

**IN THE SUPREME COURT OF PENNSYLVANIA**

**No. 67 MAP 2008**

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**BAYADA NURSES, INC.,**

**Petitioner and Appellant,**

**v.**

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR and INDUSTRY,**

**Respondent and Appellee.**

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***AMICUS BRIEF OF AARP, PENNSYLVANIA AFL-CIO, and SERVICE EMPLOYEES  
INTERNATIONAL UNION IN SUPPORT OF APPELLEE***

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Appeal from the Opinion and Order of the Commonwealth Court of Pennsylvania  
Entered September 4, 2008, No. 477 M.D. 2007

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Dated: January 7, 2009

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## **STATEMENT OF INTEREST OF AMICI**

*Amici* are AARP and labor organizations representing the interests of home health care workers and the older persons and persons with disabilities they serve in Pennsylvania. They write pursuant to Pa. Rule of App. Proc. 531 to support the ruling of the Commonwealth Court below, to shed light on the purposes of the Pennsylvania minimum wage statute and its narrow domestic services exemption, and to describe the adverse impacts of a ruling sought by Petitioner Bayada Nurses, Inc. (“Bayada”) that the Pennsylvania Department of Labor and Industry (“the Department”) abused its broad discretion when it ruled that the Pennsylvania Minimum Wage Act (“MWA”) covers agency-employed home health care workers.

Pennsylvania’s Minimum Wage Act has clear statutory language covering all agency-employed domestic workers, including all agency-placed home health care workers, and there is a strong public policy basis for the Department’s literal application of this remedial statute, which provides a baseline wage floor and thereby helps to ensure quality care for older persons and persons with disabilities.

AARP is a nonpartisan, nonprofit membership organization dedicated to addressing the needs and interests of Americans aged fifty and older. With nearly forty million members nationwide, and 1.9 million members in Pennsylvania, AARP is the largest membership organization serving the needs and interests of older persons. Most older persons and persons with disabilities in need of long-term care and supportive services prefer to receive these services in their own home, Mary Jo Gibson, *Beyond 50.03: A Report to the Nation on Independent Living and Disability* (AARP Public Policy Institute, April 2003). Without an adequate labor force, however, many may not have the



option of choosing in-home over institutional care. To preserve and expand the labor pool needed to deliver quality home care for AARP's Pennsylvania-based members, the AARP has a substantial interest in assuring that the Pennsylvania home health care work force is not denied minimum wages or otherwise marginalized beyond the minimum protections enjoyed by virtually all other workers.

The Pennsylvania AFL-CIO ("PA AFL-CIO") is a federation of labor organizations operating in the Commonwealth of Pennsylvania whose affiliates represent over 900,000 working men and women and their families, residing in virtually every community in Pennsylvania. PA AFL-CIO affiliates represent workers in both the private and public sectors of the State's economy and in virtually every form and type of work in the Commonwealth, including low-wage workers. Many of the affiliated organizations' members are employees working as home health aides for various private sector corporations operating in Pennsylvania, like Petitioner Bayada Nurses, Inc.

Most members of Pennsylvania AFL-CIO-affiliated organizations are likely to interact with home health care workers, either as employees or as family members who need the services of home health care workers. The Pennsylvania AFL-CIO regularly appears before this Honorable Court to assure the proper interpretation of labor-protective legislation, such as the MWA, and to bring the voices of those affected by such interpretations to this Court.

The Service Employees International Union (SEIU) is the largest labor union in the country and represents hundreds of thousands of health care employees, including homecare workers. SEIU is committed to enforcement of minimum wage standards, and bears witness daily to the poverty-level pay and exploitative work conditions imposed

upon homecare workers in Pennsylvania and nationwide. In the interests of its members, SEIU seeks to improve job quality and thereby elevate client care. SEIU homecare members in Pennsylvania are directly threatened by Bayada's petition, because its approval would deprive SEIU homecare workers of the most basic rights to be paid the minimum wage and overtime.

*Amici* urge this Court to affirm the Commonwealth Court's ruling upholding the Department's long-standing regulation requiring home health care agencies like Petitioner Bayada Nurses Inc. to pay minimum wages and overtime pay to their home health care employees. Doing otherwise would upset a sound and decades-long rule, allow home health care agencies like Bayada (as well as all other agencies employing domestic employees from maids to cooks) to pay these critical workers less than the minimum wage, and diminish older persons and disabled patients' ability to secure quality care in their homes.

### **SUMMARY OF ARGUMENT**

The Commonwealth Court correctly upheld the Department of Labor and Industry's decades-long rule that health care agencies cannot avail themselves of the private householder domestic services exemption under Pennsylvania's Minimum Wage Act. Pennsylvania's domestic services exemption is not analogous to the federal companionship exemption, and so it was proper for the Commonwealth Court to interpret the MWA without reference to federal authority relating to minimum wage and overtime coverage for home health care workers.

Bayada now relies almost entirely on an argument that its individual householder clients' eligibility for the MWA exemption should be extended to Bayada as well,

because each individual householder client jointly employs each home health care worker with Bayada. This argument, rejected by the Commonwealth Court, fails for three reasons. First, the statutory language describes both the type of employment (domestic services) and the type of employer (the employer in whose house the work is performed), and third party agencies do not fit into the exemption's definition of employer. Second, the Department's regulation, which is entitled to strong deference, does not permit third party agencies to avail themselves of the exemption. Third, even if the regulation and the statute permitted third party agencies to shoehorn themselves into the exemption, the required fact-intensive determination is not possible in the context of this petition process Bayada has chosen to challenge the regulation.

Moreover, strong public policy goals support the Commonwealth Court's ruling that third party agencies are not exempt under the MWA. Coverage of agency home care workers under the MWA stabilizes and strengthens the labor pool that delivers critical services to older persons and persons with disabilities. This protection is crucial in light of the well-documented shortage of home care workers in Pennsylvania and throughout the country – a shortage that is predicted to become even more acute as the population ages. Low-wage home care workers are the very ones the PMWA is intended to cover and protect. Finally, although Bayada argues that it will face financial ruin if compelled to pay its home health care workers minimum wage and overtime, this argument is unavailing because agencies like Bayada are already operating in dozens of other states requiring minimum wage and overtime pay for these workers without adverse effects.

## **ARGUMENT**

### **I. The Commonwealth Court’s Ruling Correctly Upholds the Department’s Regulation, Which Implements the MWA’s Plain Language and Is Entitled to Strong Deference.**

Bayada’s underlying petition invoked the original jurisdiction of the Commonwealth Court, asking it to: (1) declare the “domestic services” regulation at 34 Pa. Code § 231.1 inconsistent with the MWA’s domestic services exemption at 43 P.S. § 333.105(a)(2); (2) declare that Bayada’s householder clients are “employers” for purposes of the MWA and that Bayada is entitled to take advantage of the domestic services exemption, and (3) declare that the MWA domestic services exemption be interpreted consistent with the federal Fair Labor Standards Act (FLSA) exemption at 29 U.S.C. § 213 (a)(15). Appendix filed by Bayada in Lieu of Reproduced Record Pursuant to PA R.A.P. 251 (c) (“Appendix”), at 28.

The Commonwealth Court rejected each of those arguments, ruling that:

“[t]he domestic services exemption and the regulatory definition have not changed since their original enactment. The MWA determines the exemption based on the capacity of the employer and location of the work, which is to be performed in the home of the person employing the home health aide. Hence, the regulatory definition tracks the MWA’s meaning and does not violate legislative intent.”

Appendix at 338.

The Commonwealth Court correctly rejected Bayada’s request to rewrite the MWA, and this should be affirmed.

#### **A. Courts afford strong deference to agency regulations.**

When adopting a regulation under its legislative rule-making power, as the Department did in this instance, a Pennsylvania state agency’s regulations are valid and

binding on the courts as long as the regulation was: (a) adopted within the agency's granted power, (b) issued pursuant to proper procedure, and (c) reasonable. *Tire Jockey Serv., Inc. v. Dept. of Envtl. Prot.*, 915 A.2d 1165, 1186 (Pa. 2007). Bayada concedes that the MWA requires the Department to issue implementing regulations "to carry out the purposes of [the] act and to safeguard the minimum wage rates." 43 P.S. § 333.109. Appendix at 250.

The MWA provides an exemption for "domestic services in or about the private home of the employer." Because the MWA itself does not define "domestic services," the Department has the undisputed responsibility to define statutory terms in regulations. *Pines v. Farrell*, 848 A.2d 94 (Pa. 2004).

The Department adopted its "domestic services" regulation more than thirty years ago, defining domestic services to be "work in or about a private dwelling for an employer in his capacity as a householder, as distinguished from work in or about a private dwelling for such employer in the employer's pursuit of a trade, occupation, profession, enterprise or vocation." 34 Pa. Code § 231.1 (b).

There is no dispute from Bayada that the Department properly issued the proposed regulation, received public comment, and finally promulgated its regulation in March 1977. See 6 Pa. B. 2291 (Sept. 18, 1976), 7 Pa. B. 25 (Jan. 1, 1977), and 7 Pa. B. 750 (Mar. 19, 1977), Appendices G, F, and E of Department's Brief, at Appendix 214; 45 P.S. §§ 1201-1208. Thus, as the Commonwealth Court correctly held, the Department's regulation is presumed both reasonable and valid.

**II. Bayada Has Apparently Abandoned its Original Argument that Pennsylvania Law Must Follow Federal FLSA Interpretation.**

Bayada's primary argument to the Commonwealth Court was that the MWA's *domestic services* exemption must be interpreted in light of federal construction of the federal Fair Labor Standards Act's ("FLSA") *companionship* exemption. The Commonwealth Court correctly and resoundingly rejected this claim:

Inasmuch as relevant provisions of the MWA and the regulation are substantially different from the federal statute and regulation, it is inappropriate to look to federal administrative agency interpretation for guidance in determining whether the Department's regulation improperly limits application of the Section 5(a)(2) domestic services exemption as Bayada claims.

Appendix at 343-344.

In its opening brief to this Court, Bayada all but abandons this federal precedent argument, relying instead on a broad and unsupportable joint employment position. As discussed below, the clear statutory language of MWA does not permit such a distortion of the householder exemption. The Commonwealth Court's ruling should be affirmed and Bayada's petition denied.

**A. The Commonwealth Court was correct to distinguish Pennsylvania's householder exemption from the federal companionship exemption because Pennsylvania's statute does not track the federal exemption and clearly exempts a wholly different category of workers and employers.**

Bayada's references to federal case law interpreting the federal companionship exemption are inapposite because Pennsylvania law contains no analogous exemption for employees working as companions. As has been long-established in Pennsylvania jurisprudence, interpretations of the federal FLSA provide guidance to Pennsylvania courts for construction of the MWA only when the MWA contains the same (or at the

very least similar) language as the FLSA. *See, e.g., Commonwealth v. Stuber*, 822 A.2d 870, 872 (Pa. Cmwlth. 2003).

Here, the clear text of the MWA provides an exemption only for “domestic services in or about the private home of the employer,” 43 P.S. §333.105(a)(2). The FLSA, in contrast, exempts only workers providing “companionship services for individuals who (because of age or infirmity) are unable to care for themselves.” 29 U.S.C. §213 (a)(15).<sup>1</sup>

Even a cursory review of the statutory language reveals that the types of workers targeted by these two exemptions are quite different. The MWA exemption encompasses all domestic service employees, provided that these workers are solely employed in the employer’s private household. The federal exemption covers only babysitters and companions for older persons and the infirm. Thus, if Bayada’s analogy were accepted, all domestic workers employed by third parties in Pennsylvania would be exempt from the state law, despite the limited federal exemption reaching only babysitters and companions, and despite a clear contrary intent in the Pennsylvania Legislature.

Such a glaring difference in the scope and articulation of the MWA’s household employer’s exemption and the federal companionship exemption show that Congress and the Pennsylvania Legislature had sharply different intentions in shaping these two dissimilar exemptions. Indeed, a comparison of the federal and Pennsylvania legislative

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<sup>1</sup> Bayada frequently cited the Supreme Court’s decision in *Long Island Care at Home v. Coke*, 127 S.Ct. 2339 (2007), but *Coke* was decided based on deference to the United States Department of Labor’s regulation interpreting the companionship exemption in the FLSA. 127 S.Ct. 2339, 2249-50. The Court’s deference was to a federal regulation (29 C.F.R. § 552.109(a)) that said the opposite of what the Department’s regulation says, at 34 Pa. Code § 231.1(b). Thus, the U.S. Supreme Court’s decision in *Coke* actually undermines Bayada’s argument here that this long-standing, presumptively valid and reasonable regulation should be overturned.

histories makes plain that the MWA was never meant to provide an exemption for third-party agency employers of home health care workers.

The FLSA, enacted prior to the MWA, was not initially applied to domestic service workers only because such workers were not considered to be engaged in interstate commerce and thus fell outside the scope of federal power. Thus, the original FLSA contained no express exclusion of domestic employees. Amendments to the FLSA enacted in the 1960s – after a change in the understanding of the definition of the term “interstate commerce”-- brought meaningful numbers of employees in domestic service employed by agencies within that statute’s protections for the first time. By extending minimum wage and overtime protections to all individuals “employed in an enterprise” of a certain size, the 1961 and 1966 Amendments to the FLSA (Pub. L. Nos. 87-30- 2 and 89-601-102, codified at 29 U.S.C. §§203 (r), (s)) ensured that domestic service workers employed by sizeable firms and agencies, rather than individual households, would be covered.

Thus, by the time Pennsylvania enacted its MWA, in 1968, Minimum Wage Act of 1968, Act of January 17, 1968, P.L. 11, No. 5, 43 P.S. §§333.101-333.115, the FLSA covered all domestic workers employed by third-party agencies, such as agency home care workers, but did not reach domestic workers employed directly by individual families. In creating the domestic services exemption, the Pennsylvania legislature effectively tracked the scope – but not the text – of the FLSA *as it existed in 1968*.

However, the MWA and the FLSA parted ways in 1974 when the U.S. Congress amended the FLSA to cover all domestics—regardless of the size of the employer -- while simultaneously creating a narrow exemption for workers employed to provide



babysitting and companionship services. 39 Fed. Reg. 33, 385 (1974); 40 Fed.Reg. 7404 (1975); 29 U.S.C. §213(a)(15)(minimum wage and overtime exemption for casual babysitters and companions). Since those federal amendments, Pennsylvania has not amended its MWA to in any way harmonize its law with the federal, despite amendments made to its MWA in 1974 (the same year the FLSA companionship exemption was adopted), 1978, 1988, 1990, and 1998). 43 P.S. §333.104.

Pennsylvania's domestic householder exemption, by its clear and unambiguous language, has a different scope and focus from the FLSA's companionship exemption. Consequently, federal interpretations of FLSA's companionship exemption has no relevance or bearing on the meaning of the MWA's householder exemption. The Commonwealth Court's ruling rejecting Bayada's petition in light of the sharp divergence of the meaning and text of the federal and state exemptions should be affirmed.

**III. Bayada's Newfound Reliance on an Alleged Joint Employment Relationship Between its Individual Employees and Householder Clients is Unavailing Because the MWA Plainly Permits an Exemption Only for the Householder.**

Bayada's remaining and now lead argument is that its individual householder clients' eligibility for the MWA domestic services exemption should be extended to Bayada because each and every one of its householder clients at all times jointly employs the home health care workers employed by Bayada. As this argument depends upon a complete revision of the clear and unambiguous terms of the MWA, the Commonwealth Court rightly rejected this argument. Appendix at 345-346.

Bayada's joint employment argument fails for three reasons. First, the MWA's clear statutory language set forth *two* requirements to come within its narrow exemption:

the worker must be laboring in a certain type of employment (domestic services) *and* the employer must be a certain type of employer (the employer in whose home the work is performed). Third-party agencies, such as Bayada, cannot meet this second requirement: the home health aides Bayada employs do not work in Bayada's home. Second, the Department's regulation, which is entitled to strong deference, specifically prohibits third-party agencies to avail themselves of the limited exemption. Third, even if the regulation and statute permitted third party agencies to shoehorn themselves into the exemption, the petition filed by Bayada does not permit such an as-applied ruling due to the fact intensity of the required determination.

**A. The language of the MWA's householder employer exemption is clear and unambiguous and Bayada does not come within it.**

Since its enactment in 1968, the MWA has exempted "domestic services *in or about the private home of the employer*," 43 P.S. §333.105(a)(2) (emphasis added). The unambiguous language of the exemption focuses on one employer: the householder. By its terms, it is clearly intended to exempt only individual homeowners--not large, multi-state, for-profit agencies like Bayada.

Here, ignoring the clear statutory language and more than three decades of undisturbed regulation on the subject, Bayada argues that this exemption extends to it and other large businesses providing domestic services. Appendix at 21, 23-25; Petition at ¶¶ 58, 67-76. Bayada's contorted proposed construction of the MWA ignores the statutory terms "of the employer," rendering those words superfluous. Such an interpretation is not permitted under the most basic rules of statutory construction. 1 Pa. C.S.A. §1921(a), (b).

To provide support for its joint employer claim, Bayada misleadingly cites the broad definition of those covered as an “employer” under section 43 P.S. § 333.103(g) of the MWA. Appendix 255 (Bayada’s Opposition brief). While there is no dispute that the MWA defines employer broadly and contemplates joint employer relationships for the purpose of *coverage*, see, e.g., *Dailey v. The Progressive Corp.*, 2003 WL 22794689 (E.D. Pa. 2003), this observation has no bearing on Bayada’s argument. Here, the question is the scope of an *exemption*. In interpreting the reach of an exemption, the coverage capacity of the larger act is not relevant because exemptions are to be read narrowly in remedial statutes. *Dept. of Labor & Indus. v. Whipple*, 1989 WL 407328, \*3 (Pa.Com.Pl. 1989).<sup>2</sup>

The MWA affords a narrow exemption only for domestic services provided in the “private home of the employer.” Bayada is not and cannot be “the” employer described in the exemption in whose home the services are performed.<sup>3</sup> 43 P.S. §333.105(a)(2). This unavoidable legal conclusion is confirmed in a March 22, 2007 opinion letter from the Department: “The MWA does not provide an exemption for joint employment of domestic service workers.” Appendix at 74. See also, *Settlement Home Care v. Indus. Bd. of Appeals*, 151 A.D.2d 580 (N.Y.A.D. 2 Dept. 1989) (New York appellate court

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<sup>2</sup> The MWA is a remedial statute designed to provide “minimum fair wage standards” to most workers that “bear ... [a] relation to the fair value of the services rendered.” 43 P.S. 333.101. See also, *Pennsylvania Dept. of Labor and Industry v. Remsburg*, 50 Pa. D. & C.3d 272, 277, 1988 WL 168216 (Pa.Com.Pl. 1988) (“[The] public purpose [of the Minimum Wage Act] is to guarantee a decent standard of living for all wage earners.”)

<sup>3</sup> Bayada spends some time in its papers arguing that the common law- and workers compensation-derived “borrowed servant” doctrine is better suited to determine the employment status of its individual householder clients than the wage and hour-derived “economic reality” test. E.g., Appendix at 256-61, Bayada’s Brief in Opposition. While *amici* disagree with Bayada and believe that the economic reality test is the correct test to determine whether an entity “employs” another under the coverage provisions of the MWA, that question is not properly before this Court.

upheld N.Y. Department of Labor’s determination that home care service agencies’ employees were not exempt as co-employers under New York labor law’s companion exemption as urged by the agencies).

As rightly explained by the Commonwealth Court, which reached the same conclusion, it has been long-established that exemptions from remedial statutes are to be narrowly construed. Pennsylvania’s Statutory Construction Act states that “remedial legislation” like the MWA “shall be liberally construed to effect [its] objects and to promote justice.” 1 Pa. C.S.A. §§ 1903(b); 1921 (c); 1928(c). Conversely, all exemptions under the MWA – including the domestic services exemption at issue here -- are to be construed narrowly against the employer asserting a right to the exemption to ensure that the MWA’s remedial purpose is not undermined. *Dept. of Labor & Indus. v. Whipple*, 1989 WL 407328 (Pa.Com.Pl. 1989); *see also, Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (FLSA exemptions must be “plainly and unmistakably” proven by the employer seeking the exemption); *Madison v. Resources for Human Development*, 39 F.Supp.2d 542, 45 (E.D.Pa. 1999) (FLSA exemptions are construed narrowly against employers and court declined employer’s request to be found exempt under federal domestic services exemption).

Expanding the MWA exemption to encompass large businesses like Bayada would be contrary to the statute’s express terms and accepted rules of statutory construction. The MWA’s exemption depends on the nature of the work (domestic services) and of the employer (the private householder in whose home the work is performed). Both prongs of the conjunctive exemption must be met, and Bayada cannot succeed because it is not the household employer. Bayada is asking that this Court

rewrite the MWA, which it cannot do. The Commonwealth Court's ruling should be affirmed.

**B. The Department's regulation, which is entitled to robust deference, does not permit third-party agencies to avail themselves of the exemption.**

The Department's regulation, which Bayada seeks to invalidate as inconsistent with the statute, could not be truer to the plain language of the statute. The regulation defines "domestic services" as:

Work in or about a private dwelling for an *employer in his capacity as a householder*, as distinguished from work in or about a private dwelling for such employer in the employer's pursuit of a trade, occupation, profession, enterprise or vocation.

34 Pa.Code §231.1(b).

As noted above, Bayada faces a high hurdle to invalidate an agency's regulation. The regulation was properly promulgated and is thus presumptively reasonable. 43 P.S. §333.109; *Bureau of Pottstown v. Pennsylvania Mun. Retirement Bd.*, 712 A.2d 741 (Pa. 1998); *Snider v. Thornburgh*, 436 A.2d 593, 596 (Pa. 1981); *Dept. of Environmental Resources v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1211 (Pa. 1979). This Court gives "controlling weight" to an agency's interpretation of its own regulation if the regulation is consistent with the statute and the interpretation is consistent with the regulation." *Popowsky v. Pa. Pub. Util. Comm'n*, 589 Pa. 605, 629, 910 A.2d 38, 48 (Pa. 2006) (internal citations and quotation marks omitted.)

The regulation on its face properly delineates the statutory exclusion aimed at individual householders employing domestic workers. The Court should therefore defer to the Department's interpretation.

**C. Bayada cannot prove its clients jointly employ the home health care workers in this context.**

Even if the statute or the regulation permitted agencies to avail themselves of the exemption, the petition process chosen by Bayada to challenge the regulation does not permit Bayada to prove that each of its home health care workers are jointly employed by each of the individual householders.

Bayada's claim, made in a petition bringing a facial challenge to the Department's regulation, that every one of its householder clients in each instance and at all times jointly employs the home health care workers along with Bayada is not fit for judicial review because the required inquiry is extremely fact-intensive. As Bayada itself admits, "the issue of joint employment is highly factual in nature." Brief of Appellant Bayada Nurses, Inc. filed in the Supreme Court of Pennsylvania, Nov. 3, 2008, at p. 21. See *Commonwealth, Dept. of Labor & Industry, Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 874 (Pa. Cmwlth. 2003); *JFC Temps, Inc. v. Workers Comp. Appeal Bd.*, 545 Pa. 149, 153, 680 A.2d 862, 864 (Pa. 1996). "[E]ach case must be decided on its own facts." *JFC Temps.*, 545 Pa. at 153, 680 A.2d at 864 (citing *Daily Express, Inc. v. Workmen's Compensation Appeal Board*, 46 Pa. Commw. 434, 406 A.2d 600 (1979).

Its as-applied claim fails because Bayada has not alleged that the law has been applied to any specific employee or defined set of employees.<sup>4</sup> Without such an application, how can Bayada prove that each employee is jointly employed by the

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<sup>4</sup> While courts must take as true all well-pleaded material allegations in a petition for review, it need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinions. *Meier v. Maleski*, 167 Pa. Commw. 458, 648 A.2d 595 (1994). Bayada's allegations purporting to show an employment relationship in each household are mere arguments and unwarranted inferences from fact.

householder or householder she serves?<sup>5</sup> Will Bayada present evidence proving this individualized, fact-intensive relationship exists between each of its employees and each of their clients throughout the current statute of limitations period? Because the law has not been applied to a specific set of employees, the as-applied claim is not proper.

#### **IV. Strong Public Policy Goals Support the Commonwealth Court’s Ruling.**

##### **A. Good jobs mean a steady supply of workers and quality care.**

*Amici* support MWA coverage of agency home care workers in order to stabilize and strengthen the labor pool that delivers critical services to older persons and persons with disabilities. Underpaying these critical workers – which would undeniably follow the creation of a new broad exemption sought by Bayada – means a serious shortage of home care workers.<sup>6</sup>

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<sup>5</sup> Even those facts alleged in Bayada’s petition make this point. Bayada employs over 1,000 home health care aides in Pennsylvania. As Bayada’s own petition makes clear, each relationship is unique. Petition, ¶¶ 42-45, Appendix at 9-10. Some clients have long-standing relationships with their workers; some do not. Bayada states that its clients “often desire to limit the number of HHAs invited into their homes . . .,” implying that some either have no preference or are incapable of asserting control. Petition, ¶ 44, Appendix at 10. Additionally, although Bayada “tries whenever possible to accommodate a client’s requests and preferences and to minimize the number of HHAs serving a single client,” it follows that it cannot do so in every case. Petition, ¶ 45, Appendix at 10.

<sup>6</sup> See, e.g., National Center for Health Workforce Analyses, et al., *Nursing Aides, Home Health Aides, and Related Health Care Occupations – National and Local Workforce Shortages and Associated Data Needs*, viii, 1-2 (U.S. Dep’t Health and Human Servs.: 2004) (available at <ftp://ftp.hrsa.gov/bhpr/nationalcenter/RNandHomeAides.pdf>) [hereinafter Nat’l Ctr. for Health Workforce Analyses]; Robyn I. Stone & Joshua M. Wiener, *Who Will Care for Us? Addressing the Long-Term Care Workforce Crisis* 3-4, 9, 12-16 (The Urban Institute and American Association of Homes and Services for the Aging: Oct. 2001) (available at <http://www.rwjf.org/files/research/WhoWillCareforUsReport.pdf>). Susan Harmuth & Susan Dyson, *Results of the 2005 National Survey of State Initiatives on the Long-Term Care Direct-Care Workforce* 6 (National Clearinghouse on the Direct Care Workforce & Direct Care Workers Ass’n of N.C.: 2005) (29 states—three quarters of response--report long-term direct care vacancies are a “serious” workforce issue) (available at

The failure to adequately compensate home health care workers is taking a toll not only on the workers, but on our society's ability to care for older persons and persons with disabilities. There is already a shortage of home health care workers across the country, and this problem will only become more acute in the years to come because of demographic changes, including longer life expectancy.<sup>7</sup> The percentage of the population aged 65 years and older will increase from 12% today to 21% by 2050,<sup>8</sup> and the number of people aged 85 and older will double by 2030 and triple or quadruple by 2040.<sup>9</sup> All told, the number of older persons in need of personal assistance services is projected to rise from 13 million in 2000 to 27 million by 2050, and the number of working-age individuals in need of assistance due to disability is predicted to increase from 5 million to 8 million during the same time period.<sup>10</sup> These trends will produce significant increases in the demand for home care services.

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[http://www.directcareclearinghouse.org/download/2005\\_Nat\\_Survey\\_State\\_Initiatives.pdf](http://www.directcareclearinghouse.org/download/2005_Nat_Survey_State_Initiatives.pdf)).

<sup>7</sup> See Health Res. and Servs. Admin., *Nursing Aides, Home Health Aides, and Related Health Care Occupations: National and Local Workforce Shortages and Associated Data Needs*, Dept. of Health and Human Servs. 14 (Feb. 2004); Dorie Seavey & Vera Salter, *Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants* (AARP Policy Institute, Oct. 2006).

<sup>8</sup> UCSF Center for California Health Workforce Studies, *An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for Geriatric Care Workers* 30 (Feb. 2006) (available at <http://www.futurehealth.ucsf.edu/geria/062404-Geria%20Final.pdf>) [hereinafter UCSF Health Workforce Studies], at 13 (citing Congressional Budget Office, *The Looming Budgetary Impact of Society's Aging* (2002)).

<sup>9</sup> Nora Super, National Health Policy Forum Background Paper, *Who Will Be There to Care? The Growing Gap between Caregiver Supply and Demand* 2 (Jan. 23, 2002) (available at [http://www.nhpf.org/pdfs\\_bp/BP\\_Caregivers\\_1-02.pdf](http://www.nhpf.org/pdfs_bp/BP_Caregivers_1-02.pdf)) (2040 projections).

<sup>10</sup> H. Stephen Kaye, et al., *The Personal Assistance Workforce: Trends in Supply and Demand*, 25:4 Health Affairs 1113 (2006) (elderly estimates); U.S. Dep't Health and



In 2000, there were an estimated 94,150 persons employed in front-line jobs in the 3,400 agency providers comprising Pennsylvania’s long-term care industry serving the elderly with functional limitations and adults with physical disabilities.<sup>11</sup> Over 71% of the home health and home care agencies reported shortages for direct care workers, with 18% reporting them to be severe. *Id.* at pp. ix-x. Across Pennsylvania, there was a job vacancy rate of about 11% with rates being the highest among nursing homes and home health and home care agencies. *Id.* at p. x.

The 2004 Pennsylvania Long-Term Care Work Force Surveys found that “higher starting hourly wages are associated with lower vacancy rates in all types of home care/home health agencies. . . .”<sup>12</sup> Front line care givers “generally receive lower wages and are less likely to receive employer paid benefits than other workers in the United States. . . .” *Id.* Indeed, one report states there is a “direct care work force crisis” in Pennsylvania because of the inability to recruit and retain direct care workers, those that provide long-term care and support for more than a half million of Pennsylvania’s elderly and younger residents living with disabilities.<sup>13</sup>

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Human Servs and U.S. Dep’t of Labor, *The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation* 5 (2003) (available at [http://www.pascenter.org/publications/publication\\_home.php?id=61](http://www.pascenter.org/publications/publication_home.php?id=61)) (working-age persons with disabilities).

<sup>11</sup> *Pennsylvania’s Front Line Workers In Long-Term Care*, Joel Leon, et al. (February 2001), available at

[http://www.abramsoncenter.org/PRI/documents/PA\\_LTC\\_workforce\\_report.pdf](http://www.abramsoncenter.org/PRI/documents/PA_LTC_workforce_report.pdf).

<sup>12</sup> *2004 Pennsylvania Long-Term Care Work Force Surveys - A Report to the Pennsylvania Intra-Governmental Council on Long-Term Care*, Diane Brannon, et al. (May, 2005), available at

<http://www.aging.state.pa.us/aging/cwp/view.asp?a=296&q=252556>.

<sup>13</sup> *Pennsylvania’s Care Gap: Finding Solutions to the Direct Care Work Force Crisis*, Mark Davis & Steven Dawson (Paraprofessional Healthcare Institute, June 2003), at p. 9, available at [http://www.directcareclearinghouse.org/l\\_art\\_det.jsp?res\\_id=60510](http://www.directcareclearinghouse.org/l_art_det.jsp?res_id=60510).

The current labor shortage is exacerbated by the lack of competitive wages and the demanding nature of the work.<sup>14</sup> The Bureau of Labor Statistics found that the earnings of home care workers “remain among the lowest in the service industry,” with a 1998 mean annual income for home health aides of \$16,250 and for home care aides of \$14,920.<sup>15</sup> In 1998, one in ten home care aides earned less than \$12,300 per year, below the poverty level for a family of three.<sup>16</sup>

Turnover, attributable in large part to the low wages,<sup>17</sup> has been estimated at 40-100% per year by agencies interviewed for a recent news article and at 12-60% by the United States Department for Health and Human Services.<sup>18</sup> High turnover is expensive,

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<sup>14</sup> General Accounting Office, *Adults with Severe Disabilities: Federal and State Approaches for Personal Care and Other Services*, GAO/HEHS-99-101, at 35 (May 1999).

<sup>15</sup> Application of the FLSA to Domestic Service, 66 Fed. Reg. 5481, 5483 (2001) (citing BLS Occupational Employment Statistics survey).

<sup>16</sup> Application of the FLSA to Domestic Service, *supra* note 12, 66 Fed. Reg. at 5483 (citing BLS Occupational Employment Statistics survey).

<sup>17</sup> Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook 2006-2007, <http://www.bls.gov.oco.home.htm>. (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides); Yoshiko Yamada, *Profile of Home Care Aides, Nursing Home Aides, and Hospital Aides: Historical Changes and Data Recommendations*, 42:2 Gerontologist 199, 204 (2002).

<sup>18</sup> Jane Gross, *New Options (and Risks) in Home Care for Elderly*, N.Y. Times, March 1, 2007; Nat'l Ctr. for Health Workforce Analyses, *supra* note 6, at 14 (citing R. Stone, *Frontline Workers in Long-Term Care: A Background Paper* (Institute for the Future of Aging Services: 2001)); Dorie Seavey & Vera Salter, *supra*, at 2 (40-50% annual turnover); New York Association of Homes & Services for the Aging, *The Staffing Crisis in New York's Continuing Care System: A Comprehensive Analysis and Recommendations* 17 (2000) available at <http://www.nyahsa.org/docs/Staff.pdf> (40-60% turnover in one year and 80-90% in 2 years).

costing approximately \$3,362 each time a worker needs to be replaced.<sup>19</sup> It also tends to diminish the quality and continuity of patient care.<sup>20</sup>

If the wages and working conditions of home health care employment do not improve, patients will suffer the consequences of inadequate services. Many patients will be forced prematurely into institutional care, removing them from their homes and families.<sup>21</sup> For those patients who are able to secure home health care assistance, the high turnover rate that already plagues home health care work will diminish the quality and consistency of the care they receive.

**B. These low-wage home health care workers are the very workers the MWA is intended to cover and protect.**

Home health care workers perform some of the most physically and emotionally demanding jobs in our economy. They perform daily tasks such as dressing, bathing, and feeding clients, bandaging bed wounds, lifting clients in and out of beds and wheelchairs, and doing cooking and housecleaning. Home healthcare workers are overwhelmingly women and are often single parents with young children to support.<sup>22</sup>

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<sup>19</sup> Robyn Stone, *The Direct Care Worker: A Key Dimension of Home Care Policy*, 16:5 Home Health Care Management & Practice 339, 341 (2004). Stone points out that this figure does not even take into account lost productivity during time that new workers are trained and gain experience, or the attrition between initial hiring and placement. *Id.*

<sup>20</sup> Stone, *supra* note 18, at 341.

<sup>21</sup> SEIU Press Release, Caregivers and Consumers Lose as Supreme Court Rules Against Overtime and Minimum Wage for Home Care Workers, [http://www.seiu.org/media/pressreleases.cfm?pr\\_id=1423](http://www.seiu.org/media/pressreleases.cfm?pr_id=1423).

<sup>22</sup> Peggie Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 Iowa L.Rev. 1835, 1848 (2007) (citing studies).

Home care workers are two to three times more likely than other workers to be single heads of households.<sup>23</sup> Forty percent have children younger than 18.<sup>24</sup> One in five home health care aides has income below the poverty level.<sup>25</sup> 35-40% of families headed by home health care and nursing home aides live in poverty, and 30-35% receive food stamps.<sup>26</sup> In fact, home health care aides are twice as likely as other workers to receive food stamps and Medicaid and to lack health insurance. *Id.* at 13.

Home health care jobs are not casual work unnecessary to family subsistence. Rather, these jobs are the primary source of income for these workers and their families. Home care work is generally full-time or close to it. Even without counting travel time, a majority of home care aides today work more than 35 hours per week.<sup>27</sup> Daily travel time for home health care workers is substantial given that home care workers “often visit four or five clients on the same day,” and they “may spend a good portion of the working

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<sup>23</sup> William J. Scanlon (Director, Health Care Issues, General Accounting Office), *Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Testimony before the Senate Committee on Health, Education, Labor and Pensions*, GAO-01-750T, at 22 (released May 17, 2001) (available at <http://www.gao.gov/new.items/d01750t.pdf>).

<sup>24</sup> Yoshiko Yamada, Profile of Home Care Aides, Nursing Home Aides, and Hospital Aides: Historical Changes and Data Recommendations, 42:2 *Gerontologist* 199 (2002) at 200-01.

<sup>25</sup> Scanlon, *supra* note 22, at 13; Yamada, *supra* note 16, at 202-03.

<sup>26</sup> Scanlon, *supra* note 22, at 22.

<sup>27</sup> H. Stephen Kaye, et al., *The Personal Assistance Workforce: Trends in Supply and Demand*, 25:4 *Health Affairs* 1113, 1118 (2006). A 1999 study revealed home care employees worked an average of 29-32 hours per week, which did *not* include the significant time spent daily traveling between clients. Application of the FLSA to Domestic Service, *supra* note 12, 66 Fed. Reg. at 5483 (citing BLS National Current Employment Statistics). Some researchers report higher averages. *See, e.g.*, Yoshiko Yamada, *supra*, note 24 at 202 (reporting 34 hours usually worked per week).

day traveling from one client to another.”<sup>28</sup> Unsurprisingly, the Department of Labor found that “[c]urrent data suggest that many workers in the home care industry are now employed in their primary occupation.”<sup>29</sup> In contrast, most home care workers employed by the householder – rather than through a third-party agency such as Bayada-- work for a single client,<sup>30</sup> and work less than half-time.<sup>31</sup>

If home health care workers cannot expect even the minimum wage, older citizens and disabled persons will suffer. The Bureau of Labor Statistics predicts that demand for employment of home health aides will increase by 56% just in the decade between 2004

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<sup>28</sup> Bureau of Labor Statistics, *supra* note 15 (Personal and Home Care Aides); *see also Id.* (Nursing, Psychiatric and Home Health Aides).

<sup>29</sup> Application of the FLSA to Domestic Service, *supra* note 12, 66 Fed. Reg. at 5483. Recent studies establish that 34-46% of home care workers work full-time year-round, and an additional 12-19% work full-time for part of the year. Rhonda J. V. Montgomery, et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45:5 Gerontologist 593, 595-97 (2005); Yamada, *supra* note 24, at 202.

The trend of increased agency employment has been accompanied by an increase in these full-time numbers. *See* Robyn Stone, *The Direct Care Worker: A Key Dimension of Home Care Policy*, 16:5 Home Health Care Management & Practice 339, 340 (2004) (citing statistics that percentage of full-time home care workers rose from 29% to 46% in decade between late 1980s and late 1990s).

<sup>30</sup> Household-employed individuals in California serve an average of 1.4 clients while agency workers average 4 clients. Jane Tilly & Joshua Wiener, *Consumer-Directed Home Care and Community Services: Policy Issues*, Occasional Paper No. 44 (The Urban Institute: 2001) (available at <http://www.urban.org/publications/310065.html>), at 12-13.

<sup>31</sup> A study of Los Angeles home care workers directly employed by households determined that approximately one-third worked less than 10 hours average per week and another one-third less than 20. Michael R. Cousineau, *Providing Health Insurance to IHSS Providers (Home Care Workers) in Los Angeles County: Report to the California HealthCare Foundation* (2000) (available at <http://www.chcf.org/documents.insurance/ihss.pdf>), at 11.

and 2014, making it the fastest growing occupation in the nation.<sup>32</sup> As a result demand for employment of personal and home care aides is expected to grow by 41% during the same time period.<sup>33</sup> As of 2004, federal statistics documented 701,000 personal home care aides and 624,000 home health care aides.<sup>34</sup> By 2014, the Bureau of Labor Statistics projects a need for 974,000 home health aides and 988,000 personal and home care aides.<sup>35</sup>

The MWA is a remedial statute designed to provide “minimum fair wage standards” to most workers that “bear ... [a] relation to the fair value of the services rendered.” 43 P.S. 333.101. Unreasonably low wages are contrary to the public interest in Pennsylvania. *Id.* Without good wages for home health care jobs, the workers and their families will suffer or move on to better jobs, leaving the quality, availability, and continuity of the care to decline.

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<sup>32</sup> Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook 2006-2007, <http://www.bls.gov.oco.home.htm>.

<sup>33</sup> Bureau of Labor Statistics, *supra* note 32 (Tomorrow’s Jobs); Daniel E. Hecker, *Occupational Employment Projects to 2014*, Monthly Labor Rev., Nov. 2005, at 75 (citing BLS statistics).

<sup>34</sup> Bureau of Labor Statistics, *supra* note 32 (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides); Daniel E. Hecker, *Occupational Employment Projects to 2014*, Monthly Labor Rev., Nov. 2005, at 75 (citing BLS statistics). These statistics may underestimate the actual number of home health care workers significantly, by undercounting individuals hired directly by households. Stone, *supra* note 7, at 340.

<sup>35</sup> Daniel E. Hecker, *supra*, at 75 (citing BLS statistics).

**C. Agencies like Bayada are already paying minimum wage and overtime in many states without adverse effects.**

Substantial business enterprises make up a large and fast-growing portion of the home health care industry. The Pennsylvania legislature did not intend to exempt these large businesses when exempting private householders from minimum pay laws – a conclusion which is unavoidable from the plain and unambiguous language of the targeted and narrow exemption.

An estimated 62 percent of home health care aides work for the thousands of for-profit companies like Bayada in the field.<sup>36</sup> Home care agencies employ approximately 70%, or hundreds of thousands, of home care workers.<sup>37</sup> There are more than 23,000 home care agencies in the United States.<sup>38</sup> For-profit agencies like Bayada have assumed an increasingly dominant role in the home care industry, with a share of the market rising

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<sup>36</sup> See Montgomery, et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45:5 GERONTOLOGIST 593, 597 (2005).

<sup>37</sup> UCSF Center for California Health Workforce Studies, *An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for Geriatric Care Workers* 30 (Feb. 2006) (available at <http://www.futurehealth.ucsf.edu/geria/062404-Geria%20Final.pdf>) [hereinafter UCSF Health Workforce Studies].

<sup>38</sup> National Center for Health Workforce Analyses, et al., *Nursing Aides, Home Health Aides, and Related Health Care Occupations – National and Local Workforce Shortages and Associated Data Needs* viii, 12 (U.S. Dep’t Health and Human Servs.: 2004) (available at <ftp://ftp.hrsa.gov/bhpr/nationalcenter/RNandHomeAides.pdf>) [hereinafter Nat’l Ctr. for Health Workforce Analyses]. See also *Application of the Fair Labor Standards Act to Domestic Service*, 66 Fed. Reg. 5481, 5487 (2001) (to be codified at 29 C.F.R. pt. 552) (proposed Jan. 19, 2001). Between 1975 and 1999 the number of Medicare-certified home care agencies increased three-fold. *Id.* 66 Fed. Reg. at 5483.

above 40% in the mid-1990s.<sup>39</sup> As of 1999, for-profit companies employed 62% of home health care aides.<sup>40</sup>

Unlike individual households, however, agencies are traditional employers, often with hundreds and even thousands of home care employees serving clients at multiple locations.<sup>41</sup> Agencies like Bayada, which operate in many states, routinely maintain employment records and presumably comply with a multitude of labor and employment laws. Bayada provides home health care services in at least eighteen states, nearly half of which require minimum wage and overtime pay for home health care workers.<sup>42</sup> The

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<sup>39</sup> See Nat'l Ctr. for Health Workforce Analyses, *supra* note 38, at 12 (for-profit ownership of home care agencies increased from 6 % in 1980 to 43% in 1995; Application of the FLSA to Domestic Service, *supra* note 37, 66 Fed. Reg. at 5483 (unaffiliated for-profit agencies had over 40% share of market by 2000)).

<sup>40</sup> Montgomery, et al., *supra*, 593, 596 (2005).

<sup>41</sup> See Gross, *supra*; *Gentiva At a Glance*, <http://www.gentiva.com/about/AtAGlance.asp>; *About TLC Health Care Services*, <http://www.tlcathome.com/AboutUs/tabid/52/Default.aspx>; *Press Release: The Accredited Family of Home Care Services celebrates 25 years of excellence* (Apr. 14, 2005) (available at <http://www.accreditednursing.com/pdf/Press%20Release%20E%20Format.pdf>); *Addus HealthCare Services: Company Profile*, <http://www.addus.com/> (claiming to serve 40,000 individuals with in-home services); *Our History and Services*, <http://www.interimhealthcare.com/about/staffingstory.aspx>.

<sup>42</sup> See Bayada's website, at <http://www.bayada.com/jobbank/OfficeSearch.aspx>, listing multiple offices in eighteen states. Of the states listed with Bayada facilities, AZ, CO, MD, MA, MN, NJ, NY, and PA are among the states requiring minimum wage and/or overtime pay for home health care workers employed by agencies. See AZ Stat. § 23-362; 7 Colo. Code Regs § 1103-1(§ 5); Md. Code Ann. §§ 3-413, 3-415 (overtime law exempts *non-profits* engaged in providing temporary at-home care services, such as companionship... to aged, disabled, or sick individuals); Mass. Gen. Laws ch. 151 §§ 1-3; Minn. Stat. §§ 177.23 (11), 177.24, 177.25; N.J. Stat. § 34:11-56a4 (exempting part-time babysitters only); N.Y. Lab. L. § 651 (exempts live-in companions), 12 N.Y.C.R.R. § 142-2.2 (requires payment of state overtime rate to companions); 43 Penn. Stat. § 333.105 (a).



MWA exemption was based on a concern about the burdens of such requirements on individual householders, and that concern is simply inapplicable to agency employers, such as Bayada.

The actual experience in numerous states where laws already require third-party employers of home care workers to pay a minimum wage (in some cases, higher than the federal minimum) and overtime pay belies Bayada's unsupported predictions of "confusion" and doom for the agencies. Petition at 59; 83-86; Appendix at 21, 26-27. It simply cannot be the case that Bayada and other agencies operating in New Jersey, Colorado, Massachusetts, and other states can pay companions a minimum wage and premium pay for overtime, but will face financial ruin if forced to respect long-standing minimum wage standards in Pennsylvania. Bayada presented no evidence that these state law requirements have disrupted homecare care delivery or placed homecare outside the financial reach of any consumers.

### **CONCLUSION**

For the foregoing reasons, *amici* respectfully request that this Court uphold the Commonwealth Court's ruling supporting the Department's decades-long rule that home health care agencies cannot avail themselves of the private householder domestic services exemption under Pennsylvania's Minimum Wage Act.

Dated: January 7, 2009

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**CERTIFICATE OF SERVICE**

I, Joshua P. Rubinsky, hereby certify that I have this day served the foregoing *Amicus* Brief of AARP, the Pennsylvania AFL-CIO and Service Employees International Union in Support of the Respondent and Appellee Department of Labor & Industry in the manner indicated by Pa. R. App. Proc. 121, upon the following:

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Dated: January 7, 2009