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

JESSICA MARKHAM, VICTORIA MARKHAM, JESSE CHARLES, PENNSYLVANIA HOMECARE ASSOCIATION, UNITED CEREBRAL PALSY OF PENNSYLVANIA	:	No. 59 MAP 2015
	:	Appeal from the Order of the Commonwealth Court at No. 176 MD 2015 dated June 3, 2015.
	:	ARGUED: October 7, 2015
v.	:	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	:	No. 60 MAP 2015
	:	Appeal from the Order of the Commonwealth Court at No. 177 MD 2015 dated June 3, 2015.
v.	:	
	:	ARGUED: October 7, 2015
GOVERNOR THOMAS W. WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA AND	:	RESUBMITTED: January 20, 2016

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HUMAN SERVICES	:
	:
	:
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	:
	:

CONCURRING OPINION

JUSTICE DONOHUE **DECIDED: March 29, 2016**

I join in the Majority's decision to affirm the Commonwealth Court's decision with respect to the present application for intervention. I write separately only to note my disagreement with the Majority's inclusion in its analysis of this Court's prior decision in Fumo v. City of Philadelphia, 972 A.2d 487 (Pa. 2009). In particular, I disagree with the Majority's assertion that Fumo represents "the clearest articulation of the distinction between a matter implicating a legislator's direct and substantial interest in the voting process or power to act and one that does not." *Slip op.* at 14. Fumo has precedential value[1] only in the rare instance in which there has been an alleged executive usurpation

[1] Fumo represents an atypical instance in which this Court acted in contravention of our general proscription against issuing academic or advisory opinions. *See, e.g.*, Philadelphia Entm't & Dev. Partners, L.P. v. City of Philadelphia, 937 A.2d 385, 392 (Pa. 2007). In Fumo, state legislators sought to intervene to vindicate their alleged exclusive power under the 1978 Dam Safety Act, 32 P.S. § 693.1-693.27, to grant a license for the use of submerged lands under the Delaware River to construct a casino. Fumo, 972 A.2d at 496. In a companion case decided almost a year prior to Fumo, however, this Court had already determined that the Dam Safety Act did **not** grant the General Assembly any such exclusive authority, and that instead, the City of Philadelphia had properly issued a license for the construction of the casino pursuant to legislative (continued…)

of a right or power the General Assembly has, by legislative act, granted solely to itself. Fumo, 972 A.2d at 502. No such unusual circumstance exists in this case.

In my view, the Commonwealth Court's description in Wilt v. Beal, 363 A.2d 876 (Pa. Cmwlth. 1976), of the limits of legislative standing to intervene in response to executive action constitutes the "clearest articulation" of the issue. "[L]egislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with. Once, however, votes which they are entitled to make have been cast and duly counted, their interest as legislators ceases." Id. at 881. In the present case, the General Assembly passed the Pennsylvania Labor Relations Act, 43 P.S. §§ 211.1-211.13, and the Public Employe Relations Act, 43 P.S. §§ 1101.101-1101.2301. At the time of passage, the interests of the members of General Assembly (including those of the proposed intervenors here), as legislators, ceased. For this reason, the Commonwealth Court did not err in denying Appellants' Application to Intervene.

(…continued)
authority contained in prior (1907) legislation (53 P.S. § 14199, also known as "Act 321"). HSP Gaming, L.P. v. City of Philadelphia, 954 A.2d 1156, 1182 (Pa. 2008). Accordingly, at the time we decided Fumo, this Court had already ruled that the state legislators had no exclusive licensing rights, which were the sole basis for their claimed right to intervene.