Received 07/17/2015 Commonwealth Court of Pennsylvania

Filed 07/17/2015 Commonwealth Court of Pennsylvania
177 MD 2015

In the Commonwealth Court of Pennsylvania

177 M.D. 2015

DAVID W. SMITH and DONALD LAMBRECHT,
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.

BRIEF IN SUPPORT OF PETITIONERS' APPLICATION FOR SUMMARY RELIEF

On Original Jurisdiction Petition for Review of
Governor's Executive Order 2015-05

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July 17, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PENNSYLVANIA CONSTITUTION

PENNSYLVANIA STATUTES

PENNSYLVANIA REGULATIONS

PENNSYLVANIA RULES

OTHER STATUTES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

On April 6, 2015, in an effort to protect Direct Care Workers and those for whom they provide care ("Participants") Petitioners David W. Smith ("Mr. Smith") and Donald Lambrecht ("Mr. Lambrecht"), a Participant and a Direct Care Worker, respectively, filed in this Court a Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief ("Petition") pursuant to Pennsylvania Rule of Appellate Procedure 1513, naming Governor Thomas W. Wolf ("Gov. Wolf") and the Commonwealth of Pennsylvania, Department of Human Services ("Department") as Respondents. The instant brief supports Petitioners' Application for Summary Relief, filed on June 17, 2015, requesting that this Court render judgment in favor of Mr. Smith and Mr. Lambrecht on the underlying Petition. This Court has original jurisdiction pursuant to the Judicial Code, 42 Pa.C.S. § 761(a), and under the Declaratory Judgments Act, 42 Pa.C.S. §§ 7532-7533.

DETERMINATION IN QUESTION

On February 27, 2015, Gov. Wolf issued Executive Order 2015-05, 45 Pa.B. 1937 (published Apr. 18, 2015) ("Executive Order") in an attempt to impose what can only be accomplished by statute: forced representation of Direct Care Workers

by an employee organization and limitation of the rights of Direct Care Workers and Participants.

STATEMENT OF THE SCOPE AND LEGAL STANDARD

The rule concerning gubernatorial exercise of power is simple: to be legitimate, the governor must have a positive grant of authority. See Nat'l Solid Wastes Mgmt. Ass'n v. Casey (Nat'l Solid Wastes II), 600 A.2d 260, 265 (Pa. Cmwlth. 1991) ("[W]e declare that Executive Order 1989-8 is invalid and is unenforceable, because the Governor had neither constitutional nor statutory authority to issue that executive order."); Cloonan v. Thornburgh, 519 A.2d 1040, 1048 (Pa. Cmwlth. 1986) ("Having found that the Governor's Executive Order 1986-7 is without authority and contravenes the Sunset Act, we hold it to be null and void."). Even if the exercise of power is authorized, however, "[i]n no event . . . may any executive order be contrary to any constitutional or statutory provision." Shapp v. Butera, 348 A.2d 910, 914 (Pa. Cmwlth. 1975).

"An application for summary relief may be granted if a party's right to judgment is clear and no material issues of fact are in dispute." Jubelirer v. Rendell, 953 A.2d 514, 521 (Pa. 2008) (quotation marks omitted).

STATEMENT OF THE QUESTIONS INVOLVED

I. WHETHER GOV. WOLF EXCEEDED HIS AUTHORITY AND ENACTED EXECUTIVE LEGISLATION UNDER THE GUISE OF EXECUTIVE ORDER

II. WHETHER THE EXECUTIVE ORDER IMPLEMENTS OR SUPPLEMENTS STATUTES OR THE CONSTITUTION

III. WHETHER THE EXECUTIVE ORDER IS A MERE COMMUNICATION TO SUBORDINATE OFFICIALS WHERE IT CREATES AND IMPOSES DUTIES, RESPONSIBILITIES, LEGAL RIGHTS, AND LEGAL RESTRICTIONS FOR THOSE WHO ARE NOT SUBORDINATE OFFICIALS AND REQUIRES SUBORDINATE OFFICIALS TO ACT

IV. WHETHER THE EXECUTIVE ORDER CONFLICTS WITH STATUTES GOVERNING THE PROVISION OF DIRECT CARE SERVICES WHERE IT LIMITS THE ABILITY OF PARTICIPANTS TO MAKE DECISIONS ABOUT, DIRECT THE PROVISION OF, AND CONTROL THEIR OWN DIRECT CARE SERVICES

V. WHETHER THE EXECUTIVE ORDER CONFLICTS WITH STATUTES GOVERNING EMPLOYEE ORGANIZING WHERE DIRECT CARE WORKERS ARE SPECIFICALLY EXCLUDED BY STATUTE FROM ORGANIZING AND THE EXECUTIVE ORDER MANDATES AN ORGANIZATIONAL PROCESS AT ODDS WITH THOSE MANDATED BY LAW

VI. WHETHER AN EXECUTIVE ORDER THAT DISTURBS PENNSYLVANIA'S CONSTITUTIONAL ORDER SHOULD BE PERMANENTLY ENJOINED

STATEMENT OF THE CASE

Direct Care Workers play an important role across the country:

> Millions of Americans, due to age, illness, or injury, are unable to live in their own homes without assistance and are unable to afford the expense of in-home care. In order to prevent these individuals from having to enter a nursing home or other facility, the federal Medicaid

> program funds state-run programs that provide in-home services to individuals whose conditions would otherwise require institutionalization. See 42 U.S.C. § 1396n(c)(1). A State that adopts such a program receives federal funds to compensate persons who attend to the daily needs of individuals needing in-home care.[1] Ibid.; see also 42 CFR §§ 440.180, 441.300–441.310 (2013). Almost every State has established such a program.

Harris v. Quinn, 573 U.S. ___, 134 S.Ct. 2618, 2623 (2014); see also DEP'T OF HEALTH AND HUMAN SERVS., UNDERSTANDING MEDICAID HOME AND COMMUNITY SERVICES: A PRIMER (2010), available at http://aspe.hhs.gov/daltcp/reports/2010/primer10.pdf.

Pennsylvania's General Assembly passed legislation adopting these valuable programs, including the Attendant Care Services Act ("Act 150"), 62 P.S. §§ 3051-3058, and provisions within the Public Welfare Code that empower the Department to apply for, receive, and use federal funds as well as develop and submit plans and proposals to the federal government for Department programs, 62 P.S. § 201(1)-(2); see generally LEGISLATIVE BUDGET AND FIN. COMM., FAMILY CAREGIVERS IN PENNSYLVANIA'S HOME AND COMMUNITY-BASED WAIVER PROGRAMS (June 2015), available at http://lbfc.legis.state.pa.us/Resources/Documents/Reports/527.pdf.

[1] With respect to the programs impacted by the Executive Order, Pennsylvania receives federal funding for all but the Act 150 Program, which is entirely state-funded. See 55 Pa. Code § 52.3.

Central to the General Assembly's basic policy choice in crafting direct care services is the concept that a recipient of direct care services should have the right to direct his or her own care:

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

62 P.S. § 3052.

But on February 27, 2015, via Executive Order, Gov. Wolf declared his own policy: from now on, Direct Care Workers providing services under those programs

specifically designed to provide recipients of care (or "Participants"[2]) the greatest level of control over their own care could now be represented by an "employee organization" (or "labor organization"[3]). The Executive Order allowed the employee organization to collect—with the Department's active assistance[4]—names and addresses of all Direct Care Workers, to organize the Direct Care Worker's with the promise of power to negotiate "wage ranges, health care benefits, retirement benefits and paid time off,"[5] and, ultimately, to force its representation on 20,000[6] Direct Care Workers with minimal support from Direct Care Workers statewide.[7]

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[2] See Executive Order, at 1.h.

[3] The Executive Order uses both the terms "employee organization," Exh. A, at 1-5, and "labor organization," Exh. A, at 5.d-f. The sole qualification for such an "employee organization" is "that [it] has as one of its primary purposes the representation of direct care workers in their relations with the Commonwealth or other public entities." Exh. A, at 4.b.

[4] See Executive Order, at 4.

[5] See Executive Order, at 3.b(2)(d).

[6] Factual Stipulations (filed with this Court on June 6, 2015), at Exh. 1 ¶ 15.

[7] Specifically, the Executive Order allows the employee organization seeking to represent Direct Care Workers to call an election with support of just 10% of Direct Care workers and to win an election with a mere majority of those voting in the election. State and federal labor law require an initial showing of 30% support, see 9 CFR § 101.18; 43 P.S. §§ 211.7(c), 1101.603(a), and the Pennsylvania Labor Relations Act allows an employee organization victory only with a "majority of the employes in a unit appropriate for such purposes," 43 P.S. § 211.7(a).

In the months that followed, that is precisely what happened. First, the United Home Care Workers of Pennsylvania ("UHCWP"), established in part by the Service Employees International Union,[8] approached the Department to obtain a confidential list of all Direct Care Workers' names and addresses. A state contractor, Public Partnerships, LLC ("PPL") was directed to provide Direct Care Workers' names and addresses for the purpose of making those names and addresses available to UHCWP.[9] PPL was bound to provide those names and addresses to the Department pursuant to the following terms of the Executive Order:

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

Executive Order, at 4.d.

Next, pursuant to the Executive Order, the American Arbitration Association ("AAA") initiated an election after UHCWP demonstrated support from just 10% of Direct Care Workers statewide—that is, well below the 30% prerequisite in state

[8] Factual Stipulations (filed with this Court on June 6, 2015), at Exh. 2, p. 54.

[9] See Factual Stipulations (filed with this Court on June 6, 2015), at Exh. 1, ¶ 14 & Exh. 2, pp. 27-28, 82-83.

and federal labor law.[10] On or about April 7, 2015, Mr. Lambrecht received an "Official Secret Ballot" and accompanying instructions with the heading "To Determine Representation for Pennsylvania Participant-Directed Home Care Workers."[11]

UHCWP won the election with a mere 2,663 votes out of the 20,000 Direct Care Workers,[12] a victory that would have been impossible had it been conducted under the Pennsylvania Labor Relations Act ("PLRA"). Whereas the Executive Order confers exclusive representative status on an employee organization upon "majority of votes cast in the election," Executive Order, at 3.a(2) (emphasis added), the PLRA requires a "majority of the employes in a unit appropriate for such purposes," 43 P.S. § 211.7(a).

Thereafter, the Department formally recognized UHCWP as the elected representative of Direct Care Workers.[13] Going forward, UHCWP is mandated[14] by

[10] See 9 CFR § 101.18; 43 P.S. §§ 211.7(c), 1101.603(a).
[11] Factual Stipulations (filed with this Court on June 6, 2015), at Exh. 1, ¶ 16.
[12] Factual Stipulations (filed with this Court on June 6, 2015), at ¶ 3.
[13] Factual Stipulations (filed with this Court on June 6, 2015), at ¶ 3.
[14] At the moment, UHCWP is likely a willing partner in initiating and continuing discussion with the Department on these subjects. However, the history of public-sector employee unions and public sector employers should suffice to illustrate how the relationship between the Department and UHCWP could become strained relationship. The language in the Executive Order demands that UHCWP comply with the monthly meeting requirements.

the Executive Order to discuss with the Department the following aspects of Mr. Lambrecht's employment and provision of care to Mr. Smith:

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

Executive Order, at 3.b(2). The goal of this "meet and confer process" is to arrive at a written "memorandum of mutual understanding" ("MOU") and to implement

the MOU as Department policy,[15] binding on Direct Care Workers.[16] In fact, if UHCWP and the Department fail to create a MOU, the Executive Order states that Gov. Wolf or his designee will convene a separate meeting "and attempt to resolve the issues of disagreement." Executive Order, at 3.c(3).

But this Court halted implementation of the Executive Order before an MOU could be created. By order entered April 23, 2015, and signed by President Judge Dan Pellegrini, this Court enjoined Gov. Wolf and the Department "from entering into any memorandum of mutual understanding pursuant to Executive Order No. 2015-05 until this case is considered on the merits." Preliminary Injunction, at p. 1. Inherent in this Court's entry of a preliminary injunction was a determination that execution of an MOU represents an immediate, irreparable harm to Mr. Smith and Mr. Lambrecht. See Carlini v. Highmark, 756 A.2d 1182, 1185 (Pa. Cmwlth. 2000) ("A preliminary injunction is justified when the following criteria are satisfied: 1. A threat of immediate, irreparable injury that cannot be remedied through damages; . . . .").

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[15] See Executive Order, at 3.c(1). If policy change would be inappropriate, the Executive Order would allow UHCWP to recommend legislative or rulemaking changes.

[16] As the Department's Deputy Secretary admitted in his testimony to this Court at the preliminary injunction hearing, Direct Care Workers would lose their jobs if they failed to observe Department policy. See Factual Stipulations (filed with this Court on June 6, 2015), at Exh. 2, pp. 76-77.

Despite this Court's preliminary injunction, today, Mr. Lambrecht is represented against his will[17] by UHCWP, and UHCWP will be discussing terms and conditions of his employment with the Department. Meanwhile, Mr. Lambrecht and other Direct Care Workers who do not wish to be represented by UHCWP are prohibited by the Executive Order from removing UHCWP for a full year and then only under the terms of the Executive Order:

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

Executive Order, at 3.a(3).

SUMMARY OF ARGUMENT

Gov. Wolf's Executive Order is unlawful and invalid, and Gov. Wolf should be enjoined from implementing it. The Executive Order should be declared invalid and unlawful, first, because Gov. Wolf lacked the authority to enter the Executive Order, which is little more than legislation masquerading as an executive order.

Second, and relatedly, the Executive Order is invalid and unlawful because it does not resemble any of the permissible forms of executive order previously

[17] See Factual Stipulations (filed with this Court on June 6, 2015), at Exh. 1, ¶ 13.

described by this Court. Specifically, it neither implements or supplements law nor communicates requests to subordinate officials.

Third, in creating new legal relationships and destroying old ones, the Executive Order conflicts with statutes governing the provision of direct care services as well as those governing employee organizing. In the process, the Executive Order hurts Mr. Smith's ability to direct his own care and forces Mr. Lambrecht into an exclusive representation relationship with UHCWP that he did not want and from which he should have been legally protected. Therefore, the Executive Order should be invalidated even if Gov. Wolf was authorized to issue it.

Finally, given the harm and the lack of adequate legal remedy for a constitutional violation, this Court should permanently enjoin Gov. Wolf and the Department from implementing the Executive Order. This Court should also declare than any actions taken to date under the Executive Order are void.

ARGUMENT

I. GOV. WOLF EXCEEDED HIS AUTHORITY AND ENACTED EXECUTIVE LEGISLATION UNDER THE GUISE OF EXECUTIVE ORDER

Gov. Wolf exceeded his authority in issuing the Executive Order in the absence of constitutional authorization; the Executive Order he entered constitutes legislation by executive fiat. As a result, the Executive Order is invalid

and unlawful, regardless of whether the Executive Order conflicts with existing statutory law. This Court should declare as much and enter a permanent injunction to stop all implementation of the Executive Order.

Again, the rule concerning gubernatorial exercise of power is simple: to be legitimate, the governor must have a positive grant of authority. See Butcher v. Rice, 153 A.2d 869, 881 (Pa. 1959) ("Neither the President of the United States, nor the Congress, not a Governor, nor a Legislature has inherent autocratic or Constitutional absolute power, but in each case their power is authorized, limited and restricted by the Constitution—and any violation thereof will be enjoined by the Courts!!!"); Nat'l Solid Wastes II, 600 A.2d at 265 ("[W]e declare that Executive Order 1989-8 is invalid and is unenforceable, because the Governor had neither constitutional nor statutory authority to issue that executive order."); Cloonan, 519 A.2d at 1048 ("Having found that the Governor's Executive Order 1986–7 is without authority and contravenes the Sunset Act, we hold it to be null and void."); Shapp, 348 A.2d at 912 ("Under the Constitution of the Commonwealth of Pennsylvania '[a]ll power is inherent in the people', [Pa. Const. art I, § 2,] and no person nor branch of government has any more power than is provided by that absolute framework of government.").

"The Governor's power is to execute the laws and not to create or interpret them." Shapp, 348 A.2d at 914. Gov. Wolf merely "has that power which has been delegated to him by the Constitution and statutory provisions, or which may be implied properly from the nature of the duties imposed upon the Governor." Id. at 913. The General Assembly—not the Governor—makes "basic policy choices" for Pennsylvania. Nat'l Solid Wastes II, 600 A.2d at 264 (emphasis in original).

In National Solid Wastes II, 600 A.2d at 265, this Court declared invalid an executive order entered by then-Governor Casey that would have imposed a limited moratorium on new municipal waste landfills and required the Department of Environmental Resources to develop new solid waste disposal policies. Shortly after Casey entered the executive order, a trade association[18] filed suit to challenge its constitutionality, arguing that the executive order constituted "little more than legislation through gubernatorial fiat, and therefore, in conflict with the Commonwealth's constitutional scheme of government." Id. at 263. In response, and attempting to locate authorization for his executive order, Casey pointed to the constitutional guarantee to clean air, pure water, and environmental preservation within Article II, Section 27 of the Pennsylvania Constitution. Id. at

[18] See Nat'l Solid Mgmt. Ass'n v. Casey (Nat'l Solid Wastes I), 580 A.2d 893, 896 (Pa. Cmwlth. 1990) (ruling on preliminary objections).

265. But this Court rejected Casey's justification, finding that the constitutional provision required the General Assembly—not the Governor—to weigh competing environmental and societal concerns. Id. This Court ultimately declared the executive order "invalid and [ ] unenforceable, because the Governor had neither constitutional nor statutory authority to issue that executive order." Id.

Likewise, here, Gov. Wolf breached the constitutional order in issuing the Executive Order, and it must be declared invalid. Like the executive order in National Solid Wastes II, the Executive Order constitutes executive legislation that adopts a basic policy choice for Pennsylvania, creates new legal relationships and alters existing ones, and otherwise resembles a law, not an executive order. Specifically, it:

(1) adopts the basic policy choice of "reform[ing] the Commonwealth's home care programs," by "improv[ing] both the quality of home care and the working conditions of direct care workers." Executive Order, at p.1.

(2) requires the Secretary of the Department and "state vendors or contractors" to compile a list of all Direct Care Workers and provide the list to nongovernmental "employee organization[s]," obligations not found in Pennsylvania law. Id. at 4.a-d;

(3) provides an avenue by which an "employee organization" may become the exclusive representative of all Direct Care Workers and which institutes an election and procedure new to Pennsylvania law. Id. at 3.a;

(4) prohibits privately-employed Direct Care Workers from removing the exclusive representative for a full year and then only under the terms of the Executive Order, a restriction on Direct Care Workers' associational rights[19] not imposed by Pennsylvania law. Id. at 3.a(3);

(5) requires the employee organization to "meet and confer" with the Secretary and Deputy Secretary of the Department on a monthly basis, an obligation not found in Pennsylvania law. Id. at 3.b(1);

(6) sets forth "issues" that the employee organization must discuss with the Secretary and Deputy Secretary of the Department, including terms and conditions of Direct Care Workers' employment, a requirement previously unknown to Pennsylvania law. Id. at 3.b(2); and

[19] See Mulhall v. UNITE HERE Local 355, 618 F.3d 1279, 1287 (11th Cir. 2010) ("[R]egardless of whether Mulhall can avoid contributing financial support to or becoming a member of the union . . . its status as his exclusive representative plainly affects his associational rights.").

(7) requires that any mutual understandings be memorialized in a MOU, which may be implemented as binding Department policy and lead to legislation or rulemaking. Id. at 3.c.

The truth is that Gov. Wolf is attempting, via Executive Order, to replicate the model for representation of Direct Care Workers introduced in other states through legislation. See Cal. Gov. Code §§ 110000 – 110036; Conn. Gen. Stat. §§ 17b-705 – 17b-706d; 5 Ill. Comp. Stat. 315/3; Md. Code Ann., Health—General, §§ 15-901 – 15-907; Mass. Gen. Laws ch. 118E, § 73; Mo. Rev. Stat. §§ 208.850 – 208.895. Minn. Stat. § 179A.54; Or. Rev. Stat. §§ 410.612 – 410.625; Vt. Stat. Ann., tit. 21, §§ 1631 – 1644; Wash. Rev. Code § 74.39A.270.

For example, California's "In-Home Supportive Services Employer-Employee Relations Act," enacted in 2012, provides for election of a representative for "in-home supportive services employees," Cal. Gov. Code § 110027, requires that the representative and the state "meet and confer," id. at § 110025, and requires that a non-binding "memorandum of understanding" be approved by the legislature to be effective, id. at § 110028. The stated purpose of the California statute, much like Gov. Wolf's stated purpose, is "to promote full communication between the [state governing body] and the recognized employee organization representing individual providers . . . [and] is not intended to require . . . memoranda of

agreement or understanding." Id. at § 110001. The California statute, like Gov. Wolf's Executive Order, states that "[n]othing in this section shall prohibit an employee from appearing on his or her own behalf in his or her employment relations with the [state governing body]." Id. at § 110022.

Likewise, Connecticut's General Statutes, allow a representative of "personal care attendants" to bargain with and reach agreement with the state, subject to approval by legislature. Conn. Gen. Stat. § 17b-706b(c)(7)-(8) (enacted 2012). Connecticut law, like the Executive Order, requires the state, in cooperation with third-party contractors, to compile the names and addresses of all "personal care attendants" and provide the list to a requesting "employee organization" seeking to represent them. Id. at § 17b-706a(f). As here, personal care attendants in Connecticut "shall not be considered state employees," id. at § 17b-706b(a), and are prohibited from exercising certain rights associated with traditional collective bargaining, see id. at § 17b-706b(b)(1)-(5).

Maryland too allows for election of a representative for "independent home care providers," Md. Code, Health-General, § 15-903(c) (enacted 2011), for the purpose of negotiating with the state on matters including reimbursement rates, payment procedures, benefits, training, and dues deductions, id. at § 15-904(d), and entering into a "Memorandum of Understanding," id. at § 15-904(g). Maryland

law, like the Executive Order, makes any agreement subject to availability of funds and to necessary changes in state law. Id. at § 15-904(c), (f). The Maryland statute, as here, "does not prevent the certified provider organization or any other organization or individual from communicating with any State official on matters of interest." Id. at § 15-905.

From requiring a low level of support for calling an election,[20] to imposing obligations to "meet and confer" with the state,[21] to the absence of a requirement that agreement be reached,[22] the similarities between the Executive Order and state statutes are plain and remove any doubt that Gov. Wolf is attempting to legislate through Executive Order.

Unfortunately, in the process, Mr. Lambrecht has been forced into an exclusive representative relationship he neither wants nor needs. See Mulhall v. UNITE HERE Local 355, 618 F.3d 1279, 1287 (11th Cir. 2010) ("[R]egardless of whether Mulhall can avoid contributing financial support to or becoming a member of the union . . . its status as his exclusive representative plainly affects his

[20] For example, Massachusetts and Missouri law, like the Executive Order, require just 10% in order to call an election. Mass. Gen. Laws ch. 118E, § 73(e); Mo. Rev. Stat. § 208.862(4).

[21] See, e.g., Or. Rev. Stat. §§ 410.614, 243.650(4); Vt. Stat. Ann., tit. 21, § 1634(c).

[22] See, e.g., Mass. Gen. Laws ch. 118E, § 73(b), ch. 150E § 6; Mo. Rev. Stat. § 208.862(4).

associational rights."). Gov. Wolf imported a quintessentially statutory model of employee organizing without any of the checks and balances inherent to a properly enacted statute.

In sum, Gov. Wolf introduced legislation under the guise of Executive Order. Like the invalid executive order in National Solid Wastes II, this Executive Order has a fundamentally legislative character beyond that which an executive order can bear. And, like then-Governor Casey, Gov. Wolf acted without constitutional authority and exceeded his gubernatorial role "to execute the laws and not to create or interpret them." Shapp, 348 A.2d at 914. Instead, Gov. Wolf attempts to make "basic policy choices" for Pennsylvania, the exclusive province of the General Assembly. Nat'l Solid Wastes II, 600 A.2d at 264 (emphasis in original).

Because the Executive Order constitutes executive overreach and therefore a violation of the Pennsylvania Constitution, this Court should issue judgment against Respondents.

II. THE EXECUTIVE ORDER DOES NOT IMPLEMENT OR SUPPLEMENT STATUTES OR THE CONSTITUTION

Relatedly, the Executive Order does not implement or supplement statutes or the Constitution. As a result, the Executive Order is not invalid, and this Court should issue judgment for Mr. Smith and Mr. Lambrecht.

As a function of the constitutional limitation on gubernatorial authority, this Court has held that Governors may only render

> three types of executive orders: (1) formal, ceremonial, political orders, usually issued as proclamations; (2) orders which communicate to subordinate officials requested or suggested directions for the execution of the duties of the Executive Branch of government; (3) orders which serve to implement or supplement the constitution or statutes.

Nat'l Solid Wastes Mgmt. Ass'n (Nat'l Solid Wastes I), 580 A.2d 893, 897-98 (Pa. Cmwlth. 1990) (internal quotation marks omitted).

Regardless of whether an executive order conflicts with some enacted law, executive orders must fit into one of these categories in order to be valid. See Shapp, 348 A.2d at 913 ("We start with the proposition that the Governor has that power which has been delegated to him by the Constitution and statutory provisions, or which may be implied properly from the nature of the duties imposed upon the Governor. Our research discloses that there are three types of executive orders.") (footnote omitted). Even still, "[o]nly the third class of orders create legally enforceable rights and therefore have the force of law." Nat'l Solid Wastes I, 598 A.2d at 898; see also Pennsylvania Institutional Health Servs., Inc. v. Commonwealth, Dep't of Corrs., 631 A.2d 767, 769 (Pa. Cmwlth. 1993)

("[E]xecutive orders may be legally enforceable only if the order serves to implement or supplement statutes or the constitution.").

Here, the Executive Order does not "serve to implement or supplement the Constitution or statutes." Shapp, 348 A.2d at 913. Instead, Gov. Wolf makes law out of whole cloth; his Executive Order cites neither a statutory nor constitutional basis. He fails even to use terminology to suggest implementation or supplementation of the law. It is no surprise, then, that Gov. Wolf and the Department appear to have abandoned any attempt to justify the Executive Order as an implementary or supplementary measure.

If anything, the Executive Order expressly denies that it implements or supplements existing law. By stating that "[t]he provisions of this Executive Order shall not be construed or interpreted to create collective bargaining rights or a collective bargaining agreement under any federal or state law," the Executive Order clearly attempts to distance itself from implementation or supplementation of the National Labor Relations Act ("NLRA"), the Pennsylvania Labor Relations Act ("PLRA"), or the Public Employe Relations Act ("PERA").

In any event, the Executive Order could not implement or supplement the law even if it were Gov. Wolf's intent. Nothing in the labor laws—the NRLA, PLRA, or PERA—or laws and waivers governing the provision of direct care services—Act

150 or the Public Welfare Code—allow Gov. Wolf to meddle by executive order with labor relations for Direct Care Workers or with provision of direct care services to the disabled and elderly. In fact, as discussed further below, each of these laws conflict with the Executive Order and otherwise evidence clear legislative intent to "regulate in plenary fashion every aspect of" their respective fields. Cloonan, 519 A.2d at 1048.

Perhaps for these reasons, Gov. Wolf and the Department have made little attempt thus far to claim that the Executive Order implements or supplements the law. But their admission should only demonstrate to this Court that Gov. Wolf's imposition of employee organization representation on all Direct Care Workers and his attempts to take away the rights of Participants to direct their own care are legally unenforceable and should be declared invalid and unlawful. See Nat'l Solid Wastes II, 600 A.2d at 265; Cloonan, 519 A.2d at 1050.

Accordingly, this Court should grant judgment for Mr. Smith and Mr. Lambrecht and determine that the Executive Order is invalid and unlawful.

III. THE EXECUTIVE ORDER IS NOT A MERE COMMUNICATION TO SUBORDINATE OFFICIALS; IT CREATES AND IMPOSES DUTIES, RESPONSIBILITIES, LEGAL RIGHTS, AND LEGAL RESTRICTIONS FOR THOSE WHO ARE NOT SUBORDINATE OFFICIALS AND REQUIRES SUBORDINATE OFFICIALS TO ACT

Despite Gov. Wolf's claims to date, the Executive Order is not a mere communication to subordinate officials. Instead, it creates and imposes duties, responsibilities, legal rights, and legal restrictions for those—including Mr. Lambrecht and other Direct Care Workers—who are clearly anything but subordinate officials. As a result, the Executive Order is invalid and unlawful, and judgment should be rendered for Mr. Smith and Mr. Lambrecht.

In theory, an executive order may be "intended for communication with subordinate officials in the nature of requests or suggested directions for the execution of the duties of the Executive Branch of government." Shapp, 348 A.2d at 913. However, such an executive order "is not legally enforceable" and would have "no more legal effect than a request by the Governor to have birthday greetings sent to him." Id. at 913-14. Compliance would be strictly voluntary. Id. at 914 ("Since there was no legal requirement for the filing of the financial statements, they must be deemed to have been voluntarily submitted, solely for the Governor's purposes.").

For example, this Court held in Shapp, 348 A.2d at 914, that an executive order "requesting" that executive branch officials file certain financial statements was a mere directive to subordinate officials. The executive order read, in part:

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

Id. at 911. Notably, the executive order also included "a concluding paragraph expressing hope that 'this request will not prove too burdensome.' " Id. at 912. The request applied only to "Key Personnel and Chairmen and Members of Certain Boards, Commissions and Agencies." Id.

Conversely, this Court has rejected Governors' attempts to label executive orders as mere communications to subordinate officials on the grounds that they do more than simply make "requests." In Cloonan, for instance, this Court reviewed an executive order that

> purport[ed] to establish the ABC Council as an advisory agency within the Executive branch to supervise the [Pennsylvania Liquor Control Board's ("PLCB's")] termination process. It also place[d] mandatory requirements on the ABC and other administrative agencies to auction state stores, issue liquor licenses and,

> more importantly, continue the regulation of alcohol in this Commonwealth after the termination of the PLCB on December 31, 1986.

519 A.2d at 1048 (emphasis added). In a bid to save the executive order from invalidation, then-Governor Thornburgh's "argue[d] that the executive order is merely an intra-executive branch plan which neither mandates nor expects official compliance by the PLCB." Id. However, this Court rejected his argument and instead found that the executive order constituted "a reorganization of the enforcement, licensing and regulatory authority of the PLCB" and noted that "the PLCB is not subject to the exclusive control of the Governor." Id. This Court invalidated the executive order. Id.

Likewise, in National Solid Wastes II, this Court rejected then-Governor Casey's argument that his executive order was a mere "statement of policy, coupled with directions to the executive agency to carry out the Governor's policy in the course of its regular statutory duties of permitting municipal waste landfill facilities." 600 A.2d at 265. His executive order required the Department of Environmental Resources ("DER") to generally stop reviewing applications for new landfills and required the same agency to establish new volume limits for landfills and prepare a plan for waste disposal. Id. at 261. Although the executive order clearly directed a state agency in a certain manner, this Court determined that the

Governor disturbed the legislative scheme because the language of the executive order "alter[ed] DER's responsibilities." Id. at 265. In other words, even though the Executive Order was directed to subordinate officials, the mandatory language went beyond a mere communication.

Here, the Executive Order cannot be classified as a "communication to subordinate officials" for several reasons. First, the Executive Order includes directives to persons and entities that are not subordinate officials. Specifically, the Executive Order:

(1) requires current and future state vendors or contractors to assist the Secretary in compiling a list of all Direct Care Workers and restricts them from "interfering with a Direct Care Worker's decision to join or refrain from joining a labor organization." Executive Order, at 4.a-d, 5.e;

(2) requires that the AAA conduct and certify an election. Id. at 3.a;

(3) requires that Direct Care Workers be represented by "only one" employee organization, allows the terms and conditions of their employment to be altered by that employee organization, and prohibits them from removing the exclusive representative for a full year and then only under the terms of the Executive Order. Id. at 3.a(2)-(3), b-c; and

(4) requires the employee organization to "meet and confer" with the Secretary and Deputy Secretary of the Department on a monthly basis and to discuss certain "issues" with the Secretary and Deputy Secretary. Id. at 3.b(1)-(2).

As the Deputy Secretary testified before this Court, testimony to which the parties have stipulated, none of these actors—state vendors or contractors, AAA, Direct Care Workers, the employee organization—are "subordinate officials."[23] Yet, as the Deputy Secretary also admitted, Direct Care Workers would lose their jobs if they failed to observe Department policy.[24]

Second—and of equal import—the Executive Order, by its own language, imposes requirements, not "requests or suggested directions for the execution of the duties of the Executive Branch of government." Shapp, 348 A.2d at 913 (emphasis added). And, as Cloonan and National Solid Wastes II demonstrate, even executive orders generally intended only for executive branch officials cannot do any more than make requests of subordinate officials.

[23] Factual Stipulations (filed with this Court on June 6, 2015), at Exh. 2, pp. 82-84.
[24] See Factual Stipulations (filed with this Court on June 6, 2015), at Exh. 2, pp. 76-77.

The Executive Order is the opposite of a "request" or "suggested direction." In fact, the term "shall" appears a staggering 47 times throughout the Executive Order. Under the Executive Order, the Secretary for the Department "shall":

(1) compile a list of Direct Care Workers' name and addresses every month. Executive Order, at 4.a;

(2) provide the list to an employee organization. Id. at 4.c.

(3) designate the AAA to conduct the election of an exclusive representative. Id. at 3.a;

(4) recognize the employee organization that wins an election. Id. at 3, 3.a(2);

(5) meet and confer with the employee organization. Id. at 3.b;

(6) discuss a laundry list of "relevant issues." Id. at 3.b(2); and

(7) reduce agreements to writing. Id. at 3.c(1).

Accordingly, the Executive Order bears no resemblance to the executive order communicating to subordinates in Shapp. The executive order in Shapp "requested" that then-Governor Shapp's "Cabinet and members of certain boards, commissions and agencies" create and file financial disclosures. Shapp, 348 A.2d at 911 (emphasis added). As delineated above, Gov. Wolf's Executive Order clearly paints outside of those ordinal lines and applies to non-subordinate, non-officials.

But it also clearly requires—not requests—compliance from subordinate officials, to the point that the Executive Order, like those invalidated in Cloonan and National Solid Wastes II, no longer qualifies as a mere communication to subordinate officials.

Third, to rubberstamp the Executive Order as a mere communication to subordinate officials—compliance with which would be strictly voluntary—would be an absurd result. This Court would be permitting a sitting governor to issue executive orders that only appear to require compliance on the basis that no one is actually legally obligated. But the last ones to know are precisely those—in this case, Participants and Direct Care Workers—most impacted by the executive order. In each instance, it would take a lawsuit to determine the nature and applicability of the Executive Order, and everyone would run the risk of noncompliance.

In the end, the label urged by Gov. Wolf cannot stick. The Executive Order is not a communication to subordinate officials, and this Court should reject the argument. Consequently, this Court should declare that the Executive Order is invalid and unlawful and issue judgment for Mr. Smith and Mr. Lambrecht.

IV. THE EXECUTIVE ORDER CONFLICTS WITH STATUTES GOVERNING THE PROVISION OF DIRECT CARE SERVICES BECAUSE IT LIMITS THE ABILITY OF PARTICIPANTS TO MAKE DECISIONS ABOUT, DIRECT THE PROVISION OF, AND CONTROL THEIR OWN DIRECT CARE SERVICES

Even assuming the Executive Order could be properly labeled as one of the three permissible types of orders, it is nevertheless invalid and unlawful because it conflicts with constitutional or statutory authority, specifically, Act 150 and the Public Welfare Code. This Court should therefore invalidate the Executive Order.

Regardless of whether a particular Executive Order is authorized, "[i]n no event . . . may any executive order be contrary to any constitutional or statutory provision." Shapp, 348 A.2d at 914. To be "contrary to" a constitutional or statutory provision, the conflict need not be express; instead, this Court finds a conflict whenever an executive order attempts to regulate in an area over which the law indicates the General Assembly's intent to occupy the field. Nat'l Solid Wastes II, 600 A.2d at 265 ("Our review of Acts 97 and 101 and the regulations promulgated pursuant thereto, indicate the General Assembly's clear intent to regulate in plenary fashion every aspect of the [disposal of solid waste].") (alteration in original) (quotation marks omitted); Cloonan, 519 A.2d at 1048 ("[T]he order invades the exclusive province of the General Assembly to legislate

and control every phase of the alcoholic beverage industry in the Commonwealth.").

Act 150 was passed to increase the availability of direct care services so that elderly or disabled adults who are otherwise able to care for themselves could live, with assistance, in their own homes and communities. 62 P.S. § 3052(1). As part of that goal—and in recognition of the fact that Participants are fully capable of making decisions for themselves—the General Assembly gave Participants receiving care through Act 150 "the right to make decisions about, direct the provision of and control their attendant care services. This includes, but is not limited to, hiring, training, managing, paying and firing of an attendant." Id. at (3).

Meanwhile, the General Assembly required, through the Public Welfare Code, that the Department secure federal approval for additional direct care services programs for Pennsylvania. 62 P.S. § 201(1)-(2). Pursuant to the Public Welfare Code, the Department has already secured approval for certain programs expressly targeted[25] by the Executive Order:

> (1) The Aging Waiver Program.
> (2) The Attendant Care Waiver Program.
> (3) The CommCare Waiver Program.
> (4) The Independence Waiver Program.

[25] The Executive Order also targets "any successor program[s]." Executive Order, at 1.f.

(5) The OBRA Waiver Program.

Executive Order, at 1.f. At the heart of each of those programs is the General Assembly's commitment to allowing Participants to direct their own care. Under the Aging Waiver Program, for example,[26] Participants "are encouraged to self-direct their services to the highest degree possible," "have the right to make decisions about and self-direct their own waiver services," and "may choose to hire staff . . . or manage an individual budget." APPLICATION FOR A §1915(C) HOME AND COMMUNITY-BASED SERVICES WAIVER, AGING WAIVER PROGRAM RENEWAL, DEPARTMENT OF HUMAN SERVICES 140 (Jul. 1, 2013), available at http://www.dhs.state.pa.us/cs/groups/webcontent/documents/waiver/d_006875.pdf.[27] A Participant who chooses to hire and manage staff "serves as the common-law employer and is responsible for hiring, firing, training, supervising, and scheduling their support worker." Id. And Participants who choose to manage a budget have "a broader range of opportunities for participant-direction," still including "select[ion] and manage[ment of] staff." Id.

[26] As detailed in the Petition, Participants receiving care through other Medicaid waivers possess similar rights. See Petition, at ¶¶ 39, 65-66.

[27] The full text of the waivers at issue, which were attached to the Petition, are incorporated by reference within the Pennsylvania Administrative Code. 55 Pa. Code § 52.4.

The Executive Order conflicts with Act 150 because, in creating a "meet and confer process" in which the Department and a third party may effect changes with respect to Direct Care Workers' "recruitment and retention," "wage ranges, health care benefits, retirement benefits and paid time off," "[t]raining and professional development," and "[v]oluntary payroll deductions," the Executive Order necessarily limits Participants' "right to make decisions about, direct the provision of, and control their attendant care services. This includes, but is not limited to, hiring, training, managing, paying and firing of an attendant." 62 P.S. § 3052(3). The Executive Order clearly limits those similar rights provided in direct care waiver programs pursuant to the Public Welfare Code.

The Executive Order also conflicts with the Public Welfare Code because it impedes on the role given to the Department by the General Assembly in applying for, receiving, and using federal funds and submitting plans and proposals to the federal government for Department programs. See Nat'l Solid Wastes II, 600 A.2d at 265 ("Executive Order 1989-8 clearly conflicts with those acts and regulations, none of which provide the Governor with the authority to have issued such an executive order. . . . Article I, Section 27 does not give the Governor the authority to disturb that legislative scheme. Neither does it give him the authority to alter DER's responsibilities pursuant to that scheme.") (emphasis added). The General

Assembly nowhere, for instance, invited employee organizations to play a role in the formulation of Department waiver programs, each of which has already been submitted to and approved by the federal government.

Finally, even assuming a lack of express conflict with Act 150 and the Public Welfare Code, the Executive Order conflicts with statutory authority because the General Assembly has evidenced an intent to occupy the field with respect to the provision of services to the disabled and elderly. Title 62 of the Pennsylvania Statutes, together with their implementing regulations, embodies a comprehensive system of services available in defined circumstances to certain individuals. See 62 P.S. §§ 101-7006. Act 150 and the Public Welfare Code have their place within that legislative scheme, and Gov. Wolf has no authority to disturb it.

Accordingly, even if Gov. Wolf's Executive Order was authorized—and it was not—this Court should declare the Executive Order invalid and unlawful because it conflicts with laws governing provision of direct care services.

V. THE EXECUTIVE ORDER CONFLICTS WITH STATUTES GOVERNING EMPLOYEE ORGANIZING BECAUSE DIRECT CARE WORKERS ARE SPECIFICALLY EXCLUDED BY STATUTE FROM ORGANIZING AND THE EXECUTIVE ORDER MANDATES AN ORGANIZATIONAL PROCESS AT ODDS WITH THOSE MANDATED BY LAW

The Executive Order also conflicts with statutory authority governing employee organizing, specifically, the NLRA, PLRA, and PERA. Therefore, the Executive Order should be invalidated regardless of whether it was authorized.

Again, regardless of whether a particular executive order is authorized, "[i]n no event . . . may any executive order be contrary to any constitutional or statutory provision." Shapp, 348 A.2d at 914. To be "contrary to" a constitutional or statutory provision, the conflict need not be express; instead, this Court finds a conflict whenever an executive order attempts to regulate in an area over which the law indicates the General Assembly's intent to occupy the field. Nat'l Solid Wastes II, 600 A.2d at 265 ("Our review of Acts 97 and 101 and the regulations promulgated pursuant thereto, indicate the General Assembly's clear intent to regulate in plenary fashion every aspect of the [disposal of solid waste].") (alteration in original) (quotation marks omitted); Cloonan, 519 A.2d at 1048 ("[T]he order invades the exclusive province of the General Assembly to legislate and control every phase of the alcoholic beverage industry in the Commonwealth.").

The NLRA was passed in an effort to improve employee working conditions and protect commerce from employers and labor organizations alike. See 29 U.S.C. § 151. Although it covers most private-sector employees, the NLRA specifically excludes from coverage "any individual employed . . . in the domestic service of any family or person at his home." Id. at § 152(3). This provision of "[f]ederal labor law reflects the fact that that the organization of household workers . . . does not further the interest of labor peace." Harris, 134 S.Ct at 2640.

Similarly, the PLRA was enacted to encourage employee organizing as a way of preventing strife and unrest injurious to the public welfare, to settle disputes, and to promote labor peace. See 43 P.S. § 211.2. The PLRA gives those employees "the right to self-organization, to form, join or assist labor organizations,[28] to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection," 43 P.S. § 211.5, and deals exhaustively with the process of organizing and selecting a representative, see generally 43 P.S. §§ 211.1 – 211.13. However, the PLRA, like the NLRA, specifically withholds employee organizing rights

[28] The Executive Order actually uses the term "labor organization," id. at 5.d-f, to refer to the Direct Care Worker Representative.

from "any individual employed . . . in the domestic service of any person in the home of such person." Id. at § 211.3.

In this manner, the PLRA, like the NLRA, simply "reflects the fact that that the organization of household workers . . . does not further the interest of labor peace." Harris, 134 S.Ct at 2640. This legislative policy choice is entirely rational: in the unique context of direct care services, "any threat to labor peace is diminished because [Direct Care Workers] do not work together in a common state facility but instead spend all their time in private homes, either the [Participants'] or their own." Id. Moreover, the relationship between the Direct Care Worker and Participant is not marked with inequity of bargaining power; instead, it often grows out of kinship or close friendship. Cf. 43 P.S. § 211.2.

PERA too was passed to "promote orderly and constructive relationships" between employees and employers, but in the separate realm of public employment. 43 P.S. § 1101.101. PERA therefore applies only to those employees working for a "public employer," defined as

> the Commonwealth of Pennsylvania, its political subdivisions including school districts and any officer, board, commission, agency, authority, or other instrumentality thereof and any nonprofit organization or institution and any charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local,

> State or Federal governments but shall not include employers covered or presently subject to coverage under the [PLRA or NLRA].

43 P.S. § 1101.301(1).

The NLRA, PLRA, and PERA also include protections for dissenting employees who do not wish to be represented by an employee organization. For example, they each require a showing of interest from at least 30% of employees prior to conducting an election to determine whether an employee organization will become their exclusive representative. See 29 CFR § 101.18(a); 43 P.S. § 211.7(c); 43 P.S. § 1101.603(a). And each law requires that employees receive adequate notice of an election. See 29 CFR § 103.20; 43 P.S. § 211.7(c); 43 P.S. § 1101.605(a). Additionally, in Pennsylvania, the PLRA and PERA grant to the Pennsylvania Labor Relations Board ("PLRB") exclusive jurisdiction to certify a bargaining unit, conduct elections, and certify election results. See 43 P.S. § 211.7; 43 P.S. §§ 1101.602-1101.605. And perhaps most importantly, the PLRA allows an employee organization to become the exclusive representative upon a vote of the "majority of the employes in a unit appropriate for such purposes." 43 P.S. § 211.7(c) (emphasis added).

In 2010, after then-Governor Rendell entered an executive order also attempting to force exclusive representation on Direct Care Workers, this Court

held that the executive order conflicted with Pennsylvania labor law based on the conflict between the PLRA's exclusion of domestic service workers and the executive order's attempt to give them organizational rights:

> In our view, the terms of the Order conflict with Section 5 of the PLRA. In particular, Section 5 of the PLRA permits "employees" to self-organize, form, join or assist labor organizations, to collectively bargain, and to engage in concerted activities for the purpose of collective bargaining. The term "employe" as defined by the PLRA specifically excludes domestic service workers.
>
> . . . .
>
> Although respondents and intervenors maintain the agreement reached would not rise to the level of a collective bargaining agreement, the agreement could fall within the definition of a collective bargaining agreement: "[a] contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances." Black's Law Dictionary 280 (8th ed. 1999).[10] Moreover, the use of the term "shall" is mandatory, Riddle v. Workers' Comp. Appeal Bd. (Allegheny City Elect., Inc.), 603 Pa. 74, 981 A.2d 1288 (2009), and requires the Commonwealth to recognize a labor organization and engage in negotiations with it notwithstanding the Order's attempt not to confuse the Consumer-Provider's and Commonwealth-Provider's existing relationships. This is the essence of collective bargaining.
>
> FN.10. We understand the Order states an intention not to grant Providers the status of Commonwealth employees. However, we believe the Order would make the Providers de facto Commonwealth employees because of the Commonwealth's recognition of an exclusive representative for Providers and negotiation with

> that representative regarding terms and conditions of employment.

Pennsylvania Homecare Ass'n v. Rendell, No. 776 M.D. 2010 (Memorandum Opinion Granting Preliminary Injunction October 28, 2010).

Here, Gov. Wolf's Executive Order attempts to provide employee organizational rights to employees specifically excluded by the NLRA, PLRA, and PERA. The rights given to Direct Care Workers in the Executive Order include the right to self-organization, Executive Order, at 3.a, the right to form, join, or assist a labor organization, id. at 3.a, 5.d-e, to bargain collectively, id. at 3.b-c, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, id. at 3.b-c. Cf. 43 P.S. § 211.5. In other words, the Executive Order seeks to graft Direct Care Workers into existing labor law, contrary to the words and the intent of the General Assembly.

The Executive Order also fails to include protections for dissenting employees consistent with the NLRA, PLRA, and PERA. As a result, UHCWP was permitted to secure an election with just a 10% showing of support—far less than the 30% required by the NLRA, PLRA, and PERA—and a "victory" with just 13% of the 20,000 eligible votes.[29] But equally important, the Executive Order contains no

[29] See Factual Stipulations (filed with this Court on June 6, 2015), at ¶ 3 & Exh. 1, ¶ 15.

notice requirement prior to an election and wrestles away from the Pennsylvania Labor Relations Board the power to designate a collective bargaining unit of all Direct Care Workers.

But even if the Executive Order did not expressly conflict with the NLRA, PLRA, and PERA, they nevertheless conflict because the General Assembly (or Congress) intended that those laws occupy their respective fields. In other words, Gov. Wolf, in issuing the Executive Order, intruded on the General Assembly's "clear intent to regulate in plenary fashion every aspect of [employee organizing]." Nat'l Solid Wastes II, 600 A.2d at 265 (quoting Cloonan, 519 A.2d at 1048 (quoting Commonwealth v. Wilsbach Distribs., Inc., 519 A.2d 397, 400 (1986))).

In sum, even if the Executive Order was authorized—it is not—and even if the Executive Order did not conflict with Act 150 and the Public Welfare Code—it does—it is nevertheless invalid and unlawful because it is contrary to the NLRA, PLRA, and PERA. This Court should declare as much and render judgment for Mr. Smith and Mr. Lambrecht.

VI. AN EXECUTIVE ORDER THAT DISTURBS PENNSYLVANIA'S CONSTITUTIONAL ORDER SHOULD BE PERMANENTLY ENJOINED

Finally, this Court should enter a permanent injunction to protect Mr. Smith, Mr. Lambrecht, other Direct Care Workers and Participants, and the general public from the legal wrong inherent in allowing an illegal executive order to stand.

To establish entitlement to a permanent injunction,

> the party must establish his or her clear right to relief. However, unlike a claim for a preliminary injunction, the party need not establish either irreparable harm or immediate relief and a court may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law. Additionally, when reviewing the grant or denial of a final or permanent injunction, an appellate court's review is limited to determining whether the trial court committed an error of law.

Pestco, Inc. v. Associated Products, Inc., 880 A.2d 700, 710 (Pa. Super. 2005) (quoting Den-Tal-Ez, Inc. v. Siemens Capital Corp., 566 A.2d 1214, 1233 (Pa. Super. 1989)).

Here, because the Executive Order is constitutionally invalid and unlawful, its implementation hurts Mr. Smith, Mr. Lambrecht, other Direct Care Workers, other Participants, and the general public. See Keller v. Casey, 595 A.2d 670, 674 (Pa. Cmwlth. 1991) ("In Pennsylvania, the violation of an express statutory provision per se constitutes irreparable harm."). But an injunction is also necessary

to prevent the harm to Mr. Smith inherent in the loss of control and direction over his care and the harm to Mr. Lambrecht in being forced to accept unwanted representation by an employee organization.

These are legal harms for which there is no adequate redress at law and harms that are "not subject to exact valuation and compensation through damage awards." Pestco, 880 A. 2d at 710 (quoting Den-Tal-Ez, Inc., 566 A.2d at 1233). Therefore, permanent injunctive relief is appropriate, and this Court should grant such relief to allow Mr. Smith and Mr. Lambrecht to enforce its declaration that the Executive Order is invalid and unlawful.

CONCLUSION

For the reasons articulated above, this Court should declare that the Executive Order is invalid and unlawful and should enter permanent injunction to prevent its implementation.

Respectfully submitted,

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July 17, 2015

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limits of Pennsylvania Rule of Appellate Procedure 2135(1). This brief contains 9,967 words, according to the word count feature of the word processing program used to prepare the brief.

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CERTIFICATE OF SERVICE

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