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IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

DAVID W. SMITH and DONALD LAMBRECHT,	:	No. 177 M.D. 2015
Petitioners	:	
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	:	

APPLICATION FOR RELIEF SEEKING LEAVE TO INTERVENE

Pursuant to Pa.R.A.P. 106, 123 and 1531(b), and Pa.R.C.P. Nos. 2326 to 2329, President Pro Tempore Senator Joseph B. Scarnati, III, Majority Leader Senator Jake Corman, Majority Whip Senator John Gordnor and Majority Appropriations Chairman Senator Pat Browne, on behalf of the Pennsylvania

Senate Majority Caucus (collectively the "Majority Caucus"), by and through undersigned counsel, Lamb McErlane PC, hereby seek leave to intervene as party respondents in this original jurisdiction matter, and in support, avers as follows:

1. On April 6, 2015, Petitioners, David W. Smith and Donald Lambrecht, filed a Petition for Review in the Commonwealth Court's original jurisdiction, and an Application for Special Relief in the Form of a Preliminary Injunction, seeking to enjoin Respondents, Governor Thomas W. Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania and Commonwealth of Pennsylvania, Department of Human Services, from enforcing Executive Order 2015-05, which purports to establish organizational labor rights for domestic home care workers, and was issued by Governor Wolf on February 27, 2015.

2. In an original jurisdiction petition for review, a nonparty may file an application for leave to intervene. Pa.R.A.P. 1531(b).

3. The standards for intervention under Pa.R.C.P. Nos. 2326 to 2329 apply to an original jurisdiction petition for review because Pa.R.A.P. 106 ("Original Jurisdiction Matters") authorizes reliance on "general rules" applicable to practice in the courts of common pleas, that is, the Rules of Civil Procedure, so far as they may be applied.

4. Pa.R.C.P. No. 2327 provides in pertinent part as follows:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if
>
> * * *
>
> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

5. Because Executive Order 2015-15 is neither authorized by the Constitution nor by statute, and therefore represents an unconstitutional attempt by the Governor to exercise legislative power, the Pennsylvania Majority Caucus seeks leave to intervene in this matter under Pa.R.A.P. 1531(b) and Pa.R.C.P. No. 2327(3) and (4), to protect the institutional power of the Legislature from unconstitutional encroachment by the Executive.

I. Interest Of The Entity Seeking To Intervene

6. President Pro Tempore Senator Joseph B. Scarnati, III, of the 25th Senatorial District, Majority Leader Senator Jake Corman of the 34th Senatorial District, Majority Whip Senator John Gordnor of the 27th Senatorial District and Majority Appropriations Chairman Senator Pat Browne of the 16th Senatorial District, are elected Pennsylvania Republican Senators, seeking leave herein to intervene as party respondents in this original jurisdiction matter on behalf of the Pennsylvania Senate Republican Caucus.

7. Currently, the Pennsylvania Senate Republican Caucus, which is comprised of the elected Republican Senators, is the Senate Majority Caucus.

8. The Pennsylvania Senate organizes its members according to the two major political party affiliations, Republican and Democratic. The two subordinate organizations (Majority and Minority), which make up the Senate are known as the Senate "caucuses". "Although the Pennsylvania Constitution does not use the word 'caucuses' to refer to the organization of the Senate into Majority and Minority groups, they are, in fact, the two constituencies that comprise the Senate." *Precision Marketing, Inc. v. Commonwealth, Republican Caucus of the Senate of PA/AKA Senate of PA Republican Caucus*, 78 A.3d 667, 672 (Pa. Cmwlth. 2013). Whichever party holds the most seats in the Senate is considered the Majority Caucus.

9. The Majority Caucus is one of two subparts of the Pennsylvania Senate and is an integral constituent of the Senate. "As the Majority party, the Senate Republican Caucus is responsible for placing significant legislation on the agenda. When a caucus is effective, it creates the 'constitutional majority' to pass legislation." *Precision Marketing*, 78 A.3d at 673.

10. The Executive Order issued by Governor Wolf purports to make law by creating a procedure by which home health care providers can organize and collectively bargain the terms of their employment, and thus constitutes an attempt to circumvent and supplant the authority of the legislative branch, in violation of the Separation of Powers.

11. As legislators, the Majority Caucus has a substantial, direct and immediate interest in the outcome of this action because if Respondents are not enjoined from enforcing the Executive Order, there will be a discernible and palpable unconstitutional infringement on the legislative authority of the Majority Caucus.

II. Grounds On Which Intervention Is Sought

12. The claims the Majority Caucus seeks to assert in this action as legislators reflect an "interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, fall[] within the realm of the type of claim that legislators, *qua* legislators, have standing to pursue." *Fumo v. City of Philadelphia*, 972 A.2d 487, 502 (Pa. 2009).

13. Thus, the Majority Caucus "could have joined as an original party in the action or could have been joined therein" to seek redress for the Governor's usurpation of the General Assembly's unique legislative power and authority under the Pennsylvania Constitution, satisfying the requirement of Pa.R.C.P. No. 2327(3).

14. Additionally and for the same reasons, the determination of this action will affect the "legally enforceable interest of" the Majority Caucus "whether or not [the Majority Caucus] may be bound by a judgment in the action", thus satisfying the requirement of Pa.R.C.P. No. 2327(4).

III. Statement Of Requested Relief

WHEREFORE, for the foregoing reasons, President Pro Tempore Senator Joseph B. Scarnati, III, Majority Leader Senator Jake Corman, Majority Whip Senator John Gordnor and Majority Appropriations Chairman Senator Pat Browne, on behalf of the Pennsylvania Senate Majority Caucus, respectfully request that this Honorable Court GRANT this Application for Relief Seeking Leave to Intervene, and DIRECT the Commonwealth Court Prothonotary to enter the names of President Pro Tempore Senator Joseph B. Scarnati, III, Majority Leader Senator Jake Corman, Majority Whip Senator John Gordnor and Majority Appropriations Chairman Senator Pat Browne on the docket in this matter as Respondent Intervenors on behalf of the Pennsylvania Senate Majority Caucus, and DOCKET the Respondent Intervenors' Brief in Support of Petitioner's Application for Special Relief in the Form of a Preliminary Injunction, attached as Appendix "A" hereto.

Respectfully submitted,

LAMB McERLANE PC

Dated: April 21, 2015

By: /s/ Joel L. Frank

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Counsel for Respondent Intervenors

VERIFICATION

I, Joseph P. Scarnati, III, verify and affirm that the statements made in the foregoing Application for Relief are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Date: April 21, 2015

Joseph P. Scarnati, III

APPENDIX “A”

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

DAVID W. SMITH and DONALD LAMBRECHT,	:	No. 177 M.D. 2015
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GOVERNOR THOMAS W. WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HUMAN SERVICES,	:	
Respondents	:	

BRIEF OF RESPONDENT INTEVENORS IN SUPPORT OF PETITIONER'S APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION

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INTRODUCTION

Respondent Intervenors, President Pro Tempore Senator Joseph B. Scarnati, III, Majority Leader Senator Jake Corman, Majority Whip Senator John Gordnor and Majority Appropriations Chairman Senator Pat Browne, on behalf of the Pennsylvania Senate Majority Caucus, file this brief in opposition to Executive Order 2015-05, which purports to establish organizational labor rights for domestic home health care providers, issued by the Honorable Thomas W. Wolf, Governor, on February 27, 2015. Because Executive Order 2015-05 is neither authorized by the Constitution nor by statute, it is unconstitutional and violates the separation of power between the Governor and the Pennsylvania General Assembly. Together, Respondent Intervenors have an interest not merely in preserving the Legislature's constitutional prerogatives over labor relations and health care throughout the Commonwealth, but also a significant interest as leaders in the Pennsylvania Senate in protecting the institutional power of the Legislature from unconstitutional encroachment by the Executive. Executive Order 2015-05 is a blatant attempt by the Governor to circumvent the constitutionally-granted legislative authority of the General Assembly. The executive order should be declared invalid.

ARGUMENT

"The legislative power in its most pristine form is the power to make, alter and repeal laws." Blackwell v. State Ethics Commission, 523 Pa. 347, 359, 567 A.2d 630, 636 (1989) (quotation marks and citations omitted). This law-making power is not only essential to the Pennsylvania General Assembly, but it is also an exclusive power of the Legislature. The General Assembly cannot constitutionally delegate its power to make law to any other branch of government. See, e.g., Gilligan v. Pennsylvania Horse Racing Commission, 492 Pa. 92, 95, 422 A.2d 487, 489 (1980). It could not be more clear that if the Legislature cannot voluntarily delegate its legislative power, then another branch cannot legally usurp that power from the Legislature. As this Court has explained:

> This system of bicameral legislation with executive approval is the bulwark of our constitutional existence. It is the system of "checks and balances" taught to every school child in the Commonwealth and perhaps the most fundamental tenet of our constitutional existence.

National Solid Wastes Management Association v. Casey, 143 Pa. Commw. 577, 584, 600 A.2d 260, 264 (1991) (*en banc*), aff'd, 533 Pa. 97, 619 A.2d 1063 (1993).

Here, Governor Wolf issued an executive order that purports to make new law by creating a procedure through which home health care providers can organize and engage in collective bargaining with respect to the terms of their employment. The Governor purports to create this new procedure by way of

executive order, even though: (i) the General Assembly did not authorize the Executive Branch to do so, (ii) the Governor's executive order is in direct conflict with established, controlling and constitutionally enacted statutory law, and (iii) this Court (by order signed by Senior Judge Quigley) previously enjoined the Rendell administration from creating similar procedures by way of a virtually identical executive order. Importantly, there has been no change in state law since Judge Quigley issued his decision.

Simply stated, Executive Order 2015-05 violates the Separation of Powers doctrine of the Pennsylvania Constitution. Under this doctrine, the executive branch is not permitted to circumvent and supplant the authority of the legislative branch or, by executive fiat, to displace the orderly, constitutionally proper deliberative process undertaken by duly elected Senators and Representatives who are charged with the important responsibility of enacting laws for the Commonwealth of Pennsylvania. Executive Order 2015-05 is an unconstitutional overreach by the Governor. It is invalid executive "legislation" masquerading as law, and it is void because it is unconstitutional.

I. EXECUTIVE ORDER 2015-05 IS AN UNCONSTITUTIONAL ATTEMPT BY THE EXECUTIVE BRANCH TO EXERCISE LEGISLATIVE POWER.

A. For an executive order to have the force of law, it must be authorized by the Constitution or promulgated pursuant to express statutory authority.

It is well-established that to have the force and effect of law any, executive order, must be properly promulgated in accordance with express statutory authority. The Separation of Powers doctrine under the Pennsylvania Constitution, creates a system of checks and balances among the three branches – Legislative, Executive and Judicial – of Pennsylvania government. The Separation of Powers doctrine has been an indelible feature of Pennsylvania government since as early as 1776, when the state convention created the Pennsylvania Plan or Form of Government. See In re: Investigation by Dauphin County Grand Jury, September, 1938, 332 Pa. 342, 352, 2 A.2d 804, 807 (1938); see also John M. Mulcahey, *Separation of Powers: The Judiciary's Prevention of Legislative Encroachment*, 32 DUQ. L.REV. 539, 540 (1994). The Separation of Powers doctrine has continued throughout the several iterations of the Pennsylvania Constitutions that followed in 1790, 1838, 1874, and most recently in 1968. The hallmark of Separation of Powers is a deeply engrained concept:

> The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches of it, the legislature, the executive, and

> the judiciary, which, within their respective departments, are equal and co-ordinate.

DeChastellux v. Fairchild, 15 Pa. 18, 20, 1850 WL 5938 at *3 (1850). While subject to checks and balances by the other branches, as was the Constitution's design, each branch exercises its own exclusive powers. The power of the Legislature is to create the laws. PA. CONST. ART. II, §1. The power of the Judiciary is to interpret the laws. PA. CONST. Art. V, § 1. And the power of the Executive is faithfully to execute the law as created by the General Assembly and interpreted by the Judiciary. PA. CONST. Art. IV, §. 1.

In the performance of its constitutional duty to "take care that the laws be faithfully executed[,]" PA. CONST. Art. IV, § 1, the Executive branch has developed numerous means to manage the agencies and employees under its authority and control, such as management directives, administrative circulars and procedural manuals. See Cutler v. State Civil Service Commission, 924 A.2d 706, 710-11 (Pa. Commw. 2007), alloc. denied, 596 Pa. 710, 940 A.2d 366 (2007). Within appropriate constraints, the Executive also utilizes the tool of the "executive order." Significantly, there are three general types of executive orders, each with a different purpose. First, there are formal or ceremonial executive orders, usually issued as proclamations. See Shapp v. Butera, 22 Pa. Commw. 229, 234-35, 348 A.2d 910, 913 (1975). Second, there are executive orders intended as directives to subordinate executive agency officials or employees. See id. at 235,

348 A.2d at 913. Third, there are executive orders that serve to implement the law. See id. It is only that third category of executive orders – those that implement the law – which is legally enforceable. The other two categories are essentially precatory.

Consistent with this framework, the Pennsylvania Supreme Court has held that "[o]nly executive orders that have been authorized by the Constitution or promulgated pursuant to statutory authority have the force of law[.]" Werner v. Zazyczny, 545 Pa. 570, 581, 681 A.2d 1331, 1336 (1996) (citing Pagano v. Pennsylvania State Horse Racing Commission, 50 Pa. Commw. 499, 502, 413 A.2d 44, 45 (1980), aff'd, 499 Pa. 214, 452 A.2d 1015 (1982); Butera, 22 Pa. Commw. at 234-35, 348 A.2d at 913-14). After all, as this Court once admonished, "[t]he Governor's power is to execute the laws and not to create or interpret them." Butera, 22 Pa. Commw. at 235-36, 348 A.2d at 914. Thus, for an executive order to have the force of law, the Constitution or a statute must provide specific authorization for the Executive to exercise such power. "While the Governor may issue executive orders absent such authority, these executive orders will not be enforced by the courts." Werner, 545 Pa. at 581, 681 A.2d at 1336 (citing Pagano, 50 Pa. Commw. at 502, 413 A.2d at 45).

Where a statute provides express authority for the issuance of an executive order, the executive order will be considered valid. For example, in In re

Nomination Petitions of James Farrow, 754 A.2d 33 (Pa. Commw. 2000), an executive order was found to be valid because it was promulgated pursuant to express statutory authority contained in the Emergency Management Services Code, 35 Pa. C.S. § 7301 et seq. In that case, this Court considered whether the Governor's extension of a filing deadline for nomination petitions following a paralyzing snow storm constituted a valid and enforceable executive order. This Court upheld the extension, pointing to the Emergency Management Services Code as the source of authority for the Governor's action. 754 A.2d at 34-35. The Code expressly permitted the Governor to declare a disaster emergency due to a "snowstorm," 35 Pa. C.S. § 7102, and further provided that where such a disaster emergency is declared and is imminent, the Governor may:

> Suspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.

35 Pa. C.S. § 7301(f)(1) (as cited in In re Nomination Petitions of James Farrow, 754 A.2d at 35). Based on this express statutory grant of legal authority, the Governor's executive order that extended a filing deadline for nomination petitions was deemed valid and constitutional. 754 A.2d at 35; see also Zuppo v.

Commonwealth, 739 A.2d 1148, 1153 (Pa. Commw. 1999) (identifying specific statutory grant of authority before enforcing executive order).

In contrast, where the Governor cannot point to such an express grant of statutory authority, any executive order that purports to alter or amend the Commonwealth's laws is an unconstitutional overreach of power by the Executive into the General Assembly's exclusive power to legislate. In National Solid Wastes, 143 Pa. Commw. at 585-86, 600 A.2d at 264-65, for example, an executive order purported to supplement the provisions of the Solid Waste Management Act, 35 P.S. § 6018.101 et seq., and the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000.101 et seq., by adding to or varying certain requirements and procedures under those statutes. An association representing individuals and businesses impacted by the executive order filed suit, demanding that the executive order be declared unconstitutional, as violative of Separation of Powers. National Solid Wastes, 143 Pa. Commw. at 579, 600 A.2d at 261. This Court compared the terms of the executive order to the statutes it purported to implement, and concluded that the statutory scheme evidenced the General Assembly's "clear intent to regulate in plenary fashion every aspect of the disposal of solid waste." Id. at 587, 600 A.2d at 265 (quotation marks, brackets and citations omitted). This Court therefore concluded that the Governor had no authority to vary or supplement that comprehensive statutory scheme, and held the

executive order invalid and unenforceable as unconstitutional. Id. at 587, 600 A.2d at 265.

Any suggestion that this case merely involves a preemption issue and not a Separation of Powers issue misses the mark. The National Solid Wastes Court spoke, for example, of the General Assembly's "clear intent to regulate in plenary fashion every aspect of the disposal of solid waste." Id. at 587, 600 A.2d at 265. Casually referring to preemption language from federal cases creates an analytical pitfall, however, when considering the law of executive order in Pennsylvania. Whether the United States Congress has preempted a field of law from legislation by the states presents an entirely different question than whether the Pennsylvania Governor has the power to issue a legally enforceable executive order. The reason is that under the Savings Clause of The United States Constitution, state legislators have the inherent power to enact laws where Congress has not acted. Unlike a state legislature's power to legislate when measured against prior action by Congress, the Governor's power to issue executive orders is not plenary in those areas where the General Assembly has not yet legislated. To the contrary, it is well-established that an executive order, as a threshold matter, must *first* be authorized by a specific statutory grant of authority or section of the Pennsylvania Constitution to have the force of law, regardless of whether that executive order otherwise conflicts with statutory law. See, e.g., Werner, 545 Pa. at 581, 681 A.2d

at 1336; National Solid Wastes, 143 Pa. Commw. at 587, 600 A.2d at 265; Sever v. Commonwealth, 100 Pa. Commw. 217, 222, 514 A.2d 656, 659 (1986); Wilt v. Commonwealth, 62 Pa. Commw. 316, 318, 436 A.2d 713, 714 (1981), aff'd, 498 Pa. 511, 447 A.2d 943 (1982); Pagano, 50 Pa. Commw. at 502, 413 A.2d at 45; Butera, 22 Pa. Commw. at 235-36, 348 A.2d at 914. Where the General Assembly has occupied a field (in the language of preemption) or the field is left vacant, the Governor cannot fill that perceived void by executive order without a predicate express grant of statutory or constitutional authority.

This ironclad rule preserves the Separation of Powers between the Executive and the Legislative branches in Pennsylvania by preventing the Executive from upsetting the balance of powers between the branches of government as established by our Constitution. It also protects the General Assembly's prerogative to decide whether or not to adopt specific legislation and what, if any, regulatory authority to provide to the Executive branch of government. There are critical reasons for the separation of powers. Executive orders, for example, are not subject to the many protective measures of Article III of the Pennsylvania Constitution (e.g., original purpose, three readings, clear title, single subject), the collective purpose of which "is to place restraints on the legislative process and encourage an open, deliberative and accountable government." City of Philadelphia v. Commonwealth, 575 Pa. 542, 573, 838 A.2d 566, 585 (2003) (citation and quotation marks omitted); see

also Pennsylvanians Against Gambling Expansion Fund v. Commonwealth, 583 Pa. 275, 293, 877 A.2d 383, 393-94 (2005). Executive orders also sidestep the checks and balances of the dynamic legislative process by which a bicameral General Assembly passes legislation always subject to potential veto by an independent branch (which is then always subject to potential override by the General Assembly). See PA. CONST. Art. IV, § 15.

To preserve Separation of Powers, any executive order that attempts to encroach on the exclusive legislative role of the General Assembly - by publishing under the guise of an "executive order" what is in reality legislation - must be declared unconstitutional. See National Solid Wastes, 143 Pa. Commw. at 587, 600 A.2d at 265. Executive Order 2015-05 is not expressly authorized by statute or constitution. Even more, Executive Order 2015-05 clearly and obviously encroaches upon an existing, well-defined legislative scheme. As such, it is the role of the Judiciary to declare Executive Order 2015-05 unconstitutional.

B. The General Assembly has clearly intended to regulate every aspect of intrastate labor relations in the Commonwealth of Pennsylvania.

As a general matter, it is only by virtue of statutory labor laws, such as the Pennsylvania Labor Relations Act ("PLRA"),[1] the Pennsylvania Public Employee

[1] Act of June 1, 1937, P.L. 1168, No. 294, codified at 43 P.S. § 211.1 et seq.

Relations Act,[2] or the National Labor Relations Act ("NLRA"),[3] provide workers who seek to organize with specific workplace protections from designated unfair labor practices. If domestic care providers who are the subject of Executive Order 2015-05, have organizational rights,[4] it would only be through the PLRA, because these providers are private employees whose economic activities fall outside the

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[2] Act of July 23, 1970, P.L. 563, No. 195, codified at 43 P.S. § 1101.101 et seq. The Public Employee Relations Act relates to the organizational rights of public employees in Pennsylvania, Kapil v. Ass'n of Pa. State Coll & Univ. Faculties, 504 Pa. 92, 100, 470 A.2d 482, 485-86 (1983) (citing 43 P.S. §1101.101), and does not apply to the private employees who are the subject of Executive Order 2015-05. However, the substantive provisions of the Public Employee Relations Act are largely identical to those of the PLRA. Compare, e.g., 43 P.S. § 211.7(c) (requiring showing of 30% interest to justify an election) to 43 P.S. § 1101.603(a) (same). Therefore, to the extent that the Public Employee Relations Act may be said to apply, Executive Order 2015-05 would be unconstitutional for substantively the same reasons as explained in Section I(C) below.

[3] 29 U.S.C. § 151 et seq. The NLRA extends to those industries affecting interstate commerce and for which the National Labor Relations Board has not declined to exercise its jurisdiction. See Western Pennsylvania School for Deaf v. Commonwealth, 64 Pa. Commw. 1, 5, 438 A.2d 1025, 1026 (1982) (citations omitted). The economic activity of the home health care providers impacted by Executive Order 2015-05 apparently falls outside of the NLRA's jurisdiction. However, to the extent that the NLRA would be deemed to apply to those providers of long-term home health care in Pennsylvania, Executive Order 2015-05 simply would be preempted in its entirety. See Philadelphia Ass'n of Interns and Residents v. Albert Einstein Medical Center, 470 Pa. 562, 566-67, 369 A.2d 711, 713 (1976).

[4] Home health care providers could well be exempted from collective bargaining rights by the "domestic service" exception to the PLRA, set forth in the PLRA's definition of "employee" at 43 P.S. § 211.3(d). If so, then the General Assembly has established by statutory scheme that this class of workers should enjoy no statutorily protected collective bargaining rights.

Again, any argument that this is, in effect, a preemption issue, improperly conflates preemption law with the law regarding executive orders. If this case were concerned with preemption, it may be meaningful to assess whether the General Assembly has occupied the whole field of labor organization. But this case concerns the legality of an executive order, and the Governor has no express statutory or constitutional authority to issue Executive Order 2015-05. Thus, even if the PLRA did not exist at all, Executive Order 2015-05 would still be invalid. See, e.g., Werner, 545 Pa. at 581, 681 A.2d at 1336; National Solid Wastes, 143 Pa. Commw. at 587, 600 A.2d at 265; Sever, 100 Pa. Commw. at 222; Wilt, 62 Pa. Commw. at 318; Pagano, 50 Pa. Commw. at 502, 413 A.2d at 45; Butera, 22 Pa. Commw. at 235-36, 348 A.2d at 914.

scope of federal jurisdiction. Neither the PLRA nor the Pennsylvania Constitution, however, authorize the Executive to modify or supplement labor relations law in Pennsylvania by executive order. See, e.g., Werner, 545 Pa. at 581, 681 A.2d at 1336 (stating an executive order must first be authorized by a specific statutory grant of authority or section of the Pennsylvania Constitution to be legally enforceable). Indeed, the comprehensive scheme of existing statutory labor relations law summarized below shows not only that the Governor lacked the authority to issue Executive Order 2015-05 in the first place, but also that the General Assembly has fully legislated the area of labor relations.

The PLRA, first enacted in 1937, sets forth a scheme by which appropriate work units of private employees in Pennsylvania may organize and bargain collectively with their employers. It reflects the Legislature's clear intent to regulate in plenary fashion every aspect of labor relations for private employees:

- The PLRA was enacted for the purpose of ensuring that workers in private industry in Pennsylvania had the right to organize and bargain collectively. The Legislature declared that the public policy of the Commonwealth was to encourage the practice of collective bargaining and to protect the exercise of workers by self-organization and designation of representatives of their own choosing, and declared that the PLRA would provide the mechanism for workers to organize.

- Substantively, the PLRA defines the rights of employees and, to protect those rights, defines as "unfair labor practices" certain conduct on the part of employers that are deemed to prevent employees from exercising their rights.

- The PLRA affirmatively grants rights to employees at Section 5, where it vests in employees the right to self-organization, to form or join a labor organization, to bargain collectively and to engage in concerted activity for the purposes of collective bargaining or other mutual aid or protection.

- To protect the rights set forth in Section 5, Section 6 of the PLRA specifies those activities of employers which are deemed unlawful labor practices. Section 6 contains six subsections each of which proscribes different types of employer conduct. An employer is prohibited from: (i) interfering with, restraining or coercing employees in the exercise of the rights guaranteed by the PLRA; (ii) dominating or interfering with the formation or administration of any labor organization or contributing financial support to it; (iii) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; (iv) retaliating against any employee who files charges or gives testimony under the PLRA; (v) refusing to bargain collectively with the employees' representative; or (vi) deducting dues from the wages of employees unless the employer is authorized to do so by a majority vote of all employees in the bargaining unit and unless the employer receives written authorization from each employee whose wages are affected.

- Also, for the purpose of protecting the rights of employees guaranteed by Section 5 of the PLRA, Section 6 sets forth six types of conduct by labor organizations that constitute unfair labor practices. Thus, Section 6 makes it an unlawful labor practice for a labor organization to: (i) intimidate, restrain, or coerce any employee for the purpose of compelling that employee to join a labor organization; (ii) engage in a sit-down strike or to seize or damage property of the employer during a labor dispute; (iii) intimidate or coerce any employer by threats of force or violence to the person of the employer with the intent of compelling the employer to accede to demands, including the demand for collective bargaining; (iv) picket a place of employment by a person or persons who are not an employee of the place of employment; (v) engage in a secondary boycott; or (vi) call or conduct a strike against any employer on account of any jurisdictional controversy.

- Procedurally, the PLRA creates the Pennsylvania Labor Relations Board ("PLRB") to adjudicate certain defined labor disputes and set forth a

procedure for employees to select a designated representative. The powers of the PLRB are remedial in nature, not punitive, and the duties of the PLRB are performed for the public at large.

- The PLRB has the duty to investigate and consider labor disputes whenever petitioned so to do by either a labor organization, an employer, or the representative of any unit of employees. The PLRB has authority to cooperate with other agencies, including federal agencies and those of other states, in all matters concerning its powers and duties under the PLRA, particularly in relation to agreements providing for the ceding to the PLRB by the National Labor Relations Board of jurisdiction over any cases in any industry (other than for mining, manufacturing, communications and transportation, except where predominately local in character). The PLRB may meet and exercise any or all of its powers at any place and it may, by one or more of its members or by such agents as it may designate, prosecute in any part of the state any inquiry necessary for the performance of its functions.

- The PLRB also is required in each case to determine the appropriate bargaining units for both public and private employees. In the case of private employees, the PLRB decides whether a work unit shall be the employer unit, craft unit, plant unit, or any other unit. The PLRB must investigate questions concerning representation of employees, and to conduct elections for determining such representations.

- The PLRB is required at the end of each year to make a written report to the Governor, stating in detail the work it has done in hearing and deciding cases, and otherwise, and the PLRB is to sign and report in full an opinion in every case decided by it.

- The PLRB also has the authority to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of the PLRA, and it has the authority from time to time, to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of the Public Employee Relations Act.

See, generally, 20 SUM. PA. JUR. 2D, EMPLOYMENT AND LABOR RELATIONS, §§ 9:29, 9:30, 9:32; 11 WEST'S PA. FORMS, EMPLOYMENT LAW, §§ 7.2, 7.5. This statutory scheme is complimented by the separate, but substantively similar,

scheme of the Pennsylvania Public Employee Relations Act (as well as that of the NLRA), and given further texture by the comprehensive regulations promulgated by the PLRB pursuant to the authority of 43 P.S. § 211.4(f), and published in the Pennsylvania Code in Title 34, Part V, Chapters 91 and 93.

C. Executive Order 2015-05 is illegitimate "executive legislation".

1. Executive Order 2015-05 is not supported by a specific statutory or constitutional grant of authority.

To be valid and constitutional, an executive order must be authorized by a specific statutory grant of authority or section of the Pennsylvania Constitution. See, e.g., Werner, 545 Pa. at 581, 681 A.2d at 1336; National Solid Wastes, 143 Pa. Commw. at 587, 600 A.2d at 265; Sever, 100 Pa. Commw. at 222; Wilt, 62 Pa. Commw. at 318; Pagano, 50 Pa. Commw. at 502, 413 A.2d at 45; Butera, 22 Pa. Commw. at 235-36, 348 A.2d at 914. Executive Order 2015-05 has no such source of authority, and thus is invalid

Nebulous constitutional guarantees – like those in National Solid Wastes and Robinson v. Shapp, 23 Pa. Commw. 153 do not meet the level of specificity required to authorize a Governor to issue legally binding executive orders. This Court's decision in Butera demonstrates the specificity required. There, this Court stated in *dicta* that it would be possible for an executive order to be premised on the express language Article IV, Section 10 of the Pennsylvania Constitution, which reads:

> The Governor may require information in writing from the officers of the Executive Department, upon any subject relating to the duties of their respective offices.

PA. CONST. art. IV, sec. 10. This Court then described the sort of hypothetical executive order that could be authorized by this constitutional provision:

> If, for instance, the Governor issued an executive order under Article IV, Section 10 . . . requiring information from officers of the Executive Department upon a subject relating to the duties of their respective offices and any such officers refused, the Governor could obtain a court order and the sanctions of noncompliance with a court order to enforce the executive order.

Id. at 235. The direct, specific connection between the text of Article IV, Section 10 and the hypothetical executive order discussed in Butera is apparent.

The differences between Executive Order 2015-05 and other executive orders that have been upheld as valid underscores Executive Order 2015-05's obvious shortcomings. For example, in In re Nomination Petitions of James Farrow and Zuppo, the Executive relied upon a specific provision of the Emergency Management Services Code, at 35 Pa. C.S. § 7301(f)(1), to authorize his executive orders. Here, there is no similarly specific statute that can be cited as a source of authority for Executive Order 2015-05. While the PLRA includes an express grant of statutory authority to an executive agency, granted to the PLRB which, by virtue of the express grant, is authorized to engage in rule-making "as may be necessary to carry out the provisions of this act." 43 P.S. § 211.4(f).

Again tellingly, the Governor here did *not* seek to implement the provisions of Executive Order 2015-05 through the PLRB's exercise of this express delegation of rule-making authority. This is not surprising. It would have been beyond the power the PLRB to promulgate the various provisions of Executive Order 2015-05 as rules because that executive order does not "carry out" the PLRA, but instead is contrary to and specifically alters the PLRA.

2. Executive Order 2015-05 purports to amend a pre-existing and comprehensive statutory scheme.

Executive Order 2015-05 improperly tries to change an established and comprehensive statutory scheme relating to labor relations and the organization of workers in the Commonwealth of Pennsylvania, as embodied in the PLRA (and the Public Employee Relations Act). Executive Order 2015-05 is invalid because it improperly purports to alter, amend and add to the express statutory scheme of the PLRA as follows:

(1) The Executive Order, at ¶ 3(a)(1), provides that an election of a labor organization shall take place upon a showing of just 10% of employees. The PLRA, in contrast, requires a showing of 30% of employees before an election shall take place. 43 P.S. § 211.7(c).

(2) The Executive Order, at ¶ 3(a)(2) designates the American Arbitration Association as the election monitor but is silent on how the American Arbitration Association is to conduct the election as the election

monitor. The PLRA assigns to the PLRB the exclusive jurisdiction to conduct and supervise elections. 43 P.S. § 211.7(c).

(3) Perhaps most fundamentally, the Executive Order applies exclusively to health care providers employed directly by the individuals for whom they care to provide domestic services in their employers' homes. The PLRA, however, specifically disallows "any individual employed . . . in the domestic service of any person in the home of such person" from organizing into a legally protected collective bargaining unit. 43 P.S. § 211.3(d).

Thus, Executive Order 2015-05 plainly trespasses into legislative territory without legal authority. As such, Executive Order 2015-05 is an unconstitutional, invalid and unenforceable executive order.

In addition to the many instances where Executive Order 2015-05 directly conflicts with the PLRA, the Governor's directive also tries to insert substantive additions to the PLRA to the extent that the statute would otherwise apply to home health care providers. Executive Order 2015-05 attempts to insert the Commonwealth into the private work relationships between consumer-employers and the providers they employ, unilaterally seeking to authorize the Commonwealth to negotiate on behalf of consumer-employers (who now would have no say whatsoever in those negotiations) the work terms and conditions of the

providers. Executive Order 2015-05, also purports to establish an "Advisory Group" to serve as representative for consumers of personal assistance and attendant care services who directly employ their providers for purposes of dealing with the Department regarding the care and services delivered by Home Care Service Programs. Thus, Executive Order 2015-05 injects the Executive as an intermediary between the actual consumer-employers of home health care providers and those with whom they are supposedly negotiating about work conditions. In contrast, the PLRA does not supplant employers with any kind of government intermediary, but rather encourages direct negotiation between employers and properly organized work units as supervised by an impartial PLRB.

Executive Order 2015-05 also tries to direct the Commonwealth to intrude into the consumer-employer/home health care provider relationship[5] by mandating the compilation of a list of Direct Care Workers to facilitate the election of an exclusive Direct Care Worker Representative. The Executive Order commands the Commonwealth to exercise the power of the state to gather private information about individuals engaged in a private employer/employee relationship and to "compile a list each month of the names and addresses of all 'Direct Care Workers' (the "DCW List") who, within the three previous months, have been paid

[5] Executive Order 2015-05 also conflicts with the Attendant Care Services Act, at 62 P.S. §3052, which provides that "[r]ecipients of attendant care have the right to make decisions about, direct the provision of and control their attendant care services." Contrary to this legislative directive, Executive Order 2015-05 seeks to unilaterally interpose governmental intermediaries and a labor organization between recipients of attendant care and their providers.

through a Home Care Service Program that provides Participant-Directed Services. Although the Executive Order is silent as to what the Commonwealth will do with this list, presumably it is intended to be turned over to private labor organizations for the purpose of assisting those labor organizations in contacting providers to encourage an affirmative vote in favor of organizing. The PLRA, in contrast, creates a framework for interested workers to organize and bargain collectively, but does not authorize use of state resources to benefit private labor organizations.

The damage that Executive Order 2015-05 does to the statutory scheme of the PLRA, without any statutory or constitutional authority, is readily apparent. These substantive changes – this *executive legislation* – are unsupportable and unconstitutional.

II. EXECUTIVE ORDER 2015-05 SHOULD BE DECLARED UNCONSTITUTIONAL AND VOID.

The Governor's decision to unabashedly ignore the Pennsylvania Constitution and impose by gubernatorial fiat new substantive law rather than properly respecting the legislative process cannot be countenanced. This is precisely the kind of unauthorized Executive action that our tripartite form of government was designed to prevent. The Separation of Powers contemplates exclusive roles for not just the Legislature and the Executive, however. Of co-equal significance is the Judiciary's responsibility to safeguard the Constitution from any overreach by one of the other two branches. See Marbury v. Madison, 5

U.S. (1 Cranch) 137 (1803); Williams v. Samuel, 332 Pa. 265, 273, 2 A.2d 834, 838 (1939). Where, as here, the Executive and the Legislature disagree on the scope of their respective powers, it is for the Judiciary finally and definitively to resolve the conflict lest a constitutional crisis ensue. See In re: Investigation by Dauphin County Grand Jury, September, 1938, 332 Pa. at 352-53, 2 A.2d at 807 (discussing the "doctrine of separation of powers, and with the resulting necessity for judicial review to resolve differences of opinion between the legislative, executive or judicial . . . is so definitely settled that reference to precedents is unnecessary."). The unconstitutionality of Executive Order 2015-05 is clear and indisputable. This Court must therefore discharge its separate responsibility to uphold the Pennsylvania Constitution by declaring Executive Order 2015-05 unconstitutional and void.

CONCLUSION

For all the foregoing reasons, Respondent Intervenors, President Pro Tempore Senator Joseph B. Scarnati, III, Majority Leader Senator Jake Corman, Majority Whip Senator John Gordnor and Majority Appropriations Chairman Senator Pat Browne, on behalf of the Pennsylvania Senate Majority Caucus, request that this Court preliminarily and permanently enjoin enforcement of Executive Order 2015-05 as an unconstitutional attempt by the Executive to exercise legislative power.

Respectfully submitted,

LAMB McERLANE PC

Dated: April 21, 2015

By: /s/ Joel L. Frank

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Application for Relief upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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