

**[J-22A-2016 and J-22B-2016] [M.O. - Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

JESSICA MARKHAM, VICTORIA : No. 59 MAP 2015
MARKHAM, JESSE CHARLES, :
PENNSYLVANIA HOMECARE : Appeal from the Order of the
ASSOCIATION, UNITED CEREBRAL : Commonwealth Court at No. 176 MD
PALSY OF PENNSYLVANIA : 2015 dated June 3, 2015.

v.

: ARGUED: October 7, 2015
: RESUBMITTED: January 20, 2016

THOMAS W. WOLF, IN HIS OFFICIAL :
CAPACITY AS GOVERNOR OF THE :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF HUMAN SERVICES, :
OFFICE OF LONG TERM LIVING :

APPEAL OF: PRESIDENT PRO :
TEMPORE SENATOR JOSEPH B. :
SCARNATI, III, MAJORITY LEADER :
SENATOR JAKE CORMAN, MAJORITY :
WHIP SENATOR JOHN GORDNER AND :
MAJORITY APPROPRIATIONS :
CHAIRMAN SENATOR PAT BROWNE, :
ON BEHALF OF THE PENNSYLVANIA :
SENATE MAJORITY CAUCUS, :

Possible Intervenors

DAVID W. SMITH AND DONALD :
LAMBRECHT :

v.

: No. 60 MAP 2015
:
: Appeal from the Order of the
: Commonwealth Court at No. 177 MD
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GOVERNOR THOMAS W. WOLF, IN HIS :
OFFICIAL CAPACITY AS GOVERNOR :
OF THE COMMONWEALTH OF :
PENNSYLVANIA AND :

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DEPARTMENT OF HUMAN SERVICES :

APPEAL OF: PRESIDENT PRO :
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SENATOR JAKE CORMAN, MAJORITY :
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CHAIRMAN SENATOR PAT BROWNE, :
ON BEHALF OF THE PENNSYLVANIA :
SENATE MAJORITY CAUCUS, :

Possible Intervenors :

DISSENTING OPINION

CHIEF JUSTICE SAYLOR

DECIDED: March 29, 2016

I respectfully dissent, as I would recognize standing on the part of legislative leaders, acting on behalf of the Senate Majority Caucus, to intervene in the present proceedings to challenge Executive Order 2015-05 as *ultra vires*.

In the Pennsylvania Labor Relations Act,¹ the General Assembly granted to certain private-sector employees the right to organize and bargain collectively. See 43 P.S. §211.5. The Legislature, however, expressly undertook to exclude “any individual employed . . . in the domestic service of any person in the home of such person.” *Id.* §211.3(d). Moreover, under the Attendant Care Services Act,² the care recipient is invested with the “right to make decisions about, direct the provision of and control their

¹ Act of June 1, 1937, P.L. 1168, No. 294, §§1-14 (as amended 43 P.S. §§211.1-211.13).

² Act of Dec. 10, 1986, P.L. 1477, No. 150, §§1-8 (as amended 62 P.S. §§3051-3058).

attendant care services,” including “hiring, training, managing, paying and firing of an attendant.” 62 P.S. §3052(3).

Executive Order 2015-05 extends to the Attendant Care Services Act. See 4 Pa. Code §7a.111 (defining “Home care service programs”). It provides that an “employee organization” shall be elected to be the exclusive “representative” of direct care workers to “meet and confer” with the Department of Human Services regarding wages, hours, and other conditions of employment. 4 Pa. Code §7a.113(a), (b)(2), (c); *id.* §7a.114(b). This process may result in a “memorandum of mutual understanding,” which, “[w]hen appropriate, and with the approval of the Governor, . . . will be implemented as the policy of the Department[.]” *Id.* §7a.113(d)(1).

From my point of view, the Majority Caucus has advanced a colorable claim that Executive Order 2015-05 does not reflect an implementation of existing law by the executive branch, but rather, evinces an exercise of lawmaking power reserved to the legislative branch. In such a scenario, I do not agree that the concerns of a majority of the membership of one house of the General Assembly can be aptly characterized as “generalized interests in the conduct of government common to the general citizenry.” Majority Opinion, *slip op.* at 20.

Rather, I subscribe to a more functional approach to legislative standing which would take into account the aggregation of legislative interest in the matter and the character of the claimed intrusion in terms of its impact on the status quo relative to salient public policy. *Cf.* Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 375-86 (2015). Along these lines, I am of the view that the Court should be sensitive to the concern being advanced, by a majority of the Senate, that alteration, by the Executive, of entitlements and interests impacts power

and position both within the General Assembly and between the legislative and executive branches. *Accord id.*

For example, but for Executive Order 2015-05, there would be no need for the General Assembly to disapprove a “Direct Care Worker Representative.” In the face of this Executive Order and in the absence of judicial review, however, any faction of the Legislature wishing to negate the order will be required to expend the political capital necessary to effectuate the disapproval. Under a functional approach to legislative standing, and taking into account that review is being sought by a majority caucus, I conclude that sufficient injury has been alleged to confer standing.

While I share the majority’s concern with opening the door to a proliferation of challenges by legislators, I believe that taking into account the scale of the legislative interest, the colorability of the claim, and the presence or absence of political questions offers sufficient prudential limitations. While more specific parameters might be ideal, in my view, standing often devolves to an exercise in discernment. The alternative, in my view, is to deny a majority body of representatives of a coordinate branch of government the opportunity to participate directly in a serious constitutional challenge with a substantial functional impact on the General Assembly’s own constitutionally delegated powers.