

[J-79A&B-2017][M.O. - Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JESSICA MARKHAM, VICTORIA
MARKHAM, JESSE CHARLES,
PENNSYLVANIA HOMECARE
ASSOCIATION, UNITED CEREBRAL
PALSY OF PENNSYLVANIA,

Appellees

V.

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

Appellants

DAVID W. SMITH AND DONALD
LAMBRECHT,

Appellees

V.

GOVERNOR THOMAS W. WOLF, IN HIS
OFFICIAL CAPACITY AS GOVERNOR
OF THE COMMONWEALTH OF
PENNSYLVANIA AND
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF HUMAN SERVICES,

Appellants

: No. 109 MAP 2016
:
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: Appeal from the Order of the
: Commonwealth Court at No. 176 MD
: 2015 dated 9/22/16, exited 9/26/16

: ARGUED: November 28, 2017

: No. 110 MAP 2016
:
:
: Appeal from the Order of the
: Commonwealth Court at No. 177 MD
: 2015 dated 10/14/16

: ARGUED: November 28, 2017

DISSENTING OPINION

CHIEF JUSTICE SAYLOR

DECIDED: August 21, 2018

According to the majority, the Governor's executive order concerning home care services per the participant-directed model "contains none of the hallmarks of collective bargaining." Majority Opinion, *slip op.* at 24. Yet, the majority otherwise recognizes that the executive order "uses some similar concepts to those found in labor statutes[.]" *Id.* at 21. Indeed, the executive order has been the predicate for the advertisement and conduct of a "union election" by a labor organization soliciting home care attendants' membership and paycheck deductions of dues subsidized by governmental assistance monies. R.R. at 3498a, 3504a-3505a, 3528.

In approving the executive order as a valid exercise of gubernatorial authority in the form of a mere "instruction from Governor Wolf to subordinate officials," Majority Opinion, *slip op.* at 15, the majority relies substantially on the character of the executive order as being "voluntary, non-binding, non-exclusive, and unenforceable," *id.* at 16. To me, the latter observations are relatively beside the point. In my view, the Governor's social policy initiative -- particularly in a regulated arena involving the payment of government funds to secure home care services, see 62 P.S. §3051-3058 (the Attendant Care Services Act) -- represents too great a foray into legislative prerogatives to be considered anything less than a legislative act. See Pa. Const., art. II §1 ("The legislative power of this Commonwealth shall be vested in [the] General Assembly[.]").¹

¹ Appellants contends that it would be misguided for this Court to invalidate an executive order on the basis that it "looks too much like 'legislation.'" Reply Brief for Appellants at 2. I respectfully disagree, however, that the separation-of-powers doctrine should be interpreted to permit any branch of government to operate freely within another sphere (or at least freely to the point of a bright-line conflict), subject only to the technical unenforceability of such operations in a court of law. To me, the fact the (continued...)

I also agree with Appellees and their *amici* that the provisions of the executive order authorizing, *inter alia* -- the election of a labor organization, the designation of the American Arbitration Association as an election monitor, the injection of the executive branch as an intermediary between the labor organization and consumer-employers, and the facilitation of terms-and-conditions agreements which may be directed toward impacting the private work relationships between such consumer-employers and the home care providers -- represent far more than simple communications with subordinate officials.

For these reasons, I would affirm the decision of the Commonwealth Court.

Justice Mundy joins this dissenting opinion.

(...continued)

executive order in issue looks like legislation is highly relevant here. Indeed, and as otherwise noted, certainly private actors in the present context have relied on such appearances in furtherance of their own undertakings.