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

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| DAVID W. SMITH and DONALD LAMBRECHT,<br>*Appellees*<br><br>v.<br><br>THOMAS W. WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, and THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HUMAN SERVICES,<br>*Appellants* | : | No. 110 M.A.P. 2016 |

# BRIEF OF *AMICUS CURIAE* SENATE PRESIDENT PRO TEMPORE JOSEPH B. SCARNATI, III, AND SPEAKER OF THE HOUSE, MICHAEL C. TURZAI

Appeal from the Order of the Commonwealth Court
of Pennsylvania, entered October 14, 2016, at No. 177 M.D. 2015

**LAMB McERLANE PC**

Joel L. Frank
Scot R. Withers
Attorney I.D. Nos. 46601; 84309
24 East Market Street, Box 565
West Chester, PA 19381
(610) 430-8000

*Counsel for Amicus Curiae,*
*Senate President Pro Tempore Joseph B. Scarnati, III,*
*and Speaker of the House, Michael C. Turzai*

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## I. STATEMENT OF INTEREST

*Amicus Curiae*, Senate President Pro Tempore Joseph B. Scarnati, III, and Speaker of the House, Michael C. Turzai, file this *amicus curiae* brief in opposition to the Brief of the Appellants, the Honorable Thomas W. Wolf, Governor of Pennsylvania, and the Department of Human Services.

Because Executive Order 2015-05, issued by Governor Wolf on February 27, 2015, purports to establish organizational labor rights for domestic home health care providers, and is neither authorized by the Constitution nor by statute, it is unconstitutional and violates the separation of powers between the Governor and the Pennsylvania General Assembly. *Amicus Curiae* have an interest not merely in specifically 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 Legislature in protecting the institutional power of the Legislature from unconstitutional encroachment by the Executive.

Pursuant to the requirements of Pa.R.A.P. 531(b)(2), *Amicus Curiae* hereby advises the Court that no person or entity other than *Amicus Curiae* paid in whole or in part for the preparation of this *amicus curiae* brief, and no person or entity other than *Amicus Curiae* and undersigned counsel for *Amicus Curiae* authored in whole or in part this *amicus curiae* brief.

## II. SUMMARY OF ARGUMENT

Executive Order 2015-05 is a blatant attempt by the Governor to circumvent the constitutionally-granted legislative authority of the General Assembly. Executive Order 2015-05 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 the General Assembly did not authorize the Executive Branch to do so and the Governor's executive order is in direct conflict with established, controlling and constitutionally enacted statutory law.

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.

## III. ARGUMENT

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

#### 1. 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*, 2 A.2d 804, 807 (Pa. 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). 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, § 2, but not to create new laws or unilaterally change, disregard or modify existing law.

"The legislative power in its most pristine form is the power to make, alter and repeal laws." *Blackwell v. State Ethics Comm'n*, 567 A.2d 630, 636 (Pa. 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 Comm'n*, 422 A.2d 487, 489 (Pa. 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. "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 Mgmt. Ass'n v. Casey*, 600 A.2d 260, 264 (Pa. Cmwlth. 1991) (*en banc*), *aff'd*, 619 A.2d 1063 (Pa. 1993).

In the performance of its constitutional duty to "take care that the laws be faithfully executed[,]" PA. CONST. art. IV, § 2, 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 Serv. Comm'n*, 924 A.2d 706, 710-11 (Pa. Cmwlth. 2007). Within appropriate constraints, the Executive also utilizes the tool of the "executive order".

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*, 348 A.2d 910, 913 (Pa. Cmwlth. 1975). Second, there are executive orders intended as directives to subordinate executive agency officials or employees. *Id.*, 348 A.2d at 913. Third, there are executive orders that serve to implement the law. *Id.* Significantly, 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. Executive Order 2015-05 falls squarely within this third category.

However, even the Governor's authority to issue executive orders that implement the law is circumscribed as "[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*, 681 A.2d 1331, 1336 (Pa. 1996) (citing *Pagano v. Pennsylvania State Horse Racing Comm'n*, 413 A.2d 44, 45 (Pa. Cmwlth. 1980), *aff'd*, 452 A.2d 1015 (Pa. 1982); *Shapp*, 348 A.2d at 913-14)). "The Governor's power is to execute the laws and not to create or interpret them." *Shapp*, 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*, 681 A.2d at 1336 (citing *Pagano*, 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. Cmwlth. 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, the Commonwealth 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. The Commonwealth 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. *Farrow*, 754 A.2d at 35; *see also Zuppo v. Commonwealth*, 739 A.2d 1148, 1153 (Pa. Cmwlth. 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, such as here, 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 Mgmt. Ass'n v. Casey*, 600 A.2d 260, 264-65 (Pa. Cmwlth. 1991) (*en*

*banc*), *aff'd*, 619 A.2d 1063 (Pa. 1993), for example, an executive order purported to supplement the provisions of the Solid Waste Management Act, 35 P.S. §§ 6018.101 *et seq.*,[1] and the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §§ 4000.101 *et seq.*,[2] 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*, 600 A.2d at 261. The Commonwealth 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.*, 600 A.2d at 265 (quotation marks, brackets and citations omitted). The Commonwealth 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*.

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

[1] Act of July 7, 1980, P.L. 380, No. 97, §§ 101 *et seq.*

[2] Act of July 28, 1988, P.L. 556, No. 101, §§ 101, *et seq*.

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*, 838 A.2d 566, 585 (Pa. 2003) (citation and quotation marks omitted); *see also Pennsylvanians Against Gambling Expansion Fund v. Commonwealth*, 877 A.2d 383, 393-94 (Pa. 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*, 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, the *en banc* Commonwealth Court properly held below that Executive Order 2015-05 "is de facto legislation, with provisions contrary to the existing statutory scheme." (Cmwlth. Ct. slip Op., No. 176 M.D. 2015, at 34.)

### 2. 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"), 43 P.S. §§ 211.1 *et seq.*,[3] the Pennsylvania Public Employee Relations Act ("PERA"), 43 P.S. §§ 1101.101 *et seq.*,[4] or the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*,[5]

[3] Act of June 1, 1937, P.L. 1168, No. 294, §§ 1 *et seq.*

[4] Act of July 23, 1970, P.L. 563, No. 195, art. 1, §§ 101 *et seq.* The PERA relates to the organizational rights of public employees in Pennsylvania, *Kapil v. Association of Pa. State Coll. & Univ. Faculties*, 470 A.2d 482, 485-86 (Pa. 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 PERA are largely identical to those of the PLRA. *Compare, e.g.*, Act of June 1, 1937, P.L. 1168, No. 294, § 7, *as amended*, 43 P.S. § 211.7(c) (requiring showing of 30% interest to justify an election) *to* Act of July 23, 1970, P.L. 563, No. 195, art. VI, § 603, 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 Argument Section A(3), *infra*.

[5] 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 Pa. Sch. for Deaf v. Commonwealth*, 438 A.2d 1025, 1026 (Pa. Cmwlth. 1982). 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-
(continued) . . .

that workers who seek to organize are provided 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,[6] it would only be through the PLRA, because these providers are private employees whose economic activities fall outside the 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*, 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

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. . . (continued)
05 simply would be preempted in its entirety. *See Philadelphia Ass'n of Interns and Residents v. Albert Einstein Med. Ctr.*, 369 A.2d 711, 713 (Pa. 1976).

[6] 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". *See* Act of June 1, 1937, P.L. 1168, No. 294, § 3, *as amended*, 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.

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 PERA (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),[7] and published in the Pennsylvania Code in Title 34, Part V, Chapters 91 and 93.

### 3. Executive Order 2015-05 Is Illegitimate "Executive Legislation"

#### i. 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 Werner v. Zazyczny*, 681 A.2d 1331, 1336 (Pa. 1996); *National Solid Wastes*

[7] Act of June 1, 1937, P.L. 1168, No. 294, § 4, *as amended.*

*Mgmt. Ass'n v. Casey*, 600 A.2d 260, 265 (Pa. Cmwlth. 1991) (*en banc*), *aff'd*, 619 A.2d 1063 (Pa. 1993); *Pagano v. Pennsylvania State Horse Racing Comm'n*, 413 A.2d 44, 45 (Pa. Cmwlth. 1980), *aff'd*, 452 A.2d 1015 (Pa. 1982); *Shapp v. Butera*, 348 A.2d 910, 914 (Pa. Cmwlth. 1975). Executive Order 2015-05 has no such source of authority, and thus is invalid.

Nebulous constitutional guarantees do not meet the level of specificity required to authorize a Governor to issue legally binding executive orders. The Commonwealth Court's decision in *Shapp* demonstrates the specificity required. There, the Commonwealth 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 states: "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, § 10. The Commonwealth 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.

*Shapp*, 348 A.2d at 235. The direct, specific connection between the text of Article IV, Section 10 and the hypothetical executive order discussed in *Shapp* 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*, 754 A.2d 33 (Pa. Cmwlth. 2000), and *Zuppo v. Commonwealth*, 739 A.2d 1148 (Pa. Cmwlth. 1999), the Executive relied upon a specific provision of the Emergency Management Services Code, at 35 Pa. C.S. § 7301(f)(1), to authorize executive orders. Here, there is no similarly specific statute that can be cited as a source of authority for Executive Order 2015-05. The PLRA does include 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.

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

Appellants argue that Executive Order 2015-05 is a valid exercise of executive power because it falls into the second category of executive orders, and

the "Governor may use executive orders to communicate policy directives to subordinate officials and the public". (Appellant's Brief at 20.) This argument fails, as Executive Order 2015-05 clearly goes far beyond mere communication with subordinate officials in the nature of requests or suggested directions for the execution of the duties of the Executive Branch of government. Instead, Executive Order 2015-05 in reality 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 PERA. For example:

- The Executive Order at 4, ¶ 3(a)(1), provides that an election of a labor organization shall take place upon a showing of just 10% of employees (in contrast to PLRA's required showing of 30% of employees before an election shall take place, *see* 43 P.S. § 211.7(c).)

- The Executive Order at 4, ¶ 3(a)(2), designates the American Arbitration Association as the election monitor.

- The Executive Order at 5, ¶ 3(b)(2), interferes with the private work relationships between consumer-employers and the health care providers they employ by unilaterally seeking to authorize the Commonwealth to negotiate on behalf of consumer-employers the work terms and conditions of the health care providers.

Clearly, the provisions in Executive Order 2015-05, *inter alia*, calling for the election of a labor organization and the designation of the AAA as the election monitor, and the direction of the private work relationships between consumer-employers and the health care providers they employ, constitute far more than

simple communications with subordinate officials in the nature of requests of suggested directions. Instead, despite Appellants' mischaracterization of Executive Order 2015-05, it is readily ascertainable that in truth it improperly attempts to implement the Governor's version and desire of what the law, the PLRA and PERA, should be.

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. 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[8] by mandating the compilation of a list of Direct Care Workers to facilitate the election of an exclusive Direct Care Worker Representative. *See* Executive Order 2015-05 at 2, ¶ 1(d), and at 4, ¶ 3. 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 through a Home Care Service Program that provides Participant-Directed Services". *See* Executive Order 2015-05 at 2, ¶ 1(d). Although the Executive Order is silent as to what the Commonwealth will do with this list, it is likely 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 and thereafter to bolster its membership.[9] The PLRA, in contrast, creates a framework for interested workers

[8] Executive Order 2015-05 also conflicts with the Attendant Care Services Act, Act of December 10, 1986, P.L. 1477, No. 150, § 2, 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.

[9] The record reflects that the United Home Care Workers of Pennsylvania used the DCW List to contact direct care workers. (*See* R. 3476a-87a; R. 3488a-92a; R. 3525a-30a, R. 3538a-51a.)

to organize and bargain collectively, but does not authorize use of state resources to benefit private labor organizations.

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. The damage that Executive Order 2015-05 would havoc on 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.

## IV. CONCLUSION

The Governor's decision to unabashedly ignore the Pennsylvania Constitution and attempt to 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*, 2 A.2d 834, 838 (Pa. 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*, 2 A.2d 804, 807 (Pa. 1938) (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 Honorable Court must therefore discharge its separate responsibility to uphold the

Pennsylvania Constitution by upholding the *en banc* decision of the Commonwealth Court.

WHEREFORE, *Amicus Curiae*, Senate President Pro Tempore Joseph B. Scarnati, III, and Speaker of the House, Michael C. Turzai, respectfully request that the Supreme Court of Pennsylvania AFFIRM the October 14, 2016 Order of the Commonwealth Court.

Respectfully submitted,

**LAMB McERLANE PC**

Dated: March 20, 2017

By: /s/ Joel L. Frank

Joel L. Frank
Attorney I.D. No. 46601
Scot R. Withers
Attorney I.D. No. 84309
24 E. Market Street
West Chester, PA 19381
(610) 430-8000

*Counsel for Amicus Curiae, Senate President Pro Tempore Joseph B. Scarnati, III, and Speaker of the House, Michael C. Turzai*

## Pa.R.A.P. 531(b)(3) and 2135(d) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief *Amicus Curiae* complies with the word count limit contained in Pa.R.A.P. 531(b)(3), because it contains 5,353 words, as computed by the "Word Count" function in Microsoft Word 2013, excluding the parts exempted by Pa.R.A.P. 2135(b).

**LAMB McERLANE PC**

Dated: March 20, 2017

By: /s/ Joel L. Frank

Joel L. Frank
Attorney I.D. No. 46601
Scot R. Withers
Attorney I.D. No. 84309
24 E. Market Street
West Chester, PA 19381
(610) 430-8000

*Counsel for Amicus Curiae, Senate President Pro Tempore Joseph B. Scarnati, III, and Speaker of the House, Michael C. Turzai*