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**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

Filed in Supreme Court

MAR 20 2017

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SUPREME CT. NO. 110 MAP 2016

David W. SMITH and Donald LAMBRECHT,

Appellees,

vs.

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

Appellants.

**BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF
INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER**

Appeal of the Order of the Commonwealth Court entered
October 14, 2016 at 177 M.D. 2015
Supreme Ct. No. 110 MAP 2016

Received in Supreme Court

MAR 20 2017

Middle

Aaron D. Martin
Mette, Evans & Woodside
Attorney I.D. No. 76441
3401 North Front Street
Post Office Box 5950
Harrisburg, PA 17110
(717) 232-5000 (phone)
(717) 231-1816 (fax)
admartin@mette.com

Date: March 20, 2017.

Counsel for Amicus Curiae,
National Federation of Independent
Business Small Business Legal Center

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Statement of Interest of *Amicus Curiae*

The National Federation of Independent Business Small Business Legal Center (“NFIB Legal Center”) is a non-profit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (“NFIB”) is the nation’s leading small business association, representing members in Washington, D.C. and all 50 state capitals. Founded in 1943 as a non-profit, non-partisan organization, NFIB’s mission is to promote and protect the rights of its members to own, operate, and grow their businesses. Its membership spans the spectrum of business operations ranging from sole proprietor enterprises to firms with hundreds of employees. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

This case concerns NFIB because Executive Order 2015-05 affects Pennsylvania business owners’ right to petition their government in the manner of their choosing. The challenged order also threatens to distort entrepreneurial growth and free market principles to the benefit of big labor unions and public officials, at the expense of small businesses and those who receive the services they offer.

Appellees¹ are not members of NFIB, and neither they nor their counsel contributed to the authoring or preparation of this *amicus* brief, in whole or in part, or contributed money that was intended to fund the preparation or submission of this *amicus* brief. No person other than the NFIB Legal Center, its members, and its counsel contributed money that was intended to fund the preparation or submission of this *amicus* brief.

¹ Plaintiff-Appellees David W. Smith and Donald Lambrecht (“Appellees”).

Questions Presented

1. Whether the Commonwealth Court's grant of summary relief and invalidation of portions of Governor Tom Wolf's Executive Order 2015-05, based upon the conclusion that the Executive Order exceeded gubernatorial authority by creating legal rights and duties, was in error?

Suggested Answer: No

2. Whether the Commonwealth Court's grant of summary relief and invalidation of portions of Governor Tom Wolf's Executive Order 2015-05, based upon the conclusion that the Executive Order conflicted with the participant-directed model for public home care programs, was in error?

Suggested Answer: No

3. Whether the Commonwealth Court's grant of summary relief and invalidation of portions of Governor Tom Wolf's Executive Order 2015-05, based upon the conclusion that the Executive Order conflicted with state statutes regulating labor relations, was in error?

Suggested Answer: No

Summary of the Argument

The provision of home health care services requires significant investments of time and resources. In order to work as a home care service provider, an individual or small business must investigate current and future demand for home care services, gain certain skills tested for in a competency exam, and receive appropriate licensing. The 20,000 home care service providers (“Direct Care Workers” or “DCWs”) who work in Pennsylvania and are paid through the Pennsylvania Home Care Programs provide an essential service.

DCWs enable those who require home care to stay in their homes where they are comfortable, and this is often achieved at a cost lower than by residence in nursing home or other institutional care services. Many DCWs provide care for family members. Pennsylvania offers a subsidy to make it easier for low-income, disabled, and otherwise qualified individuals to receive in-home care. The subsidy also economically incentivizes individuals to the home care service sector to meet the needs of Pennsylvania’s aging population.

The subsidy helps low-income, disabled, and otherwise qualified individuals to receive the care they need and deserve. Executive Order 2015-05, however, diverts a portion of these funds to the coffers of the American Federation of State, County, and Municipal Employees (“AFSCME”) and the Service Employees International Union (“SEIU”). The forced unionization of individual DCWs and

small business owners does nothing to improve the quality or availability of home care services, but rather drives a wedge between DCWs and the people they compassionately serve. Governor Wolf's executive order undermines the intent of the state subsidy program by taking up to \$8,800,000 of wages per year – money that comes from state funds – and giving it to national, politically-active unions.

In prohibiting the Governor from enacting this scheme, the Commonwealth Court ruled properly. Affirmance of the Commonwealth Court's order invalidating portions of Executive Order 2015-05 is therefore requested.

Argument

I. Executive Order 2015-05 is an Attempt to Compel the Unionization of Participant-Directed Home Care Service Workers

Executive Order 2015-05 (“EO 2015-05”) is an attempt to alter the rights of DCWs and create a collective bargaining system, despite the order’s protestations to the contrary. See Executive Order 2015-05 § 5. When examining a dispute in the context of an employment relationship, courts are bound to take into account the circumstances surrounding the dispute and not merely the content of any writing that purports to affect the relationship. See *Hammermill Paper Co. v. Rust Engineering Co.*, 430 Pa. 365, 370, 243 A.2d 389, 392 (1968) (enumerating factors other than strict terms of an employment agreement to determine whether a relationship is employer-employee or independent contractor in nature) (citations omitted). It is the role of a court to characterize a disputed relationship as it actually exists under the law, and not how the parties claim the relationship exists.

In the course of examining the entirety of EO 2015-05, it becomes clear that the order alters the rights of DCWs, seeks to compel their unionization, and mandates the creation of a collective bargaining system. EO 2015-05 achieves these ends through its mandate that the Secretary of Human Services recognize a sole representative of DCWs, its mandate that the Secretary of Human Services meet and confer with the aforementioned sole representative of DCWs, and the mandate that any agreements arrived at by the Secretary of Human Services and

the sole representatives of DCWs be reduced to Memorandums of Understanding. *See* Executive Order 2015-05 § 3. Such measures establish a system that is substantively indistinguishable from the collection of rights secured for Pennsylvania’s unionized employees by federal and state statutory regimes.

Unionized employees in Pennsylvania are governed by the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151–169, and the state’s analog, the Pennsylvania Labor Relations Act (“PLRA”), 43 P.S. §§ 211.1–211.13. The similarities between the rights of unionized employees under the PLRA and DCW rights under EO 2015-05 are striking. The PLRA requires that a representative be elected for a given bargaining unit. *See* 42 P.S. § 211.7(a) (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employes in a unit appropriate for such purposes, shall be the exclusive representatives of all the employes in such unit for the purposes of collective bargaining . . .”). EO 2015-05 similarly requires the election and recognition of a singular representative for DCWs. *See* Executive Order 2015-05 § 3. The PLRA empowers the representative to bargain on issues such as wages, benefits, and other terms of employment. *See* 42 P.S. § 211.7(a) (representative may engage in “. . . collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .”). EO 2015-05 similarly states that the goal of its process is to address issues such as wages, benefits, and other conditions

of employment. *See* Executive Order 2015-05 § 3(b). These similarities and others evince a purpose of EO 2015-05 to confer collective bargaining rights to DCWs in everything but name. Such conference violates the PLRA, which expressly proscribes domestic service workers from engaging in the unionization process. *See* 43 P.S. § 211.3(d) (“The term ‘employee’ . . . shall not include any individual . . . in the domestic service of any person in the home of person, or any individual employed by his parent or spouse.”).

II. Public Policy Prohibits Forced Unionization of Private Individuals and Small Business Owners

This is not a case of vulnerable workers organizing against an exploitative employer. In fact, the opposite is true – it is AFSCME and the SEIU that are exploiting independent business owners, individual DCWs, and low-income receivers of home care. AFSCME and the SEIU joined forces to form the United Home Care Workers of Pennsylvania (“UHCWP” or “Union”), an organization imposed upon 20,000 home care workers in Pennsylvania as a result of securing only 2,663 votes cast in the union election. *Markham v. Wolf*, 147 A.3d 1259, 1268-69 (Pa. Commw. 2016). Because of this forced unionization, SEIU and AFSCME, two of Governor Tom Wolf’s largest campaign contributors,² have

² Governor Wolf has received more than \$1,500,000 from various national, state, and local arms of the SEIU and AFSCME between 2013 and 2016, according to public state campaign finance filings. *See* <https://www.campaignfinanceonline.pa.gov/pages/CFAnnualTotals.aspx?Filer=20130153>.

secured the ability to skim up to 2 percent of wages from Pennsylvania's home care workers³ – up to \$8,800,000 per year.⁴ These funds should go toward low-income and disabled citizens' home care services; the funds should not pad the pockets of politically-active national unions.

A. Forced Unionization Harms Small Businesses, Individual DCWs, and Recipients of Home Care Services

Compulsory unionization of DCWs undermines Pennsylvania's home care programs. These programs facilitate access to home care services for low-income, disabled, and otherwise qualified Pennsylvania citizens. By forcing the independent businesses and individual DCWs that provide home care services to join a union and diverting their revenue to national unions, the quality of care available to recipients of home care services is likely to decrease. This decrease in the quality of care available will be directly attributable to EO 2015-05 and its impact on the home care service sector in Pennsylvania.

Forced unionization acts as a disincentive to home care service providers and potential DCWs. Some private individuals will be dissuaded from associating

³ When soliciting support in the union election, UHCWP included a "Membership Dues Check-Off Authorization" form in its campaign materials sent to all those on the home care workers list. The materials may be viewed at: http://www.commonwealthfoundation.org/docLib/20150419_DuesCheckoffMailin g.pdf (accessed March 20, 2017).

⁴ Data used was the most recent Occupational Employment and Wages report on Home Healthcare Workers from the Bureau of Labor Statistics. Salary used was the average salary for Home Healthcare Workers in Pennsylvania. *See* <https://www.bls.gov/oes/current/oes311011.htm> (accessed March 20, 2017).

with national unions that spend membership dues on contentious national, state, and local political contests. Such activities alienate members who are not politically active or who disagree with the union's stance on certain issues or association with certain candidates.

Allowing national unions to skim off wages received by DCWs also harms providers' ability to reinvest in themselves and their businesses through training, ongoing education, and expanding their offerings of home care services. Taking money from individual DCWs not only offends the progressive goals of the state subsidies, it does nothing for the interests of DCWs that the Governor's order purports to advance. Perversely, the forced unionization of DCWs will necessarily decrease the wages received by these parties – which stands in direct opposition to the stated purposes of Governor Wolf's executive order.

B. DCWs Have Been Denied a Meaningful Voice in the Unionization Process

The Governor's executive order does not compel UHCWP and the Secretary of Human Services to reach mutual understandings on issues important to DCWs. Even if they should reach such agreement, any writings resulting from these understandings would not have the force of law. EO 2015-05 states as much when it dictates that any agreements would only become the policy of the Department of Human Services, and, further, that the representative of DCWs must petition the state legislature to implement the agreements reached by the DCW representative

and the Secretary of Human Services through appropriate legislative action. See Executive Order 2015-05 § 3(c)(1). UHCWP, AFSCME, and the SEIU receive up to \$8,800,000 in membership dues per year in addition to a list of names and home addresses for all DCWs paid through the Home Care Services Programs that may be utilized or sold for their political purposes and gains. Meanwhile, DCWs receive absolutely nothing of substance. Not only does the Governor's order force unionization, it facilitates the exploitation of DCWs.

Even the process that installed the UHCWP as the sole representative of Pennsylvania DCWs is an affront to traditional democratic principles. Only 2,970 DCWs voted in the so-called "election" that imposed the SEIU and AFSCME upon DCWs, a participation rate of just under 15 percent. This low participation rate can only mean that the representation election was underpublicized and the UHCWP does not speak for many Pennsylvania DCWs. Since this installation, the Union has done little for DCWs in Pennsylvania – failing even to issue a press release since April 2015.⁵ UHCWP has also failed to update any other portion of its website, such as issue statements, since April 2015. Similarly, other sources of information for the UHCWP such as its Facebook page parrot national union

⁵ UHCWP blog postings and press releases may be seen at: <http://pahomecareworkers.org/category/blog/> (accessed Feb. 27, 2017).

talking points – with limited documentation, if any, of what the UHCWP is doing to advance the cause of DCWs in Pennsylvania.⁶

While this eviscerates UHCWP’s claim to “represent” the interests of Pennsylvania’s DCWs, the most disturbing problem is that these DCWs, who just want to serve their home care recipient employers, are being asked to support a union seeking only to supplement its own income. The injection of union politics into the Pennsylvania Home Care Programs subvert the goals of the programs, allows pick-pocketing of DCW paychecks by labor unions, and creates inefficiencies in an assistance program that needs – and deserves – every penny that it can get.

⁶ UHCWP’s Facebook page may be viewed at: <https://www.facebook.com/UnitedHomeCareWorkersofPA/> (accessed Feb. 27, 2017).

Conclusion

For the foregoing reasons, *Amicus Curiae* National Federation of Independent Business Small Business Legal Center requests that this Court find for Appellees and affirm the Commonwealth Court's order invalidating portions of Governor Wolf's executive order.

Respectfully submitted,

METTE, EVANS & WOODSIDE

/s/ Aaron D. Martin 

By: _____

Aaron D. Martin
Mette, Evans & Woodside
Attorney I.D. No. 76441
3401 North Front Street
Post Office Box 5950
Harrisburg, PA 17110
(717) 232-5000 (phone)
(717) 231-1816 (fax)
admartin@mette.com

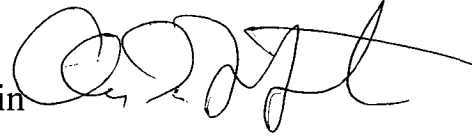
*Counsel for Amicus Curiae,
National Federation of Independent
Business Small Business Legal Center*

Date: March 20, 2017.

Certification of Word Count

I certify that the foregoing brief contains 2,372 words as calculated by
Microsoft Word, which number complies with the Rules of Court

/s/ Aaron D. Martin

A handwritten signature in black ink, appearing to read 'A. D. Martin', written over a horizontal line.

Aaron D. Martin

CERTIFICATE OF SERVICE

I, Aaron D. Martin, hereby certify that on this 20th day of March, 2017, I served the foregoing *Amicus Curiae* **Brief of the National Federation of Independent Businesses** upon the parties in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121;

VIA FIRST CLASS U.S. MAIL:

Sean M. Concannon, Esquire
OFFICE OF GENERAL COUNSEL
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563

Kenneth L. Joel, Esquire
Maryanne M. Lewis, Esquire
OFFICE OF ATTORNEY GENERAL
15th Floor, Strawberry Square
Harrisburg, PA 17120
Tel: (717) 787-8106

Counsel for Appellants

David R. Osborne, Esquire
Karin M. Sweigart, Esquire
Nathan J. McGrath, Esquire
THE FAIRNESS CENTER
225 State Street, Suite 303
Harrisburg, PA 17101
Tel: (844) 293-1001

Counsel for Appellees



AARON D. MARTIN

Pa. Atty. I.D. No. 76441

Attorney for National Federation of
Independent Businesses

METTE, EVANS & WOODSIDE

3401 North Front Street

Post Office Box 5950

Harrisburg, PA 17110

Tel: (717) 232-5000

Fax: (717) 231-1816

Email: admartin@mette.com

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VIA FIRST CLASS U.S. MAIL:

Sean M. Concannon, Esquire
OFFICE OF GENERAL COUNSEL
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563

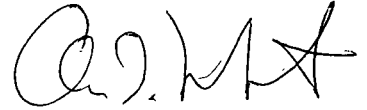
Kenneth L. Joel, Esquire
Maryanne M. Lewis, Esquire
OFFICE OF ATTORNEY GENERAL
15th Floor, Strawberry Square
Harrisburg, PA 17120
Tel: (717) 787-8106

Counsel for Appellants

David R. Osborne, Esquire
Karin M. Sweigart, Esquire
Nathan J. McGrath, Esquire
THE FAIRNESS CENTER
225 State Street, Suite 303
Harrisburg, PA 17101
Tel: (844) 293-1001

Counsel for Appellees

/s/ Aaron D. Martin



AARON D. MARTIN

Pa. Atty. I.D. No. 76441

Attorney for National Federation of
Independent Businesses

METTE, EVANS & WOODSIDE

3401 North Front Street

Post Office Box 5950

Harrisburg, PA 17110

Tel: (717) 232-5000

Fax: (717) 231-1816

Email: admartin@mette.com

