SUPREME COURT OF THE STATE OF NEW JERSEY

MARK LEWIS and DENNIS WINSLOW; SAUNDRA HEATH and CLARITA ALICIA TOBY; CRAIG HUTCHISON and CHRIS LODEWYKS; MAUREEN KILIAN and CINDY MENEGHIN; SARAH and SUYIN LAEL; MARILYN MANEELY and DIANE MARINI; and KAREN and MARCYE NICHOLSON-MCFADDEN,

Plaintiffs-Appellants,

v.

GWENDOLYN L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services; CLIFTON R. LACY, in his official capacity as the Commissioner of the New Jersey Department of Health and Senior Services; and JOSEPH KOMOSINSKI, in his official capacity as Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services,

Defendants-Respondents.

Docket No. 58,389

Appellate Division Docket No. A-2244-03T5

Sat Below:
Hon. Skillman, P.J.A.D., Collester, J.A.D., and Parrillo, J.A.D.

BRIEF IN OPPOSITION TO MOTION TO INTERVENE

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs-Appellants are six couples living in New Jersey who are in committed, same-sex relationships. On June 26, 2002, they initiated the instant matter by filing a Complaint in which they claimed that the State, by refusing them access to marriage, denied them equal treatment under law. After the trial court granted the State's motion for summary judgment, the Plaintiffs-Appellants pursued an appeal in the Appellate Division, which affirmed. *See Lewis v. Harris*, 378 *N.J. Super.* 168 (App. Div. 2005). Plaintiffs-Appellants then appealed to this Court, which issued a decision on October 25, 2006. *See Lewis v. Harris*, 188 *N.J.* 415 (2006).

The Court ruled that the equal protection guarantee of Article I, Paragraph I of the New Jersey Constitution requires that committed, same-sex couples be afforded the rights and benefits married couples enjoy. *Id.* at 423, 458. "[S]o that plaintiffs can exercise their full constitutional rights," the Court ordered that "the Legislature must either amend the marriage statutes or enact an appropriate statutory structure" within 180 days of its decision. *Id.* at 463.

The Legislature responded by enacting the Civil Union Act, *L.* 2006, *c.* 103 ("the Act") on December 12, 2006, with an effective date of February 19, 2007. The Act provided for civil

unions, a novel legal status through which same-sex couples purportedly were to be provided "all the rights and benefits that married heterosexual couples enjoy," *N.J.S.A.* 37:1-28(d). The Act also established the Civil Union Review Commission ("CURC"), in order to evaluate the effectiveness of the Act and make recommendations to the Governor and Legislature regarding civil unions. *N.J.S.A.* 37:1-36.[1]

The CURC held numerous hearings on the effectiveness of the Act in providing equality to same-sex couples, and ultimately issued a report unanimously concluding that civil unions do not provide for equal rights and benefits as required by Article I, Paragraph I of the New Jersey Constitution, and this Court's decision in *Lewis*. Thus, the CURC recommended that the Legislature allow same-sex couples to marry. In considering a bill to this effect, Senate Bill No. 1967, the Senate heard testimony from many individuals who pointed to the underlying facts that formed the basis of the CURC's conclusions. Notwithstanding the CURC report and this testimony, the Senate refused to enact the bill.

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[1] The Act charged the CURC to "(1) evaluate the implementation, operation and effectiveness of the act; (2) collect information about the act's effectiveness from members of the public, State agencies and private and public sector businesses and organizations; (3) determine whether additional protections are needed; (4) collect information about the recognition and treatment of civil unions by other states . . . ; (5) evaluate the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage[.]" *N.J.S.A.* 37:1-36(c).

As a result, on March 18, 2010, Plaintiffs-Appellants filed a Motion in Aid of Litigants' Rights in this Court. Pursuant to *R.* 1:10-3, Plaintiffs-Appellants seek to compel compliance with this Court's earlier constitutional ruling. The Attorney General responded on May 24, 2010, opposing the Plaintiffs-Appellants' application for relief. On May 26, 2010, Plaintiffs-Appellants sought leave from this Court to file supplemental papers in reply by June 23, 2010.

On June 1, 2010, Movant the New Jersey Family Policy Council ("NJFPC") filed a Motion to Intervene as a Party Defendant in this case. NJFPC is a non-profit organization whose self-described mission is "to preserve marriage as a key social institution for the benefit of children and society."[2] Br. at 2. Neither the Brief nor the Certification of the President of NJFPC filed in support of its application discloses that NJFPC previously sought to intervene as a party in this litigation and was denied the right to do so; instead, the Superior Court granted NJFPC leave to participate as *amicus curiae* under *R.* 1:13-9, *see Lewis v. Harris*, 2003 WL 23191114 *1, *N.J. Super. L.*, Nov. 5, 2003, and NJFPC filed briefs in this

[2] NJFPC's website states, "Our mission is to intervene and respond to the breakdown that the traditional family, the cornerstone of a virtuous society, is experiencing. In light of the decline in moral standards, we are energized by a strong desire and dedication to pursue justice and righteousness. *See* http://www.njfpc.org/html/about.asp.

capacity in the Appellate Division on September 21, 2004, and in this Court on December 20, 2005.

ARGUMENT

The application of Movant NJFPC to intervene in this litigation should again be denied. Movant has no greater purported interest in this litigation since the trial court originally denied intervention in this case, and the issue in the present motion – compliance with the Court's judgment – is far narrower than that presented when Movant previously sought intervention. Even if there were not a prior determination of the issue, NJFPC does not have the kind of "interest" in the outcome of the litigation that is necessary to justify intervention. Its desire to advance policy arguments in support of a particular social outcome is not a cognizable basis for intervention and will neither be impaired nor impeded by the resolution of Plaintiffs-Appellants' Motion. Moreover, the policy arguments that Movants seek to interject are not relevant to the issues currently before the Court. The Plaintiffs-Appellants do not seek to reopen the merits of the Court's decision. Rather, the Plaintiffs-Appellants seek, through a Motion in Aid of Litigants' Rights, to enforce the Court's order in *Lewis* that the State must afford same-sex couples the equality mandated by the New Jersey Constitution. Thus, the Court's decision will be limited solely to the issue of whether

the State's refusal to allow same-sex couples to marry – notwithstanding the evidence that civil unions fail to provide equality – contravenes the relief that the Court previously granted. The policy arguments of Movant are not germane to this limited issue. In addition, the participation of Movant is not necessary to challenge the findings of the CURC. The Attorney General has shown in her response that she is more than willing to contest the legal and factual bases of Plaintiffs-Appellants' motion. If further factual development is necessary in the Court's determination, it may, as Plaintiffs-Appellants have previously argued, appoint a Special Master.

I. THE LAW OF THE CASE DICTATES THAT MOVANT MAY NOT INTERVENE

As stated, NJFPC earlier sought to intervene in this action. NJFPC failed to convince the trial court that it qualified for either intervention as of right or by permission of the court. *See Lewis v. Harris*, 2003 WL 23191114 *1, *N.J. Super. L.*, Nov. 5, 2003. The "law of the case" doctrine "operates to prevent litigation of a previously resolved issue." *In re Estate of Stockdale*, 196 *N.J.* 275, 311 (2008). This doctrine is "based on the sound policy that 'when an issue is once litigated and decided during the course of a case, that decision should be the end of the matter.'" *Feldman v. Lederle Labs.*, 125 *N.J.* 117, 132 (1991) (quoting *State v. Hale*, 127 *N.J. Super.* 407, 410 (App. Div. 1974)); *see also id.*, 127 *N.J. Super.*

at 410 ("Where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit.").

The "law of the case doctrine" is appropriately applied to the decision of the trial court denying Movant's earlier application for intervention. *See CFG Health Systems, LLC v. County of Essex*, 411 *N.J. Super.* 378 (App. Div. 2010) (applying doctrine to foreclose relitigation of motion to intervene). Plaintiffs-Appellants are currently pursuing a Motion in Aid of Litigants Rights in the very same case in which Movant earlier sought to intervene. Already found unable to establish an interest sufficient to warrant intervention under either *R.* 4:33-1 or *R.* 4:33-2, Movant does not now assert any changed circumstance that might conceivably give rise to a legally cognizable interest. Moreover, Movant does not advance any argument justifying a disregard of the prudential "law of the case" doctrine; instead, Movant fails even to disclose – let alone to address – its earlier, unsuccessful effort. The Court should find the instant Motion precluded.

II. MOVANT IS NOT ENTITLED TO INTERVENE IN THIS MATTER UNDER *RULE* 4:33-1.

In the event that the Court finds that Movant is not precluded under the law of the case doctrine from seeking intervention a second time, it should nevertheless deny the

application, as Movant does not satisfy the requirements for intervention. Under *R.* 4:33-1, intervention is available only where "the applicant claims an interest relating to the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest." *R.* 4:33-1. Intervention under this rule is not warranted where "the applicant's interest is adequately represented by existing parties." *Id.* Movant must provide "clear proof of justification" in order to intervene, *State v. Lanza*, 39 *N.J.* 595, 600 (1963), and must satisfy each requirement of the rule, *Hanover v. Morristown*, 118 *N.J. Super.* 136, 140 (Ch. Div.), *aff'd* 121 *N.J. Super.* 536 (App. Div. 1972).

A. Movant NJFPC Has Not Articulated an "Interest" of the Type Sufficient to Establish Entitlement to Intervention.

1. The Policy Arguments Set Forth by Movant Are Not at Issue in this Litigation.

NJFPC asserts that it is entitled to party status in this matter because it is "richly knowledgeable about the connection between marriage and the social order" and is "an educational source for legislative facts with respect to marriage policy." Br. at 6. NJFPC promises to "advance compelling arguments in support of the marital definition, which the New Jersey Attorney General's opposition brief did not address." Br. at 2.

It is true that the Attorney General's brief did not address itself to policy arguments regarding marriage; this is because those arguments are not relevant to this litigation. This Court has already determined that "the State has failed to show a public need for disparate treatment" of same-sex couples, 188 *N.J.* at 458, and that "under the equal protection guarantee of Article I, Paragraph I of the New Jersey constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples," *id.* The issue currently before the Court is whether the Civil Union Act satisfies this constitutional requirement. To the extent that it is necessary to consider facts in order to answer the question of whether civil unions provide "the same rights and benefits" of marriage, the Court may refer to the existing factual record or order further fact-finding.

In either case, facts of the type offered by Movant – presumably those contained in its Brief in Opposition to Plaintiffs-Appellants' Motion in Aid of Litigants' Rights – are beyond the scope of this action and entirely irrelevant. For example, that "New Jersey has a long legal history of reflecting that a key rationale for marriage as a legal status is responsible procreation," Br. at 7, may have been relevant to the resolution of Plaintiffs-Appellants' claim to a fundamental right to marry, which this Court has already decided, *see* 188

N.J. at 441, and which Plaintiffs-Appellants do not seek to "reopen," but has no bearing on whether civil unions provide equal rights and benefits. Similarly, Movant suggests that allowing same-sex couples to marry will sever "the connection [of marriage] to procreation and paternity," Br. at 6, and create a "dystopian" reality, Br. at 24 (citing Aldous Huxley, *Brave New World*). The proffer of these purported "legislative facts" not only ignores the recognition in *Lewis* that state law and policy has and continues to protect and uphold the ability of same-sex couples to parent, *see* 188 *N.J.* at 432, but misunderstands the nature of the question before the Court: whether the Legislature has complied with the mandate of *Lewis*.

Notably, where ideology-based organizations similar to NJFPC have sought to intervene in cases challenging deprivation of same-sex couples' constitutional rights, courts have routinely rejected those applications. For example, in Connecticut, a non-profit policy group with a stated mission of developing a "restored consensus" that marriage should consist only of heterosexual partners sought to intervene in a constitutional challenge brought by same-sex couples to that state's marriage laws. *See Kerrigan v. Connecticut*, 2005 WL 834296 *1 (Conn. Super. March 3, 2005). The court denied the motion, finding that the group "ha[d] no interest to assert that is any different from any member of the public at large who may

have an opinion about important political and social issues of the day. The fact that [it] may be more articulate, vocal, passionate or organized in expressing its view does not confer upon it a legal interest of any kind." *Id.* at *3;[3] *see also Hernandez v. Robles*, 2004 WL 2334289 *2 (N.Y. Sup. Aug. 20, 2004) (denying intervention to New York Family Policy Council because it did not make "any showing that their interest in this action differs from that of any other person in the state who may favor or oppose same-sex marriage"); *Wilson v. Ake*, No. 8:04-cv-1680 (M.D. Fl. Aug. 12, 2004) (declining to grant intervention in constitutional challenge to Defense of Marriage Act where applicant group only articulated strong moral and religious views in opposition to allowing same-sex couples to marry).

In *Alons v. Iowa Dist. Court for Woodbury County*, 698 *N.W.*2d 858 (Iowa 2005), a group of legislators sought to appeal a trial court decision dissolving the Vermont civil union of two Iowa women. The legislators argued that, although they were not parties to the dissolution action, their interest "in seeing

[3] The court also denied the group's application for permissive intervention, because "[w]ithout some interest different from that of any number of individuals or organizations with an opinion on the subject of same-sex marriage, the grant of intervention . . . would open the doors to intervention by any number of other proposed intervenors . . . creating a vast and unwieldy lawsuit that would ill-serve the real interests of the plaintiffs and defendants already in the case." 2005 WL 834296 *4.

that the law passed to preserve traditional marriage is properly enforced" gave them standing to seek review of the order of dissolution *Id.* at 872-73. Their appeal was denied for lack of standing, as the Supreme Court of Iowa found that the legislators had failed to show "a legally recognized or personal stake in the underlying case." *Id.* at 873-74. Though "many people have strong opinions about marriage, as they do about divorce, child custody, zoning, and many other issues, "[s]imply having an opinion" is, the court held, not enough. *Id.* (citation omitted).

Like other courts to consider similar motions, this Court should deny Movant's application for intervention. The only basis for intervention advanced by NJFPC fails. Its policy arguments are not relevant to the issue before the Court, and the desire to make them does not entitle NJFPC to intervene.

2. Movant Has No Legally Cognizable Interest in this Litigation.

Moreover, NJFPC cannot possibly articulate the kind of interest required under *R.* 4:33-1 to support a right to intervene. Although NJFPC clearly has an opinion regarding the outcome of the case, and is in that sense *interested*, this is not the same as possessing *an interest* sufficient to satisfy the requirements of *R.* 4:33-1.

As the United States Court of Appeals for the Third Circuit has made clear, an applicant for intervention must demonstrate that its interest in the litigation is "a legal interest as distinguished from interests of a general and indefinite character." *Harris v. Pernsky*, 820 *F.*2d 592, 601 (3d Cir. 1987); *see also R.* 4:33-1, *Cmt. 1* (stating that requirements for intervention are same as those under parallel federal rule, *Fed. R. Civ. P.* 26(a)). In this context, an interest is "a legal share in something; all or part of a legal or equitable claim to or right in property." Black's Law Dictionary (8th ed. 2004). In evaluating the sufficiency of an interest for the purposes of intervention, "the polestar" is "whether the proposed intervenor's interest is direct or remote." *Kleissler v. U.S. Forest Service*, 157 *F.*3d 964, 972 (3d Cir. 1998). The interest must be "specific to them," "capable of definition," and "may not be remote or attenuated." *Id.* Applying this definition of "interest," New Jersey courts have found that a direct pecuniary interest supports intervention, *see, e.g., Cold Indian Springs Corp. v. Township of Ocean*, 154 *N.J. Super.* 75, 88 (App. Div. 1977), as does an interest linked to real property, *see, e.g., Meehan v. K.D. Partners, L.P.*, 317 *N.J. Super.* 563, 568 (App. Div. 1998).

Here, NJFPC's interest is not direct but attenuated and ill-defined. For example, Movant supports its motion by stating

that it has written a report that "directly embraces the subject matter of this action." Br. at 6. But, having knowledge or information regarding the subject matter of a dispute does not, however, give rise to an interest sufficient to intervene. *See Donaldson v. United States*, 400 *U.S.* 517, 531 (1971) (interpreting parallel federal rule as requiring a "significantly protectable" interest).

Movant cites *American Civil Liberties Union of New Jersey v. County of Hudson*, 352 *N.J. Super.* 44 (App. Div. 2002), to support its argument that having "unique information" about a subject matter entitles one to intervention. There, the United States was allowed to intervene because its interest in protecting national security that could be jeopardized by the disclosure of certain information sought in that case made it "the real party in interest," *id.*, and its interest in protecting national security was singular and significant. *Id.* at 68. Movant, of course, has no comparable interest here.

Similarly, Movant misstates the facts and the import of *Atlantic Employers Insurance Company v. Tots & Toddlers Pre-School Day Care Center, Inc.*, 239 *N.J. Super.* 276 (App. Div. 1990). There, parents of children allegedly abused at a day care center were allowed to intervene in an action brought by an insurance company seeking a declaratory judgment that it was not

required to indemnify the day care center against liability claims. *Id.* at 278. The day care center, which had been separately sued by the parents, did not defend the declaratory judgment action. *Id.* The parents were appropriate intervenors because "a ruling in favor of [the insurance company] probably would render any judgment in favor of [them] in the other litigation uncollectible." *Id.* at 280. The sufficiency of their interest was directly related to their financial stake in the determination and not, as Movant suggests, due to the fact that they were the "source of legislative facts" or that the case touched on issues of "social policy." Br. at 7.

By citing *Meehan v. K.D. Partners, L.P.*, 317 *N.J. Super.* 563 (App. Div. 1998), Movant again suggests that the perceived social importance of the subject matter of litigation, and the strength of conviction regarding that subject matter, is the appropriate focus of analysis. Br. at 7 ("If a property owner has a sufficient interest in the development of adjacent land, then the Council's matchless grasp of the nexus between New Jersey law and the well-being of children born to heterosexual couples gives them a sufficient interest" to intervene.) However, this is not the applicable legal standard; rather, in order to be entitled to intervene, Movant must establish an interest in the nature of a right, entitlement, or claim that is specific to it, and which is directly implicated in the

litigation. Movant has established no such legally cognizable interest, and is therefore not entitled to intervene.

B. Resolution of this Litigation Will Not Impair Any Interest of Movant.

Likewise, NJFPC cannot show, as it must in order to intervene under *R.* 4:33-1, that this litigation will "impair or impede" its ability "to protect" any legally cognizable interest.

First, NJFPC describes its purpose as "promoting the study of family structures and particularly of marriage as the social and legal mechanism that ensures responsible procreation." Br. at 1. Plaintiffs-Appellants do not seek to enjoin any of these activities; nor would a determination by this Court that the Legislature has not complied with its constitutional mandate have any bearing on NJFPC's ability to pursue its goal of promoting and advocating a particular family structure. The activities of NJFPC are undoubtedly protected by the First Amendment, and are in no way threatened by this litigation. *Cf. Brody v. Spang*, 957 *F.*2d 1109 (3d Cir. 1992) (granting intervention to students where resolution of suit brought against school district allowing prayer at graduation ceremony might affect First Amendment rights of intervenors).

NJFPC suggests that it meets this requirement for intervention because unless it is allowed to participate as a

party, the Court "will not consider all conceivable rationales which could justify the marriage and civil union scheme." Br. at 9. As stated earlier, these justifications are not germane to the present litigation, but, in any event, it is difficult to see how this would have "a direct and immediate impact" on Movant, as it claims. Br. at 9. No "tangible threat to the applicant's legal interest" is made in this case. *Brody*, 957 *F.*2d at 1123.

Second, the inability of Movant to articulate any interest that may be directly impaired by resolution of Plaintiffs-Appellants' Motion further illustrates that it fundamentally lacks a legally cognizable interest in this matter. In this way, NJFPC is different from the intervenors in the cases it cites. The United States could intervene in *American Civil Liberties Union v. County of Hudson* because the disclosure of names sought in the lawsuit would "impair the government's ability to investigate and disrupt terrorist networks at home and overseas." 352 *N.J. Super.* at 68. The parents in *Atlantic Insurance* were entitled to intervene because they stood to lose the ability to collect on their collateral judgment should the insurance company prevail in its declaratory judgment action. 239 *N.J. Super.* at 280. The property owner in *Meehan* was entitled to intervene because "he contends [development] will diminish his property values and will lessen the quality of

enjoyment of light, air, and quiet." 317 *N.J. Super.* at 571. Here, NJFPC can only say that it will be harmed if the Court rules on this case without considering irrelevant policy arguments, and that a potential outcome of this litigation will not be in keeping with its philosophical beliefs. That is simply not enough to warrant intervention. *See Kerrigan*, 2005 WL 834296 at *3 (observing that having "articulate, vocal, [or] passionate" views on political or social issues "does not confer . . . a legal interest of any kind"); *cf. Baker v. Carr*, 369 *U.S.* 186, 204 (stating that a personal, ideological interest alone is not sufficient to give rise to constitutional standing).

C. The Movants Have Not Established that the Attorney General Will Not Adequately Defend the Lawsuit.

Test for intervention under *R.* 4:33-1 requires applicants to establish that the current parties do not adequately represent their interests; as set forth above, NJFPC has no such interest that merits representation in this matter.[4] However, NJFPC asserts that its involvement as a party is nonetheless required because, without its participation, the

[4] Movant asserts that "the Attorney General has no interest or duty to represent the Council's specific interest to preserve marriage as a key social institution for the benefit of binding children to both of their biological parents." Br. at 13. This statement is accurate. However, it only serves to further establish that Movant's application to intervene is inappropriate, as these "specific interests" have no place in the current litigation.

Court will not be able to adequately assess the factual record compiled by the CURC. This is so because, according to NJFPC, the Attorney General "cannot make the same arguments about the CURC" as Movant because "the Attorney General must defend the actions of the individuals" involved in the CURC. Br. at 14; *see also* Cert. of Len Deo at ¶ 8 ("[T]he Attorney General cannot contradict the CURC's Final Report because it was staffed by State Officials").

This argument is wrong. First, it is not the case that the Attorney General has endorsed wholesale the findings of the CURC. In its opposition papers, the Attorney General makes clear its position that the conclusions of the CURC are not dispositive because "[t]he Legislature did not charge the Commission with evaluating compliance with this Court's decision in *Lewis*," Def. Br. at 10, and "did not charge or request that the Commission weigh in on such controversial social questions," Def. Br. at 13. To the extent that the Attorney General does not challenge certain aspects of the CURC's findings, this is because it evidently considers them insufficient to establish violations of equal protection. *See* Def. Br. at 27 ("[A]ppellants' claimed violation of equal protection fatally lacks a colorable claim of state action.") It is not, as suggested by NJFPC, the result of a conflict of interest or an unwillingness to challenge the validity of the CURC's findings.

Second, the Court has before it the entire record of the CURC proceedings. *See* Pl. Exs. 13-26. This record contains ample information from which the Court may assess the conclusions reached by the CURC in its Reports. In the event that the Court finds the record inadequate, it may appoint a special master for further factual development, as Plaintiffs-Appellants contend would be an appropriate exercise of the Court's authority.

Finally, the suggestion that the Attorney General somehow labors subject to a conflict of interest because the CURC was composed partly of individuals holding various governmental offices is wrong. In addition to being statutorily charged by *N.J.S.A.* 52:17A-4(c) with defending the laws of New Jersey from constitutional attack[5] – making the Attorney General the appropriate party to articulate the State's position on the policy issues here implicated, should they be deemed relevant – the Attorney General is also charged with prosecuting all

[5] New Jersey law clearly mandates that the Attorney General "shall exclusively attend to and control all litigation and controversies to which the State is a party or in which its rights and interests are involved. N.J.S.A. 52:17A-4(c); *see Gormley v. Lan*, 88 *N.J.* 26, 43 (1981); *see also Woulfe v. Associated Realties Corp.*, 223 A.2d 399 (Ch. Div. 1942) (in litigation concerning public rights, the general public should be represented by the Attorney General); *accord Kleissler*, 157 *F.*3d at 972 (government officials charged with defending a law are presumed adequate for the task).

violations of state law, including by public officials. *See* N.J.S.A. 52:17A-4(h). To this end, the Attorney General has identified as a "priority area" malfeasance by public officials. *See* Press Release, Dec. 29, 2009 (citing increase in corruption prosecutions).[6] The Attorney General has, then, not hesitated to attack through prosecution, and certainly would not hesitate to question, the actions of public officials should trial be appropriate. No conflict exists here.

Thus, the Movant has not established that the Attorney General will not adequately represent its interest in this litigation. This is so because Movant has no legally cognizable interest, and because in this case, the Attorney General is the only appropriate party represent the State with respect to whether it has complied with the Court's order that Plaintiffs and other same-sex couples be provided equal rights and benefits.

III. THE COURT SHOULD NOT GRANT PERMISSIVE INTERVENTION TO MOVANT UNDER *RULE* 4:33-2.

Nor should Movant NJFPC be granted permissive intervention, as they have already sought and been denied party status under this rule. *See Supra Part I.* Moreover, a grant of permissive intervention is inappropriate, as it would confuse rather than

[6] *Available at* http://www.nj.gov/oag/newsreleases09/pr20091229b.html (accessed June 9, 2010).

focus the issues before the Court, and cause undue delay and prejudice to Plaintiffs-Appellants as they seek relief from unequal treatment in the form of a Motion in Aid of Litigants Rights.

Rule 4:33-2 provides for permissive intervention where an applicant asserts "a claim or defense" that "[has] a question of law or fact in common" with the main action. *R.* 4:33-2. Movant NJFPC's desire to express a policy view on the subject of marriage equality is not a "claim" or "defense." *See, e.g., Amchem Products, Inc. v. Windsor*, 521 *U.S.* 591, 623 (1997) (permissive intervention is justified only by "the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending lawsuit"); *see also KERRIGAN*, 2005 WL 834296 AT *4 (finding a strongly held opinion on subject matter insufficient to justify permissive intervention). Additionally, *R.* 4:33-2 directs that a court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *R.* 4:33-2. The risk of such delay and prejudice is especially high where, as here, the Movant seeks to enlarge the scope of the issues properly before the court by reference to disputed social science and theories regarding parenting by same-sex couples that are not only irrelevant to the limited issue in this action, but have been unequivocally rejected by the law and policy of this State. *See*

Lewis, 188 *N.J.* at 453 (observing that the State "recogniz[es] the right of same-sex couples to raise natural and adopted children and plac[es] foster children with those couples"); *id.* at 438 (recognizing that "discrimination against gays & lesbians is no longer acceptable in this State, as is evidenced by various laws and judicial decisions") (citing, *inter alia*, *In re Adoption of a Child by J.M.G.*, 267 *N.J. Super.* 622, 623 (Ch. Div. 1993) (determining that lesbian partner was entitled to adopt biological child of partner)). Interjection of these arguments would serve no purpose and distract from the resolution of the case, and weighs against permissive intervention. *See American Civil Liberties Union of New Jersey v. County of Hudson*, 352 *N.J. Super.* at 70 (identifying concern that grant of permissive intervention "may further complicate litigation which is already complex").

Should the Court feel that consideration of the case will be assisted by participation of NJFPC as *amicus curiae*, Plaintiffs-Appellants would not oppose their participation in that capacity. In that capacity, NJFPC may offer its arguments without injecting itself as a party seeking to redefine the sole issue now before the Court: whether the Legislature has complied with *Lewis*'s constitutional mandate that same-sex couples be afforded equal rights and benefits as married heterosexual couples. *Accord State v. Nance*, 148 *N.J.* 376, 385

(1997) (observing that *amicus* may not redefine the issues in a case as raised by the parties). Movant cites this Court's earlier statement that it would "not rely on policy justifications disavowed by the State, even though vigorously advanced by *amici curiae*," 188 *N.J.* at 432, n.7, as an indication that it must be granted party status or else its policy arguments will not be heeded. Plaintiffs-Appellants respectfully suggest that the problem lies not with the Court's earlier position, but with the Movant's policy arguments. It is not for private organizations to articulate state policy. That is the job of the State, as it is represented here by the Attorney General. That the State has not adopted the arguments of Movant does not mean that NJFPC is entitled to intervene. On the contrary, that the Movant seeks to stand in the shoes of the Attorney General and advance a policy specifically rejected by state law illustrates that intervention is not appropriate. *See Kleissler*, 157 *F.*3d at 972-73 (reasoning that when proposed intervenors claim in interest in the public welfare, the government is presumed to adequately represent this interest).

CONCLUSION

Movant NJFPC has no legally protected interest that would be impaired by resolution of this matter. They seek to interject policy arguments that are not relevant to the disposition of this case, are not theirs to make, and embody

views that were specifically disavowed by the State in this litigation and are contrary to state law and policy. The Attorney General is the appropriate party to defend Plaintiffs-Appellants' motion. Movant's second attempt to intervene should again be denied, as it is every bit as inappropriate at this late phase in the litigation as when it was first made. It would be inappropriate to grant NJFPC party status, as its inclusion would inject confusion into the proceedings, causing unnecessary delay and thereby prejudicing the Plaintiffs-Appellants as they seek resolution of their constitutional claim.

Respectfully submitted,

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MARK LEWIS, et al., Appellants, v. GWENDOLYN L. HARRIS, et al., Respondents.	**SUPREME COURT OF NEW JERSEY** **Docket No. 58,389** **Civil Action** Appeal From the Superior Court of New Jersey, Appellate Division Docket No. A2244-03T5 Sat Below: Hon. Skillman, P.J.A.D., Collester, J.A.D., and Parrillo, J.A.D.

CERTIFICATION OF SERVICE

I hereby certify under penalty of perjury that on this 11 day of June 2010, I served two true and correct copies of Plaintiff-Appellants' Brief in Opposition to Motion to Intervene, filed herewith, by electronic mail and federal express on counsel for all parties and movants as follows:

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