §§ 208.850–208.895; Minn. Stat. § 179A.54;

[27] PERA imposes on public employers and employee organizations a similar obligation "to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." 43 P.S. § 1101.701.

Or. Rev. Stat. §§ 410.612–410.625; Vt. Stat. Ann., tit. 21, §§ 1631–1644; Wash. Rev. Code § 74.39A.270.

B. The Executive Order Conflicts with the NLRA, PLRA, and PERA Because It Mandates an Organizational Process at Odds with Those Mandated by Law.

Next, by stripping DCWs of protections to which they would have been entitled under the NLRA, PLRA, and PERA, the Executive Order conflicts with existing law. The General Assembly considered these protections to go hand-in-hand with labor organizing, contrary to the scheme devised by Gov. Wolf.

All three statutes, the NLRA, PLRA, and PERA, include important protections for employees who do not wish to be represented by an employee organization. All three, for example, require a showing of interest from *at least 30%* of employees before an exclusive representation election, *see* 29 CFR § 101.18(a); 43 P.S. § 211.7(c); 43 P.S. § 1101.603(a), and provide for adequate notice in the event of an election, *see* 29 CFR § 103.20; 43 P.S. § 211.7(c); 43 P.S. § 1101.605(a). Additionally, the PLRA and PERA task the Pennsylvania Labor Relations Board ("PLRB"), and the NLRA, the National Labor Relations Board, with the responsibility of ensuring appropriate bargaining units and fair union elections. *See* 43 P.S. § 211.7; 43 P.S. §§ 1101.602–1101.605. Perhaps chief among protections for dissenters in union elections, the PLRA requires employee organizations to secure a vote from a "majority of the employes *in a unit*." 43 P.S. § 211.7(c) (emphasis added).

Here, the Executive Order ignores such protections, at the expense of thousands of DCWs. As a result, UHCWP was permitted to secure an election with just a 10% showing of support—far less than the 30% required by the NLRA, PLRA, and PERA—and a "victory" with *just 13%* of the 20,000 eligible votes. (R. 1968a). The Executive Order contains no election notice requirement and leaves all 20,000 DCWs without the routine protections normally provided by the PLRB.

Gov. Wolf wholly fails to explain how removing these protections avoids a statutory conflict. If anything, Gov. Wolf again argues that the Executive Order's lack of protections is actually a feature, apparently distinguishing it from labor law.[28] *See, e.g.*, Appellants' Br. 41 ("If any provider or elected representative is not satisfied with the frequency, quality or outcome of these discussions, there are no legal remedies."). But it is *obvious* that DCWs lack any power to control their own supposed "representative" or to petition the NLRB or PLRB for help when the union or employer engage in unfair labor practices. Even the Executive Order's promise to protect DCW's "right to . . . refrain from becoming a member of [a] labor organization" or directive that "all existing or future vendors or contractors . . . shall

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[28] Amici labor unions make the same argument but only serve to further illustrate the obvious detriment to DCWs:

> [T]he Executive Order confers no such legal rights to, or protection for, the DCWs or their Representative. They have no recourse to either a labor board or to the courts with respect to any feature of the Executive Order.

Brief of Amici Curiae, the Pennsylvania AFL-CIO and Other Pennsylvania Unions in Support of Appellants at 11.

refrain from interfering with a [DCW's] decision to refrain from joining a labor organization" are, by Gov. Wolf's calculations, unenforceable. EO ¶ 5d-e. The lack of protections do not evidence creative thinking—they constitute violations of the law.

Even assuming Gov. Wolf crafted an Executive Order that successfully threads the needle between the NLRA, PLRA, and PERA, that does not mean his Executive Order is valid. On the contrary, all Gov. Wolf will have done is create what only the General Assembly can: a legal regime granting organizational rights to 20,000 DCWs across Pennsylvania. Conflict or not, in issuing the Executive Order, Gov. Wolf made law; this is legislation by executive fiat.

Accordingly, as the Commonwealth Court observed, the Executive Order conflicts with the NLRA, PRLA, and PERA. This Court should come to the same conclusion; Gov. Wolf attempted to unionize a workforce prohibited from organizing and, at the same time, stripped them of any protections provided by the General Assembly.

C. The Executive Order Conflicts With the NLRA, PLRA, and PERA Because the General Assembly Has Occupied the Field

Finally, even if the Executive Order did not expressly conflict with the NLRA, PLRA, and PERA, it nevertheless conflicts because the General Assembly (or Congress) intended that those laws occupy their respective fields. Accordingly, Gov. Wolf, in issuing the Executive Order, intruded on the General Assembly's "clear intent to regulate in plenary fashion every aspect of [employee organizing]." *Casey II*,

600 A.2d at 265 (quoting *Cloonan*, 519 A.2d at 1048 (quoting *Commonwealth v. Wilsbach Distribs., Inc.*, 519 A.2d 397, 400 (1986))).

The General Assembly has dealt extensively and comprehensively with labor-related issues throughout Title 43 of the Pennsylvania Statutes. The legislature has tackled, among other issues, employment-related safety, 43 P.S. §§ 1–26-7; child and female labor, 43 P.S. §§ 40.1–71, 101–133; workers' wages and hours, 43 P.S. §§ 165-1–165-17, 221–336.10, 932.1–932.6; unemployment compensation, 43 P.S. §§ 751–919.10; self-employment, 43 P.S. §§ 920.1–920.12; civil and whistleblower rights, 43 P.S. §§ 951–963, 1421–1428; and seasonal farm labor, 43 P.S. §§ 1301.101–1301.606. Title 43 also includes the PLRA and PERA, which together represent the General Assembly's basic policy choice for labor organizing.

The PLRA and PERA, for their part, deal comprehensively with labor organizing for, respectively, private- and public-sector workers.[29] The PLRA provides to private-sector workers broad rights, not just to collectively bargain but also "to engage in concerted activities for the purpose of . . . *other mutual aid or protection*." 43 P.S. § 211.5 (emphasis added). The PLRA determines the organizational process and the method of selection of a union, 43 P.S. § 211.7, and it created the PLRB as an enforcement agency, protecting the rights of employers, labor unions, and employees alike, 43 P.S. §§ 211.4–211.11.

[29] The NLRA, likewise, extensively governs labor organizing for private-sector workers on the federal level.

Similarly, PERA gives to public employees the ability "to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining *or other mutual aid and protection*." 43 P.S. § 1101.401 (emphasis added). PERA tasks the PLRB with oversight over union elections, organizing, and unfair labor practices, 43 P.S. §§ 1101.501–1101.503, 1101.1301–1101.1306, defines the scope and practice of bargaining for public employers and unions, 43 P.S. §§ 1101.701–1101.1101, and prohibits public-sector unions from using general treasury dollars to support political candidates, 43 P.S. § 1101.1701.

These extensive and detailed policies, codified throughout Title 43, were intended to work together to accomplish the General Assembly's ultimate policy goal of achieving, for one, a safe and effective workforce. The General Assembly could have, as other states have, grafted organizational rights for DCWs into this scheme. But it did not, and that makes perfect sense: Congress too determined that "the organization of household workers . . . does not further the interest of labor peace." *Harris*, 134 S. Ct. at 2640. The General Assembly did not leave this avenue open; its occupation of the field of labor law precludes executive meddling, making Gov. Wolf's foray into labor policymaking a conflict *per se*.

In sum, Gov. Wolf's Executive Order forces labor organizing on DCWs and Participants, in violation of the NLRA, PLRA, and PERA. Accordingly, this Court should, as Pennsylvania courts have done in the past, conclude that his Executive Order conflicts with existing statutes occupying the field. *See Casey II*, 600 A.2d at 265

(“Our review of Acts 97 and 101 and the regulations promulgated pursuant thereto, indicate the General Assembly’s clear intent to regulate in plenary fashion every aspect of the [disposal of solid waste].”) (alteration in original); *Cloonan*, 519 A.2d at 1048 (“[T]he order invades the exclusive province of the General Assembly to legislate and control every phase of the alcoholic beverage industry in the Commonwealth.”).

CONCLUSION

The Executive Order looks, reads, and operates like legislation; it is, no doubt, an imposition of employee organizing rights on DCWs and Participants. Therefore, in issuing the Executive Order, Gov. Wolf exceeded his authority and violated laws governing provision of Home Care Service Programs as well as labor law. This Court should call the Executive Order what it is: an invalid exercise of gubernatorial power.

Respectfully Submitted,

THE FAIRNESS CENTER

March 20, 2017

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limits of Pennsylvania Rule of Appellate Procedure 2135(a)(1). This brief contains 13,984 words, according to the word count feature of the word processing program used to prepare the brief.

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Appendix A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David W. Smith and Donald Lambrecht, Petitioners	:	
v.	:	No. 177 M.D. 2015 Argued: June 8, 2015
Governor Thomas W. Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania and Commonwealth of Pennsylvania, Department of Human Services, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: October 14, 2016**

Before this Court are the parties' cross-applications for summary relief. David W. Smith (Smith) and Donald Lambrecht (Lambrecht) (collectively, Petitioners) filed a petition for declaratory and injunctive relief seeking to invalidate an executive order (Executive Order) issued by Governor Thomas W. Wolf (Governor Wolf) pertaining to direct care workers (DCW) whose services to eligible aged or disabled individuals (participants) are paid by the Department of Human Services, Office of Long Term Living (Department). The Department and Governor Wolf (collectively, Respondents) also filed preliminary objections, which are before us for disposition.

Petitioners assert the Executive Order is an unauthorized exercise of power, is unconstitutional and is in conflict with existing labor and health laws. Respondents counter that Petitioners' claims are not ripe and their challenge lacks merit. Addressing similar contentions, this Court recently analyzed the validity of the Executive Order in Markham v. Wolf, __ A.3d __ (Pa. Cmwlth., No. 176 M.D. 2015, filed September 22, 2016) (en banc) (Markham). Following Markham, we grant Petitioners' application for summary relief as to those provisions of the Executive Order declared invalid (Sections 3 and 4, and parts of Sections 1 and 5). Also, we deny Respondents' application for summary relief as to the invalid provisions of the Executive Order. Further, we overrule their preliminary objections to the extent they are not mooted by our decision on the merits.

I. Background

Other than the identity of the Petitioners, the background of this case is substantially similar to that set forth in Markham. Therefore, we incorporate the "Background," including terminology, from Markham by reference.

Petitioners here filed a petition for review containing identical claims to those contained in the petition for review the petitioners in Markham filed. Respondents filed preliminary objections to the petition for review. Specifically, they allege the action is not ripe because Petitioners raise purely speculative harm. Respondents also object in the nature of a demurrer to the claims that the Executive Order does the following: exceeds the Governor's authority; conflicts with statutory authority, (the Attendant Care Services Act,[1] (Act 150) the

[1] Act of December 10, 1986, P.L. 1477, as amended, 62 P.S. §§3051-3058.

Pennsylvania Labor Relations Act[2] (PLRA), and the Public Employe Relations Act[3] (PERA)); and, violates the PLRA or PERA.

Lambrecht is a DCW who provides personal care to Smith, a participant in a Home Care Program through Act 150. Lambrecht has provided services to Smith for more than 25 years. Petitioners claim a direct, substantial and present interest in the controversy.

Petitioners allege the Executive Order interferes with the unique relationship between a DCW providing in-home care, and the participant who employs him. Specifically, Smith alleges "the insertion of a union between he and his [DCW] will limit [his] authority ... to make decisions about, direct the provision of, and control his direct care services." Pet. for Review, ¶3. Respondents thus disturb the employment relationship, creating a barrier and alternative communication structure regarding terms and conditions. Lambrecht also claims injury in that his "name and home address will be made available to employee organizations for the purpose of canvassing and recruitment, and he will be subjected to unwanted exclusive representation by a labor organization ... [that] may materially alter the terms and conditions of [his] employment." Id., ¶4. Moreover, Lambrecht alleges he did not want representation by UHCWP. As a result, he is harmed because such representation is required for at least one year under the Executive Order's terms.

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[2] Act of June 1, 1937, P.L. 1168, as amended, 43 P.S. §§211.1-.13.

[3] Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §§1101.101-.2301.

The parties entered into stipulations prior to the preliminary injunction hearing in April 2015. Then President Judge Dan Pellegrini conducted the hearing, after which he issued a preliminary injunction order identical to the order issued in Markham. The parties then entered into a second stipulation in June 2015.

After briefing, and hearing argument seriately with Markham, this case is ready for disposition.

II. Discussion

The underlying claims are the same as those set forth in Markham. Accordingly, we adopt our analysis that applies to this case. However, we analyze Respondents' preliminary objection to the ripeness of Petitioners' claim separately.

A. Preliminary Objections

"The question of standing is rooted in the notion that for a party to maintain a challenge to an official order or action, he must be aggrieved in that his rights have been invaded or infringed." Franklin Twp. v. Dep't of Envtl. Res., 452 A.2d 718, 719 (Pa. 1982). Ripeness involves a related challenge to whether the injury alleged is speculative as opposed to real and concrete. See Robinson Twp., Washington Cnty. v. Com., 83 A.3d 901 (Pa. 2013) (recognizing overlap between doctrines of standing and ripeness, especially as to allegations of speculative harm).

Our Supreme Court recognized DCWs and participants are sufficiently impacted by the Executive Order "from a standing perspective." Markham v. Wolf, 136 A.3d 134, 146 (Pa. 2016). Here, Petitioners are a DCW

and a participant who fostered a unique relationship over more than 25 years. They have an interest in maintaining the integrity of their relationship. Moreover, participants have a direct, substantial and immediate interest in maintaining control over their relationship with DCWs, which control is protected by Act 150.

Petitioners allege the Executive Order causes harm in that it interferes with the unique DCW-participant relationship by inserting the Department in a position of authority and influence, without input from participants. Further, the Executive Order created a process for unionizing DCWs, and empowering a Designated Representative to negotiate terms and conditions of employment with the Department. That negotiation process, called "meet and confer," is designed to result in a MOU that may bind participants in terms of wages, hours and benefits.

Although the specifics as to how that relationship would be altered are not now known, the interference with the relationship is concrete, and presently occurring. Participants' abilities to control and direct their care are undermined when they are excluded from a negotiation process designed to affect terms and conditions of employment. As employers, participants have a real and concrete interest in maintaining the status quo that the Executive Order disturbs. Contrary to Respondents' characterization, that harm is not speculative.

For these and the reasons set forth more thoroughly in Markham, we overrule Respondents' preliminary objection to the ripeness of Petitioners' claims.

B. Summary Relief

From our review, Petitioners' application for summary relief is substantively similar to the application the petitioners filed in Markham. Thus, we adopt and apply our analysis in Markham to the declaratory and injunctive relief claims here.

III. Conclusion

For the reasons set forth above and as incorporated from Markham, we grant Petitioners' application for summary relief in part as to those sections of the Executive Order we declared invalid in Markham, (E.O. Sections 1(d) and 1(e), 3 and 4, and Sections 5(b) through 5(g)). Respondents are also enjoined from enforcing those sections of the Executive Order or taking any actions in accordance with those sections. Pa. Pub. Util. Comm'n v. Israel, 52 A.2d 317 (Pa. 1947). Conversely, we deny Respondents' application for summary relief in part, as to the invalid sections and subsections of the Executive Order. Respondents' application for summary relief is granted in part, only as to the provisions of the Executive Order that retain their validity.

As a result, the preliminary objections of Respondents in the nature of a demurrer are rendered moot. See Leach v. Turzai, 118 A.3d 1271 (Pa. Cmwlth. 2015), aff'd, 141 A.3d 426 (Pa. 2016). We overrule Respondents' preliminary objection challenging the ripeness of Petitioners' claims.

ROBERT SIMPSON, Judge

Judge Covey did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

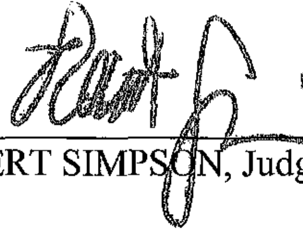
David W. Smith and Donald Lambrecht, Petitioners	:	
v.	:	No. 177 M.D. 2015
Governor Thomas W. Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania and Commonwealth of Pennsylvania, Department of Human Services, Respondents	:	

ORDER

AND NOW, this 14th day of October, 2016, having declared certain sections and subsections of Executive Order 2015-05 **INVALID** in Markham v. Wolf, __ A.3d __ (Pa. Cmwlth., No. 176 M.D. 2015, filed September 22, 2016) (en banc), Petitioners' Application for Summary Relief pursuant to Pa. R.A.P. 1532(b) is **GRANTED in PART**, only as to Sections 1(d) and 1(e), 3, 4, and Sections 5(b) through 5(g) of the Executive Order; and **JUDGMENT** is entered in their favor as to those sections and subsections only. Respondents' Application for Summary Relief is **DENIED in PART**, as to Sections 1(d) and (e), 3 and 4, and Sections 5(b) through 5(g) of Executive Order 2015-05, and **GRANTED in PART**, and **JUDGMENT** is entered in their favor as to the remaining provisions.

Pursuant to Markham, Respondents are **ENJOINED** from prospectively enforcing the sections of Executive Order 2015-05 declared invalid and *void ab initio*, or taking any future actions in accordance with those sections.

AND FURTHER, Respondents' preliminary objection to the ripeness of Petitioners' claims is **OVERRULED** for the reasons set forth in the foregoing opinion. Respondents' preliminary objections in the nature of a demurrer are **DISMISSED** as **MOOT**.



ROBERT SIMPSON, Judge

Certified from the Record

OCT 14 2016

and Order Exit

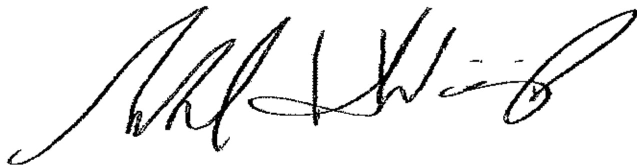
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David W. Smith and Donald Lambrecht, Petitioners	:	No. 177 M.D. 2015 Argued: June 8, 2016
v.	:	
Governor Thomas W. Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania and Commonwealth of Pennsylvania, Department of Human Services, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

DISSENTING OPINION
BY JUDGE WOJCIK FILED: October 14, 2016

I respectfully dissent for the reasons stated in my dissenting opinion in *Markham v. Wolf*, __ A.3d __ (Pa. Cmwlth., No. 176 M.D. 2015, filed September 22, 2016) (*en banc*).



MICHAEL H. WOJCIK, Judge

Appendix B

2015-05 - Participant-Directed Home Care Services

<table>
<tr><td colspan="2" align="center">EXECUTIVE ORDER
Commonwealth of Pennsylvania
Governor's Office</td></tr>
<tr><td>Subject:
Participant-Directed Home Care Services</td><td>Number:
2015-05</td></tr>
<tr><td>Date:
02/27/2015</td><td>By Direction of:
Tom Wolf, Governor</td></tr>
</table>

WHEREAS, the administration is committed to ensuring that Pennsylvania residents have access to quality home care services; and

WHEREAS, direct care workers are individuals who provide vital home care services to Pennsylvania's seniors and people with disabilities who require assistance; and

WHEREAS, without assistance from direct care workers who are paid through various programs administered by the Department of Human Services through its Office of Long Term Living, these residents otherwise would require institutional care, such as that provided in a nursing home; and

WHEREAS, residents who are consumers of in-home personal care services must maintain the right to select and direct the daily work of direct care workers who provide services through the programs administered by the Department of Human Services; and

WHEREAS, the average cost of providing in-home personal care services is typically much less than the cost of care provided in nursing homes or similar institutional settings, and Pennsylvania's home care services programs therefore save the Commonwealth millions of dollars per year; and

WHEREAS, the demand for direct home care services is expected to rise in the coming years in light of Pennsylvania's aging population; and

WHEREAS, the quality of life for Pennsylvania's seniors and people with disabilities is significantly improved by the option of received self-directed in-home care services; and

WHEREAS, direct care workers typically earn low wages and receive no benefits, paid time off, or standardized training; and

WHEREAS, as a result, the pool of direct care workers available for consumers of in-home care services in Pennsylvania suffers from high turnover and inconsistent quality; and

WHEREAS, reform of the Commonwealth's home care programs requires careful consideration of its economic impact and must ensure Pennsylvania's right to receive the maximum amount of federal funds to which it is entitled and, therefore, should be informed by input from all interested stakeholders; and

WHEREAS, the administration believes there is a need to improve both the quality of home care and the working conditions of direct care workers and that these two goals are related;

NOW, THEREFORE, I, Thomas W. Wolf, Governor of the Commonwealth of Pennsylvania, by virtue of the authority vested in me by the Constitution and laws of the Commonwealth of Pennsylvania, do hereby direct the following:

1. **Definitions.** As used in this Executive Order, the following definitions shall apply:

   a. "Department" means the Department of Human Services.

   b. "Deputy Secretary" means the Deputy Secretary of Human Services for Long Term Living.

c. "Direct Care Worker" means a person who provides Participant-Directed Services in a Participant's home under a Home Care Service Program.

d. "Direct Care Worker List" means a monthly list compiled at the direction of and maintained by the Department of the names and addresses of all Direct Care Workers who have within the previous three (3) months been paid through a Home Care Service Program that provides Participant-Directed Services. The list shall specify the program through which each Direct Care Worker is paid, but nothing that would identify the name of any participant.

e. "Direct Care Worker Representative" means the designated representative elected according to the procedure outlined in Paragraph 3.

f. "Home Care Service Programs" means the following programs administered by OLTL, and any successor program:

(1) The Aging Waiver Program.
(2) The Attendant Care Waiver Program.
(3) The CommCare Waiver Program.
(4) The Independence Waiver Program.
(5) The OBRA Waiver Program.
(6) The *Act 150* Program.

g. "OLTL" means the Department's Office of Long Term Living.

h. "Participant" means a person who receives services from a Direct Care Worker under a Home Care Service Program.

i. "Participant-Directed Services" means personal assistance services, respite, and Participant-Directed community supports or similar types of services provided to a senior or a person with a disability who requires assistance and wishes to hire, terminate, direct and supervise the provision of such care pursuant to the Home Care Service Programs, provided now and in the future, to (i) meet such person's daily living needs, (ii) ensure such person may adequately function in such person's home, and (iii) provide such person with safe access to the community. Participant-Directed Services does not include any care provided by a worker employed by an agency as defined by *Section 802.1* of the *Health Care Facilities Act (35 P.S. § 448.802a)*.

j. "Secretary" means the Secretary of Human Services.

2. **Advisory Group on Participant-Directed Home Care.** There is hereby established an Advisory Group to ensure the quality of long-term Participant-Directed Home Care that shall be known as the Governor's Advisory Group on Participant-Directed Home Care. The Advisory Group shall advise the Governor's Office and executive branch agencies and offices of the Commonwealth (including the Department) on ways to improve the quality of care delivered through the Home Care Services Programs.

a. The Advisory Group shall be composed of seven (7) members, who shall serve at the pleasure of the Governor. The seven members shall include the Secretary, or a designee (who shall serve as chairperson of the Advisory Group), and the Deputy Secretary, or a designee. The remaining five (5) members of the Advisory Group shall be appointed by the Governor, and will include both participants or their surrogates and advocates for seniors and people with disabilities.

b. Commencing no later than June 30, 2015, the Advisory Group shall meet at least quarterly to study and discuss the experiences and best practices of other states that administer similar programs to provide Participant-Directed Home Care Services. In particular, the Advisory Group shall review the following subjects:

(1) Establishment and maintenance of policies, practices and procedures designed to ensure that the Commonwealth continues its efforts to reduce the numbers of Pennsylvania residents currently on waiting lists to receive services through the Home Care Service Programs.

(2) Evaluation of the work of OLTL so as to ensure that the program standards of the Home Care Service Programs are being met as they apply to the provision of Participant-Directed Services. However, the Advisory Group shall not be allowed to review the activities of the Department pertaining to pending reviews and investigations that involve potential fraud or criminal conduct, unless the information is publicly available.

(3) Establishment and maintenance of policies, practices and procedures designed to ensure that the Commonwealth continues its efforts to rebalance resources for long term care services from institutional care to home and community based services.

(4) Establishment and maintenance of policies, practices and procedures designed to ensure that the Commonwealth continues to adhere to the principles of participant-direction, independent living and consumer choice.

(5) Any other issues that the Governor may deem appropriate.

3. **Direct Care Worker Representative.** The Secretary shall recognize a representative for the Direct Care Workers for the purpose of discussing issues of mutual concern through a meet and confer process.

a. **Election Process.** The Secretary shall designate the American Arbitration Association to conduct an election and certify the election outcome, pursuant to the following process:

(1) An election shall be conducted to designate a representative when an organization seeking to be so designated presents signed authorization cards to the Governor, or his designee, demonstrating that at least ten (10%) percent of the providers identified on the most recent Direct Care Worker List (as described below) choose to be represented by such organization.

(2) All Direct Care Workers identified on the most recent Direct Care Worker List (at the time the election is requested) shall be eligible to vote in an election. If the majority of votes cast in the election are for the petitioning organization, the American Arbitration Association shall certify the election results, and the Secretary shall recognize the organization as the Direct Care Worker Representative. There shall only be one Direct Care Worker Representative recognized at any time.

(3) The recognized Direct Care Worker Representative shall continue to act as such for so long as such organization complies with its responsibilities concerning representation of Direct Care Workers. Direct Care Workers who wish to remove the Direct Care Worker Representative shall seek such removal in accordance with the election process set forth in this Order. Direct Care Workers may not seek such removal earlier than one (1) year after the organization is recognized as the Direct Care Worker Representative.

b. **Meet and Confer Process.** The Secretary, the Deputy Secretary, and the Direct Care Worker Representative shall meet and confer to address concerns of Direct Care Workers and ways to improve the quality of care provided under the Home Care Services Programs.

(1) The Secretary, the Deputy Secretary and the Direct Care Worker Representative shall meet at least monthly, on mutually agreeable dates and times.

(2) The Secretary, the Deputy Secretary and the Direct Care Worker Representative shall discuss relevant issues, including the following:

(a) The quality and availability of Participant-Directed Services in the Commonwealth, within the framework of principles of participant-direction, independent living and consumer choice.

(b) The improvement of the recruitment and retention of qualified Direct Care Workers.

(c) The development of a Direct Care Worker registry or worker-participant matching service to provide routine, emergency and respite referrals of qualified Direct Care Workers to participants who are authorized to receive long-term, in-home care services under one of the Home Care Service Programs.

(d) Standards for compensating Direct Care Workers, including wage ranges, health care benefits, retirement benefits and paid time off.

(e) Commonwealth payment procedures related to the Home Care Services Programs.

(f) Development of an orientation program for Direct Care Workers working in a Home Care Services Program.

(g) Training and professional development opportunities for Direct Care Workers.

(h) Voluntary payroll deductions for Direct Care Workers.

(3) The Direct Care Worker Representative shall have the opportunity to meet with the Governor, or his designee, at least once annually to discuss the outcome of the meet and confer sessions with the Secretary.

c. **Memorandum of Mutual Understanding.**

(1) Mutual understandings reached during the meet and confer process shall be reduced to writing. Where appropriate, and with the approval of the Governor, understandings reached through the meet and confer process will be implemented as the policy of the Department related to Direct Care Workers providing Participant-Directed Services. If any such mutual understanding requires legislation or rulemaking, the Direct Care Worker Representative may make recommendations for legislation or rulemaking to the relevant body.

(2) Nothing in this Executive Order shall compel the parties to reach mutual understandings.

(3) In the event the parties are unable to reach mutual understandings, the Governor or a designee will convene a meeting of the parties to understand their respective positions and attempt to resolve the issues of disagreement.

4. **Direct Care Worker List.**

a. The Secretary shall compile a list each month of the names and addresses of all Direct

Care Workers ("DCW List") who, within the previous three (3) months, have been paid through a Home Care Service Program that provides Participant-Directed Services. The DCW List shall specify every program through which each Direct Care Worker was paid. However, the DCW List shall not include the name of any participant, any designation that a Direct Care Worker is a relative of a participant, or any designation that the Direct Care Worker's home address is the same as a participant's address.

b. An employee organization that has as one of its primary purposes the representation of direct care workers in their relations with the Commonwealth or other public entities may petition the Secretary to represent a particular unit of Direct Care Workers.

c. Upon a showing made to the Secretary by an employee organization described in Subparagraph 4.b. that at least 50 Direct Care Workers support the organization's petition to provide representation, the Secretary within seven (7) days shall provide to the organization the most recent DCW List, and, for an additional six (6) months thereafter, upon request shall supply subsequent monthly lists.

d. Any vendor or contractor that provides financial management services for the Commonwealth in connection with any Home Care Service Program shall assist and cooperate with the Department in compiling and maintaining the DCW List. The Secretary shall ensure that all existing and future contracts with vendors or contractors providing financial management services for the Commonwealth require the fiscal intermediary to cooperate in the creation and maintenance of the DCW List.

5. No Change to Existing Rights and Relationships.

a. Nothing in this Executive Order shall be construed to limit communication between or among Commonwealth employees, representatives of employee associations, the heads of executive branch agencies, and the Governor. The provisions of this Executive Order shall not be construed or interpreted to diminish any rights, responsibilities, powers or duties of individual employees in their service to the Commonwealth. Further, the provisions of this Executive Order shall not diminish or infringe upon any rights, responsibilities, powers or duties conferred upon any officer or agency by the Constitution or laws of the Commonwealth of Pennsylvania.

b. Nothing in this Executive Order shall be interpreted to grant Direct Care Workers the status of Commonwealth employees. The provisions of this Executive Order shall not be construed or interpreted to create collective bargaining rights or a collective bargaining agreement under any federal or state law.

c. Nothing in this Executive Order or in any Memorandum of Mutual Understanding that may be reached hereunder shall alter the unique relationship between the individual participants and Direct Care Workers. Participants shall retain the rights to select, hire, terminate and supervise a Direct Care Worker. This Executive Order is not intended to grant any right, or to imply that Direct Care Workers have any right, to engage in a strike or other collective cessation of the delivery of services.

d. Nothing in this Executive Order, or in any Memorandum of Mutual Understanding that is reached hereunder, shall alter the rights of Direct Care Workers, including the right to become a member of a labor organization or to refrain from becoming a member of labor organization.

e. In accordance with all applicable federal and Commonwealth laws, all existing or future vendors or contractors providing financial management services for the Commonwealth shall refrain from interfering with a Direct Care Worker's decision to join or refrain from joining a labor organization.

f. This Executive Order and any Memorandum of Mutual Understanding reached hereunder shall not be interpreted to require a Direct Care Worker to support a labor organization in any way.

g. Nothing in this Executive Order, or in any Memorandum of Mutual Understanding that is reached thereunder, shall limit a Direct Care Worker's ability, individually or in concert with others, to petition the Commonwealth regarding any issue of concern.

6. Cooperation by Commonwealth Agencies. Agencies under the Governor's jurisdiction shall take all steps necessary to implement the provisions of this Executive Order.

7. Effect and Duration. This Executive Order shall be effective immediately and remain in effect until amended or rescinded by the Governor.

Attached File: 2015-05.pdf

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief, filed on behalf of Appellees David W. Smith and Donald Lambrecht, has on this date been served on the following persons in a manner that satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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March 20, 2017

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