[J-22A-2016 and J-22B-2016] [MO: Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE 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 DOUGHERTY **DECIDED: March 29, 2016**

I join the Majority Opinion in full, writing separately in supplementation out of respect for the Senate Majority Caucus, and to address additional points on the prudential doctrine of standing to sue.

I candidly acknowledge the underlying political pressures attending this matter. A Democratic Governor takes an action and a finite but important group of Republican legislators, representing the Senate Majority Caucus, currently seeks redress in the courts premised upon status as legislators. Of course, a future challenge could arise where the political affiliations are reversed. Legislative challenges to executive actions obviously exist along a continuum. A bipartisan challenge brought by the General Assembly as a whole premised upon a claim of an improper inroad into legislative prerogative, for example, presumably would present a stronger case for recognizing

legislative standing than a claim forwarded by a single legislator (regardless of party affiliation).[1] This case rests somewhere in between those extremes.

Notably, the parties are in agreement on the governing law – the relevant principles and instructive application are set forth in *Fumo v. City of Philadelphia*, 972 A.2d 487, 497-502 (Pa 2009) – with disagreement focusing on application of those principles. The Senate Majority Caucus thus does not seek to revisit or adjust our established precedent; the Caucus seeks relief under *Fumo*. *See* Brief for Appellants (No. 59 MAP 2015) at 18 ("Here, the Majority Caucus has standing for the exact same reasons and the exact same rationale present in *Fumo*."). The Majority Opinion persuasively explains why *Fumo* and related precedent counsel a conclusion the Senate Majority Caucus lacks standing in this instance; in my view, the Majority Opinion strikes a proper balance.[2]

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[1] Like the Majority Opinion, I recognize legislative standing does not involve a distinct or separate analytical approach to standing, albeit the reality is cases considering the standing of legislators in prior disputes obviously offer the most direct guidance.

[2] I am in respectful disagreement with Justice Donohue concerning *Fumo*'s precedential value. *See* Concurring Opinion slip op. at 2-3 & n.1 (Donohue, J.). The parties do not suggest any limitation on the precedent. Moreover, justiciability questions (including political question limitations, standing, ripeness, and mootness) are threshold matters generally to be resolved before proceeding to the merits. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 916-17 (Pa. 2013); *Council 13, AFSCME, AFL–CIO ex rel. Fillman v. Rendell,* 986 A.2d 63, 74 n.10 (Pa. 2009). The *Fumo* Court's decision to address standing first -- which was explained by the Court, *see* 972 A.2d at 491 n.1 – appears to have followed this practice.

Moreover, there is no indication in *Fumo* that a question of mootness was raised in light of the decision in *HSP Gaming L.P. v. City of Phila.*, 954 A.2d 1156 (Pa. 2008), the Court was not required to raise the concern *sua sponte,* see *Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 718-19 (Pa. 2009), and there are countervailing reasons that support reaching even moot questions. *See id.* (discussing considerations). Finally, *Fumo* was unanimous with respect to the principles governing legislative standing and their proper application. Under the circumstances, the decision remains fully viable precedent.

Given the prudential basis for standing doctrine, *see, e.g., Fumo*, 972 A.2d at 496, and being cognizant of the deference due members of a coordinate branch, if there were a developed and persuasive challenge to the existing approach to standing involving legislators, the Court no doubt would be open to its consideration. Indeed, it appears the Court has adopted a practical and flexible approach to the concept of standing generally. *See generally Johnson v. American Standard*, 8 A.3d 318, 331-34 (Pa. 2010). This is so much the case that a Pennsylvania treatise has opined:

> In light of the "requirement of standing under Pennsylvania law [being] prudential in nature," Pennsylvania decisional law is somewhat unclear in distinguishing a plaintiff who has been adversely affected and a plaintiff who is merely asserting interests common to all citizens in procuring obedience to the law. The result is a very flexible, if not amorphous, concept of standing to sue.

G. Ronald Darlington et al., 20 West Pennsylvania Appellate Practice Series, §501:15, at 803 (2015-16 ed.) (footnotes omitted). The authors illustrate this flexibility by noting various theories employed to recognize standing. Notably, the *Fumo* decision itself reflects a nuanced approach specific to legislative standing.

Finally, as the Majority Opinion notes, it is significant this intervention dispute does not pose a situation where the lawfulness of the Governor's Executive Order will proceed unchallenged, and the Senate Majority Caucus was permitted to participate as *amicus curiae*. *See* Majority Opinion, slip op. at 20.

Under the circumstances, there is some force to this observation by appellees:

> The Senators' argument is particularly precarious, as there are 253 members of the General Assembly, each with his or her own political agendas and constituencies to protect. In this very case, Executive Order 2015-05 was defended by the Democratic caucuses in an amici curiae brief. That is the proper vehicle to show support for a position, not to become a party.

Brief for Appellees (No. 59 MAP 2015) at 25 (footnote omitted).