

3528296

**THE LESNIAK INSTITUTE FOR
AMERICAN LEADERSHIP and
RAYMOND J. LESNIAK,**

Plaintiffs-Appellants,

v.

**NEW JERSEY FISH & GAME
COUNCIL, NEW JERSEY
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
DIVISION OF FISH AND
WILDLIFE, GOVERNOR PHILIP D.
MURPHY, GOVERNOR OF NEW
JERSEY, and NEW JERSEY STATE
FEDERATION OF SPORTSMEN'S
CLUBS,**

Defendants-Respondents.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-001687-23 T4**

Civil Action

**On Appeal from the Final Order
Of the Superior Court, Law Division
Mercer County**

**Sat Below: Hon. Robert T. Lougy,
A.J.S.C.**

BRIEF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

This is a case of first impression in New Jersey. The New Jersey Fish & Game Council is the only policy making and regulatory body in the government of the State of New Jersey that is controlled by a single private organization. The majority of its members (6 out of 11) must be sportsmen recommended by the New Jersey State Federation of Sportsmen's Clubs thereby giving this private organization an ostensible public status to regulate hunting, trapping and conservation of game animals in New Jersey in violation of Articles III and IV of the New Jersey State Constitution. The statutes governing the composition of the Council and delegating regulatory authority to it also contravene the related private non-delegation doctrine.

PROCEDURAL HISTORY

Plaintiffs, The Lesniak Institute For American Leadership (“Institute”) and Raymond J. Lesniak, individually, instituted this action by Verified Complaint and Order to Show Cause on September 21, 2023. (Pa1) The trial court entered a Scheduling Order on September 22, 2023. (Pa14)

On October 4, 2023, the trial court per the Honorable Robert T. Lougy, A.J.S.C., denied the plaintiffs’ application for a preliminary injunction. (Pa50) Defendant New Jersey State Federation of Sportsmen’s Clubs (“NJSFSC”) filed an Answer on October 18, 2023. (Pa71) Prior to the deadline for the State defendants¹ to file an Answer to the Complaint, the defendants filed Motions to Dismiss the Complaint pursuant to R. 4:6-2(e), returnable December 1, 2023. (Pa80, 84) On November 21, 2023, the plaintiffs filed opposition to those motions, together with a Cross-Motion for Summary Judgment pursuant to R. 4:46-1 and 2. (Pa89) The hearing on the motions was adjourned to January 5, 2024 at the NJSFSC’s request. On January 10, 2024, the trial court entered an Order granting the motions to dismiss and denying the cross-motion for summary judgment. (Pa113) On February 8,

¹ The term “State defendants” includes the New Jersey Fish & Game Council, New Jersey Department of Environmental Protection, Division of Fish and Wildlife and Governor Philip D. Murphy.

2024, the plaintiffs filed a Notice of Appeal from said Order. An Amended Notice of Appeal was filed on February 15, 2024. (Pa133)²

STATEMENT OF FACTS

Plaintiff, Raymond J. Lesniak (“Lesniak”), is a former New Jersey State Senator and the President of Plaintiff, The Lesniak Institute For American Leadership (“Institute”), a non-profit organization, of which Senator Lesniak serves as President. (Pa93) The Institute focuses on advocacy of social justice, including conservation and animal welfare as its principal mission. *Id.* Lesniak testified in the public hearings in opposition to the adoption of the Comprehensive Black Bear Management Policy (“CBBMP”) by the New Jersey Fish & Game Council (“Council”) and the regulatory code and amendments at public hearings conducted by the Council. *Id.*

Defendant Council is an agency within the Division of Fish and Wildlife in the Defendant New Jersey Department of Environmental Protection (“DEP”). (Pa94) The Council “shall consist of eleven members, each of whom shall be chosen with due regard to his knowledge and interest in conservation in fish and

² Plaintiffs have included in a Supplemental Appendix to this Appellate Brief, two unreported opinions cited in their brief: (1) New Jersey Outdoor Alliance v. NJDEP, No. 0525-18T4, 2018 WL 6005064 (App. Div., Nov. 16, 2018), certif. den., 237 N.J. 191 (2019) (Pa145); and (2) In the Matter of Petition to Repeal Rules Permitting Black Bear Hunting, etc., No. A-0984-20, 2022 WL 2251251 (App. Div., June 22, 2022), certif. den. 253 N.J. 434 (2023) (Pa164). See R. 1:36-3.

game”. N.J.S.A. 13:1B-24. Three (3) of the members of the Council shall be farmers, recommended to the Governor for appointment to the Council by the Agricultural Convention held pursuant to statute; six (6) of such members shall be sportsmen, recommended to the Governor by the NJSFSC; one (1) of such members shall be the chairman of the committee established pursuant to the Endangered and Nongame Species Conservation Act (N.J.S.A. 23:2A-1, et seq.); and one (1) such member shall be a person knowledgeable in land use management and soil conservation. (Pa94)

The defendant, New Jersey Department of Environmental Protection (“DEP”), is a principal executive department in the Executive Branch of government. N.J.S.A. 13:1D-1. The Governor appoints the commissioner of the department with the advice and consent of the Senate and to serve at the pleasure of the Governor. N.J.S.A. 13:1B-2. The Commissioner’s role is to “coordinate and oversee the DEP’s environmental protection and conservation initiatives.” N.J.S.A. 13:1B-3. The Commissioner’s duties include the administration of the work of the department, the appointment and removal of officers and the exercise and discharge of functions, powers and duties of the department through divisions. N.J.S.A. 13:1B-3. While the Commissioner had the right to approve or disapprove of comprehensive policies for the protection of fish, birds and game animals that are formulated by the Council, the Commissioner does not have the authority to

formulate those comprehensive policies. That power rests with the Council.
N.J.S.A. 13:1B-28.

Defendant, Division of Fish and Wildlife, is under the immediate supervision of a director, who is appointed by the Council subject to the Governor's approval, and shall serve at the pleasure of the Council until a successor is appointed and qualified. N.J.S.A. 13:1B-27.

Defendant, Philip D. Murphy, is the Governor of the State of New Jersey. The Governor approves the members of the Council recommended by the NJSFSC and the Agricultural Convention and has the right to remove the Director of the Division of Fish and Wildlife appointed to that position by the Council. N.J.S.A. 13:1B-27. (Pa95)

The defendant, NJSFSC, is a private organization that through its authority to recommend NJSFSC's members has the effective majority control of the Council including the approval of policies and practices of the Council and the adoption of regulations governing hunting and trapping of game animals, as well as controlling decisions of the Director of the Fish and Wildlife which the Council appoints. (Pa94) The NJSFSC is an organization of individual sportsmen/women and sportsmen's clubs in New Jersey which describes itself as "a group of outdoor enthusiasts that maintain hunting, fishing and trapping are vital resources in natural conservation". The NJSFSC represents more than 150,000 hunters, trappers and

fishermen throughout the State with the support of local chapters at the County level. www.njsfsc.org (last visited 9/18/23). (Pa95)

Prior to 1948, the functions described below regarding the Council were the responsibility of the Legislature itself. United Hunters Assoc. of N.J. v. Bontempo, 53 N.J. Super. 181, 189-90 (App. Div. 1958). Thereafter, the Legislature delegated to the Council, subject to the approval of the Commissioner, the right “[to] formulate comprehensive policies for the protection and propagation of fish, birds and game animals...”, N.J.S.A. 13:1B-28, and to “[e]stablish, extend, shorten or abolish open seasons and closed seasons’ and ‘[p]roscribe the manner and means of pursuing, taking or killing any species or variety.” N.J.S.A. 13:1B-32(a), (b). (Pa95-96)

The Legislature also authorized the Council “to determine under what circumstances...game animals, and fur-bearing animals...may be pursued, taken, killed, or had in possession so as to maintain an adequate and proper supply thereof, and...adopt and from time to time amend and repeal such appropriate and reasonable regulations concerning the same...as it deems necessary to preserve, properly utilize and maintain the best relative number of any species or variety thereof, at the times, and the manner and to the extent hereinafter provided. The regulations so established shall be called the ‘State Fish and Game Code’ (“Code”).” N.J.S.A. 13:1B-30. The Code, N.J.A.C. 7:25-5 to 5.39, is codified in

Subchapter 5 of N.J.A.C. 7:25. (Pa96)

Although the DEP Commissioner must approve the Council's comprehensive policies before the Council authorizes a bear hunt, see U.S. Sportsman's Alliance Foundation v. New Jersey Department of Environmental Protection, 182 N.J. 461, 469-79 (2005), "...it is clear that despite the Commissioner's transcendent obligation to coordinate and oversee the DEP's environmental protection and conservation initiatives the Legislature granted substantial independence to the Fish & Game Council and withheld from the Commissioner overall supervisory power over the Council...". Id. at 474. (Pa96) The Council is authorized to promulgate the detailed regulations and policies governing the bear hunt, and it is the Council, not the DEP or the DEP Commissioner, that has the authority to "adopt and from time to time amend and repeal" the regulations that make up the Code. N.J.S.A. 13:1B-30.

In addition to formulating comprehensive policies for the protection and propagation of fish, birds, and game animals, N.J.S.A. 13:1B-28, the Council itself is responsible for promulgating the Code, N.J.S.A. 13:1B-30, the purpose of which is to ensure "an adequate and flexible system of protection, propagation, increase, control and conservation of freshwater fish, game birds, game animals and fur-bearing animals in this State, and for their use and development for public recreation and food supply." Id. Accordingly, the Council through the Code

regulates: “under what circumstances, when and what localities, by what means and what amounts and numbers such freshwater, game birds and game animals, and fur-bearing animals, or any of them may be pursued, taken, killed or had in possession so as to maintain an adequate and proper supply thereof.” Id.

With regard to game specifically, the Council may under N.J.S.A. 13:1B-31:

- a. Establish, extend, shorten or abolish open seasons and closed seasons;
- b. Establish, change or abolish bag limits and possession limits;
- c. Establish and change territorial limits for pursuit, taking or killing of any species or varieties;
- d. Prescribe the manner and means of pursuing, taking, or killing any species of variety; and
- e. Establish, change or abolish restrictions based on sex, maturity or other physical distinction.

On August 20, 2018, Governor Murphy signed Executive Order No. 34, which directed the Commissioner of DEP to take all necessary and appropriate actions to protect the black bear on lands controlled by the State including determining whether to close such lands to hunting black bears. (Pa97) The Commissioner of DEP also signed Administrative Order No. 2018-24 ordering and directing that all lands owned, managed or otherwise controlled by the DEP be

closed to hunting black bears. (Pa98) With the expiration of the CBBMP in 2021, no bear hunting took place in New Jersey between 2020 and the end of November 2022. (Pa98)

On November 15, 2022, based on its findings of an increase in the bear population in New Jersey and adverse human-bear interactions, the Council averred that there was an imminent peril necessitating the reinstatement of a bear hunting season for 2022 on an emergency basis. (Pa98) Thereupon, the Council enacted emergency regulations authorizing a bear hunt which included a new CBBMP and amendments to the Code that prohibited the hunting of cubs under 75 pounds and adults traveling with cubs under 75 pounds, and imposed certain restrictions on baiting. The Commissioner of DEP approved the CBBMP and stated his agreement with the Council's finding of imminent peril. (Pa98)

On November 15, 2022, Governor Murphy issued Executive Order No. 310, in which he concurred with the Council's statement of imminent peril, thereby rescinding Executive Order No. 34 (2018). (Pa98)

Despite litigation initiated by animal rights and conservation groups the "emergency bear hunt" went forward in December of 2022. (Pa98) The emergency bear hunt was subsequently declared by the Appellate Division of the Superior Court to be authorized by the Council and other State defendants under invalid emergency rule-making on November 6, 2023. Animal Protection League of New

Jersey, et al. v. New Jersey Fish and Game Council, et al., 477 N.J. Super. 145 (App. Div. 2023).

After authorizing the invalid emergency bear hunt, the Council proposed a new five-year management plan and amendments to the Code that would extend the regulations authorizing a bear hunt until 2028. The plan called for an archery hunt of black bears beginning on October 9, 2023 and six-day hunt beginning on December 4, 2023 during the annual six-day shotgun season. Both hunts would include the restrictions approved as part of the emergency bear hunt in December of 2022. See, 2023 Black Bear Management FAQs, published at dep.nj.gov (last visited 11/15/23). (Pa98-99) In addition, hunters were to be required by the Council to pay a permit fee in order to hunt bears within special zones set up within the northwestern part of the State where bear hunting was to be allowed. (Pa99)

Under the bear hunt approved by the Council, harvest rates equal the number of harvested bears that were tagged in the current calendar year within the bear management zones opened to hunting divided by the number of bears that were tagged in the current year that are available for harvest. As the bears are killed by hunters and brought to check stations, state biologists look to the special tags and collect data on the bear and from the hunters about where the animal was harvested. N.J.A.C. 7:25-5.6 published in New Jersey Register, Vol. 55, No. 19, October 2, 2023. With the known number of tags returned, biologists come up with a harvest

rate, i.e., the number of tagged bags killed out of the total tagged bears. That percentage then determines whether the hunt will be extended, if it is below a 20% rate, or terminated, if the rate gets to 30%. N.J.A.C. 7:25-5.6, current through amendments included in the New Jersey Register, Vol. 55, Issue No. 18, dated September 18, 2023. If the 30% threshold was reached before the second phase of the bear hunt on December 4, then the second phase would be cancelled. See, 2023 Black Bear Management FAQs published at dep.nj.gov (last visited 11/15/23). The Code promulgated by the Council requires that hunters obtain black bear hunting permits and comply with the black bear hunting requirements, including the payment of a permit fee in order to hunt bears within the special zones set up within the northwestern part of the State where bear hunting is to be allowed. N.J.A.C. 7:25-5.6 published in New Jersey Register, Vol. 55, No. 19, October 2, 2023.

On September 6, 2023, the Council unanimously approved the CBBMP and the amendments to the Code. On or about September 8, 2023, the DEP Commissioner signed off on the CBBMP. See 2023 Black Bear Management FAQs published at dep.nj.gov (last visited 11/15/23). The amendments to the Code and the CBBMP were published by the Office of Administrative Law in the New Jersey Register in Vol. 55, No. 19 on October 2, 2023. (Pa100)

Despite the authority resting in the Commissioner of the DEP and the Division of Fish and Wildlife, the Council has been delegated the primary

responsibility of protecting and developing an adequate supply of fish and game for recreation and commercial purposes through adoption of the Code, over which the Council has sole responsibility, and in the formulation of comprehensive policies. (Pa100) The Commissioner's authority regarding the CBBMP is limited to the approval or disapproval of the policy. The Commissioner cannot formulate the policy. The sole authority for formulating the comprehensive policy and promulgating the Code rests with the Council. N.J.S.A. 13:1B-28.

There is no evidence that the sportsmen members of the Council, who are recommended by the NJSFSC to the Governor, are not members of that organization, or that there is a residue of the sportsmen available for appointment who are not members of the NJSFSC, or any of the subsidiary county sportsmen's clubs comprising that organization. N.J.S.A. 13:1B-24.

The statutory policy of the Legislature is to advance the interests of private sportsmen's clubs "[i]n order to permit for the broadest possible representation of sportsmen in the making of recommendations for appointment of sportsmen to membership in the Council...". N.J.S.A. 13:1B-25. The purpose of this legislative policy is to ensure that every sportsmen's club of at least 25 members and duly organized and existing under the laws of New Jersey shall be eligible for membership in the appropriate County Federation of Sportsmen's Clubs; if a County Federation of Sportsmen's Clubs refuses to accept a Sportsmen's Club into

membership, the NJSFSC is given the statutory right to reverse that decision. N.J.S.A. 13:1B-25. The legislative purpose of the above statute is to ensure that members of the Council will be members of the NJSFSC to the greatest extent possible. N.J.S.A. 13:1B-25.

The NJSFSC has the opportunity accorded by the statute to advance the interests of its own members by recommending its own members for appointment to the Council. N.J.S.A. 13:1B-24. To plaintiffs' knowledge, the Governor has not removed a member of the Council recommended by the NJSFSC because the member manifests a pro-hunting bias. (Pa101)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT SHOULD HAVE ENTERED SUMMARY JUDGMENT FOR THE PLAINTIFFS AND DENIED THE MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM ON THE MOTION RECORD (Pa115, Pa120-121, Pa131).

In this case the trial court granted the defendants' motions to dismiss the Complaint for failure to state a claim with prejudice and denied the plaintiffs' Cross-Motion for Summary Judgment.

An appellate court undergoes a plenary standard of review of motions to dismiss pursuant to R. 4:6-2(e). Baskin v. P.C. Richards & Sons, 246 N.J. 157, 171 (2021). Similarly, since the propriety of the trial court's order on summary judgment is a legal, not a factual question, the review of a summary judgment order is *de novo*. Fernandez v. Nationwide Mut. Ins., 402 N.J. Super. 166, 170 (App. Div. 2008), aff'd o.b., 199 N.J. 591 (2009). The appellate court utilizes the same standard as the trial court on the same motion record. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Consequently, the same principles that apply to the trial court in deciding the Motions to Dismiss and the Cross-Motion for Summary Judgment apply to the Appellate Division.

It is the plaintiffs' position that this matter was ripe for the granting of the Cross-Motion for Summary Judgment because the issues presented by the plaintiffs are questions of law and rested upon undisputed material facts. The issues dealt with

the interpretation of statutes, administrative regulations and constitutional precepts relating to the distribution of powers among the three branches of government under Art. III, Par. 1 and the limits on delegation of legislative authority pursuant to Art. IV, Sec. 1, Par. 1 of the New Jersey Constitution (1947). Other facts, which were presented for background purposes and to put the questions of law in proper perspective did not foreclose the entry of summary judgment even if they were disputed, because there was an absence of any material factual issue as to those critical facts which are necessary to decide the questions of law. See, e.g., Rankin v. Sowinski, 119 N.J. Super. 393, 399-400 (App. Div. 1972). See also, R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-5 (1954); and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 539-40 (1995) (linking the summary judgment standard to R. 4:37-2(b)).

Summary judgment is also a judicially approved procedure for the issuance of a declaratory judgment, which interprets statutes, regulations and constitutional provisions affecting the rights and legal relations of the parties. R. 4:42-3; N.J.S.A. 2A:16-52, -53. See also, New Jersey Ass'n for Retarded Citizens, Inc. v. Dep't of Human Services, 89 N.J. 234, 241-42 (1982); Bell v. Stafford Tp., 110 N.J. 384, 390-91 (1988). Also, since the entry of a declaratory judgment does not preclude the issuance of other relief, R. 4:42-3, it would have been appropriate to issue a permanent injunction as part of the affirmative relief within the discretion of the

court; either division of the trial court could grant equitable relief such as an injunction based on a declaration of the rights of a plaintiff. Horizon Health Center v. Felicissimo, 135 N.J. 126, 137 (1994).

The primary distinction between a motion to dismiss the complaint for failure to state a claim under R. 4:6-2(e) and a motion for summary judgment under R. 4:46 is that the former is based on the pleadings themselves and that if any material outside the pleadings is relied on the motion is converted into a summary judgment motion. R. 4:6-2. See e.g., County of Warren v. State, 409 N.J. Super. 495, 504 (App. Div. 2009), certif. den., 201 N.J. 153 (2010). In contrast to summary judgment, the motion to dismiss for failure to state a claim requires that the complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned even from obscure statement, especially if further discovery is taken. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). Every reasonable inference is to be accorded the plaintiffs, and the motion is granted only on rare instances and ordinarily without prejudice. Id. See also, Baskins v. P.C. Richard & Son, 246 N.J. 157, 171 (2021). Furthermore, the complaint should not have been dismissed under the rule where a cause of action was suggested by the facts and a theory of actionability might have been articulated by amending the complaint. Printing Mart, 116 N.J. at 746; Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 324, 349 (App. Div.), certif. den., 188 N.J. 353 (2006). It is respectfully

submitted that the undisputed material facts supported the entry of summary judgment for the plaintiffs, whereas a search of the Complaint in depth and with liberality and the reasonable inferences drawn therefrom in the plaintiffs' favor did not support the dismissal of the Complaint by the trial court under the standard for motions to dismiss in R. 4:6-2(e).

POINT II

THE DELEGATION OF REGULATORY AUTHORITY TO AN ENTITY THAT IS EFFECTIVELY CONTROLLED BY A PRIVATE NON-GOVERNMENTAL INTEREST GROUP VIOLATES ART. III, PAR. 1 AND ART. IV, SEC. 1, PAR. 1 OF THE NEW JERSEY CONSTITUTION (Pa115, Pa123-127, Pa127-130).

Art. III, Par. 1 states in full that “the powers of the government shall be divided among the three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution”. In Brown v. Heymann, 62 N.J. 1, 9 (1972), the Court held that “there is no indication that our State Constitution was intended, with respect to the delegation of legislative power, to depart from the basic concept of distribution of powers of government embodied in the Federal Constitution....”. So, it is appropriate to look to the private non-delegation doctrine under the federal cases (as hereinafter discussed) in order to determine whether the delegation of regulatory authority to the Council violates the New Jersey Constitution. The doctrine of separation of powers is intended to be applied so as to maintain the balance between

the three branches of government, to safeguard their respective independence and integrity and to preclude the concentration of unbridled power in any one branch.

David v. Vesta Co., 45 N.J. 301, 323-24 (1965).

Under Art. IV, Sec. 1, Par. 1, a legislative delegation of power may not be invoked “solely for the economic protection of particular individuals and groups...where the dominant purpose of the legislation is to advance private interests under the guise of the general welfare.” Independent Electricians and Electrical Contractors’ Association v. New Jersey Board of Examiners of Electrical Contracts, 54 N.J. 466, 470 (1961).

As the history of the litigation over the approval or prohibition of a bear hunt manifests, “[b]ear management is a topic that sparks widespread disagreement and strong public sentiments...” N.J. Animal Rights Alliance v. N.J. Dept. of Env’tl Prot., 396 N.J. Super. 358, 372-73, n. 3 (App. Div. 2007). In that case, the court invalidated the 2005 Comprehensive Black Bear Management Policy (“CBBMP”) and affirmed the Commissioner’s withdrawal of the policy over the objections of the NJSFSC. So, over the years whenever bear hunts have been approved, lawsuits have been filed by animal rights and conservation or environmental groups, and when hunts have been prohibited, sportsmen and hunting organizations have initiated litigation to challenge the ban. See e.g., Safari Club Int’l v. N.J. Dept. of Env’tl Prot., 373 N.J. Super. 515 (App. Div. 2004) (upholding the Commissioner’s order

to close all lands, owned, managed or controlled by the DEP to black bear hunting); N.J. Outdoor Alliance v. N.J. Dep't of Env'tl Prot., No. A-05250525-18 T4, 2018 WL 6005064 (App. Div., Nov. 16, 2018), certif. den. 237 N.J. 191 (2019) (Pa145) (denying sportsmen's groups challenge to closure of the hunt's second phase). See also U.S. Sportsmen's Alliance Foundation v. N.J. Dept. of Env'tl Prot., 182 N.J. 461 (2005) (action initiated by hunters and hunters' organizations to challenge the DEP Commissioner's direction to the Division of Fish and Wildlife to not issue bear hunting permits authorized by the Council).

The more recent history of the bear hunt litigation is summarized in Animal Protection League of New Jersey, et al. v. New Jersey Fish and Game Council, et al., 477 N.J. Super. 145, 152 (App. Div. 2023). In that case, the Appellate Division invalidated the use of emergency rule-making under N.J.S.A. 52:14B-4(c) of the Administrative Procedures Act by the Council and other State Defendants, when they failed to demonstrate that enactment of the rule was necessary on fewer than thirty (30) days' notice and the hunt was necessary to avert imminent peril. In fact, the court criticized the Council for manufacturing an emergency by improperly delaying the adoption of the emergency rule. Id. at 164-166. Thus, the history of the bear hunt litigation clearly and convincingly shows that the Council with its majority NJSFSC membership has a pro-bear hunting bias, which is manifested in the policies and regulations that it has formulated.

Although the litigation history establishes pro-bear hunting bias by the Council, the plaintiffs' arguments under the New Jersey constitutional provisions in Articles III and IV do not turn on that particular bias.³ It is the plaintiffs' position that the designation of any private organization or individuals with an opportunity to exercise control over a regulatory agency violates the constitutional provisions regardless of the interests of the particular private interest group favored by the Legislature. So, if the Legislature had earmarked a conservation or animal rights group that favored non-lethal means of managing the black bears by giving them a majority interest on a regulatory agency, instead of a pro-hunting or trapping group, such a delegation of power would similarly violate the constitutional provisions. In other words, it is the delegation to private interest groups or individuals of the opportunity to control a regulatory agency that, regardless of the particular interest group favored, constitutes a constitutional violation.

The fact that there are other state agencies or boards that are comprised of private individuals does not serve to ameliorate the constitutional violations. The professional licensing boards cited by the defendants in their motion papers below are distinguishable, because the private members of those boards regulate themselves and not the public in general, in contrast to the policies and regulations

³ The pro-hunting bias of the Council is a relevant consideration for the defendants' motion to dismiss, but not plaintiffs' motion for summary judgment.

formulated by the Council. The State Board of Agriculture cited by the State defendants below is also distinguishable, because the members representing the four (4) leading agricultural commodities and engaging in the production of farm crops or livestock products in New Jersey are dispersed, so that no one group has majority control of the Board. See N.J.S.A. 4:1-4 and 4:1-15. In contrast, the plaintiffs in the case at bar assert that the legislative delegation of regulatory authority to the Council violates the separation of powers and distribution of governmental authority under Art. III, Par. 1, N.J. Const. (1947) and constitutes an improper delegation of legislative power vested in the Senate and General Assembly to a private organization, or an organization controlled by a private group and individuals in violation of Art. IV, Sec. 1, Par. 1, N.J. Const. (1947).⁴

POINT III

THE COUNCIL IS A PRIVATE REGULATORY AGENCY BECAUSE IT IS EFFECTIVELY CONTROLLED BY A PRIVATE ORGANIZATION (Pa115, Pa125-127, Pa129-130).

The trial court held that the members of the Council nominated by the private interest groups are public officials because they are appointed by the Governor with

⁴ Since plaintiffs sought a declaratory judgment challenging the constitutionality of a legislative enactment, they filed their lawsuit in Trial Court instead of the Appellate Division. See City of Camden v. Whitman, 325 N.J. Super. 236, 242 (App. Div. 1999). See also Humane Society of the United States v. N.J. State Fish and Game Council, 70 N.J. 565 (1976) in which the constitutional claims were filed in the Chancery Division when the environmental organizations and individuals challenged the constitutionality of N.J.S.A. 13:1B-24 on due process and equal protection grounds.

the advice and consent of the Senate, and the Governor has the right to remove them. According to the court below, the Council is, therefore, a public regulatory agency. However, under the challenged statutory scheme, the exclusive right to nominate is effectively the right to control the Council by a private interest group. The qualifying sportsman on the Council are highly likely to be members of the NJSFSC and support the mission of that organization. The fact that theoretically the NJSFSC could nominate “sportsmen” who are not members of one of its clubs under N.J.S.A. 13:1B-24, does not mean that it was proper for the trial court to construe the statute on the basis of that remote possibility. A statute should not be construed in a manner that leads to an absurd result. State v. Provenzano, 34 N.J. 318, 322 (1961). Courts will look to extrinsic aids if a literal reading of a statute will lead to absurd results, State v. Harper, 229 N.J. 228, 237-38 (2017); Burnett v. County of Bergen, 198 N.J. 408, 425 (2009). Instead of reading the statute in isolation, the trial court should have considered it in the context of “other constituent parts so that a sensible meaning may be given to the whole statutory scheme.” Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012). In the very next section of the overall legislative scheme, the Legislature facilitated the interests of sportsmen’s clubs throughout the State in becoming members of the NJSFSC “[i]n order to permit the broadest possible representation of sportsmen to membership in the council. . .”. N.J.S.A. 13:1B-25. It is absurd to assume that a sportsman nominated by the

amalgamated sportsmen's club would not be a member of one of such clubs. While the Governor appoints each member of the Council with the advice and consent of the Senate, he has no discretion to appoint anyone who is not a sportsman nominated by the NJSFSC. Similarly, while the Governor can remove a member of the Council for cause, the replacement nevertheless is required to be a sportsman nominated by the NJSFSC. Consequently, the Legislature abdicated its regulatory authority to a quasi-legislative body controlled by a private organization with pro hunting and trapping mission in violation of Articles III and IV of the New Jersey Constitution and the private non-delegation doctrine.⁵

The Council is not merely an advisory agency populated by citizens who are expert in areas of conservation and protection of the environment and acting to assist a state department or its department head in environmental and conservation matters

⁵ Indeed, the Legislature's use of the term "sportsmen" in N.J.S.A. 13:1B-24 and 25, if it is not tied to membership in the NJSFSC, would result in the statute being ambiguous and vague. Merriam Webster defines a "sportsmen" as (1) "a person who engages in sports (such as hunting or fishing)", or (2) "a person who shows sportsmanship." www.merriam-webster.com/dictionary/sportsman (last visited 4/1/24). The Cambridge Dictionary defines a sportsman as "a man who plays a sport, especially one who plays it well" and "someone who plays a sport in a way that shows respect and fairness toward the opposing player and team." dictionary.cambridge.org/dictionary/English/sportsman (last visited 4/1/24). N.J.S.A. 13:1B-24 and 25 do not define "sportsmen". Unless a "sportsman" is construed to be a member of the NJSFSC, the statute would be rendered "substantially incomprehensible" and unconstitutionally vague. See, Matter of Farmers Mut. Fire Assurance Ass'n of N.J., 256 N.J. Super. 607, 619-20 (App. Div. 1992) (internal citations omitted).

because of its expertise. The Council is delegated the right to formulate policies and regulations to govern the conduct of the public in general. Although the Commissioner of the DEP has the right to approve the “overarching” policy governing the black bears (and other game), the Commissioner neither formulates the policy nor writes the regulations that govern all aspects of black bear management. That authority to exercise legislative power rests solely with the Council, which cannot be said to be subordinate to the Commissioner for regulatory purposes. See, e.g., National Horsemen’s Benevolent & Protection Ass’n v. Black, 53 F.4th 869, 881 (5th Cir. 2022). The Legislature should not imbue a private organization or private individuals with the status to effectively control the Council with a majority of the members. In essence, the Legislature has entrusted the entire regulatory scheme governing black bear and other game management to the Council fettered only by the Commissioner’s limited review of the general policies. The delegation of such regulatory authority to an agency effectively controlled by a private interest or advocacy group violates Articles III and IV and the private non-delegation doctrine.

POINT IV

THE DELEGATION OF REGULATORY AUTHORITY TO THE COUNCIL VIOLATED THE PRIVATE NON-DELEGATION DOCTRINE (Pa115, Pa130-132).

While the adjudication of these constitutional issues may be of first

impression in New Jersey, it has long been decided by the federal judiciary.⁶ A recent example is National Horsemen’s Benevolent & Protective Ass’n v. Black, supra, 53 F.4th at 872, 888-89, in which the Fifth Circuit, relying on well-established United States Supreme Court precedents enunciating the private non-delegation doctrine, id. 880-81, declared the Horseracing Integrity and Racing Safety Act (“HISA”), 15 U.S.C.A. §3052, to be unconstitutional, because it gave “a private entity the last word on implementing federal law.” The court held that the private entity must be truly subordinate to the public agency or official for rule-making purposes in order for the private non-delegation doctrine not to apply.⁷ For an explanation of the private non-delegation doctrine, see Consumers’ Research, Cause Based Commerce, Inc. v. Federal Communications Commission, 88 F.4th 917, 925 (11th Cir. 2023). See also, James M. Rice, “The Private Nondelegation Doctrine:

⁶ See e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936); Currin v. Wallace, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441 (1939); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940).

⁷ In response to the Court’s decision, Congress amended the HISA to give the Federal Trade Commission discretion to “abrogate, add to, and modify” any rules that bind the industry, in the Consolidated Appropriations Act of 2023. Pub. L. No. 117-328, 136 Stat. 4459 (2022). As a result, in Oklahoma v. United States of America, et al., 62 F.4th 221 (6th Cir. 2023), the court upheld HISA. However, the Court’s decision did not obviate the principle posited by the federal court in the earlier decision that the delegation of primary regulatory authority to a private organization violated the private non-delegation doctrine.

Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations”, 105 Calif. L. Rev. 539 (2017). The private non-delegation doctrine has also been assiduously followed by several states. See, Joseph Postell and Randolph J. May, “The Myth of the State Nondelegation Doctrines”, 74 Admin. L. Rev. 263 (2022).

In contrast, it cannot be said that the Council is subordinate to the DEP. The Council is not strictly an advisory body that has private members like some other agencies of state government. While the Commissioner of the DEP has the authority to approve the CBBMP formulated by the Council, the Council retains substantial independent authority. The Commissioner has no authority over the Council’s day-to-day activities; moreover, the Commissioner does not have veto authority over the Council’s regulations. For these reasons, the court should have invalidated the Council’s regulations on the basis of the private non-delegation doctrine.⁸

⁸ While the private non-delegation doctrine may have been followed in theory, but not in practice by the United States Supreme Court for many years after the Carter Coal Co. case (see note 5, infra), as long as Congress provided “an intelligible principle” to guide the regulatory agency in the enabling legislation, a recent trend has been manifested in dissents by conservative members of the Court and in the granting of certiorari to put more teeth into the non-delegation and private non-delegation doctrines. See e.g., Gundy v. United States, 588 U.S. ___, 139 S.Ct. 2116, 2131, 204 L.Ed.2d 522 (2019) (Gorsuch, dissenting); See also, Community Financial Services Assoc., of America, Limited v. Consumer Financial Protection Bureau, 51 F.4th 616 (5th Cir. 2022), cert. granted in Consumer Financial Protection Bureau v. Community Financial Services Assoc., 143 S.Ct. 978 (2023); Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir., 2022), cert. granted in part, 143 S.Ct. 2429 (2023); Jarkesy v. Securities and Exchange Commission, 34 F.4th

POINT V

THE PRIMARY DECISIONS RELIED ON BY TRIAL COURT ARE DISTINGUISHABLE, SINCE THEY DO NOT ADDRESS THE CONSTITUTIONALITY OF THE STATUTES SPECIFYING THE COMPOSITION OF AND DELEGATING REGULATORY AUTHORITY TO THE COUNCIL UNDER ART. III, PAR. 1 AND ART. IV, SEC. 1, PAR. 1 AND THE RELATED PRIVATE NON-DELEGATION DOCTRINE (Pa115, Pa123-132).

In the Humane Society of U.S. v. N.J. State Fish and Game Council, 70 N.J. 565 (1976), the Court held that N.J.S.A. 13:1B-24, which, among other things, authorizes the New Jersey State Federation of Sportsmen’s Clubs (“NJSFSC”) and the State Agricultural Convention to recommend the appointment of sportsmen and farmers as members to the Council, did not violate the environmental and animal rights groups’ due process and equal protection rights. The Court held that allowing these private farmers, commercial fisherman⁹ and sportsmen to become members of the Council, did not violate the due process and equal protection rights of the plaintiff environmental and animal rights organizations in that the latter could be considered

446 (5th Cir. 2022), cert. granted in Securities and Exchange Comm. v. Jarkesy, 143 S.Ct. 2688 (2023). As indicated earlier, Articles III and IV of the New Jersey Constitution are predicated on comparable provisions in the United States Constitution, so federal decisions should be instructive in New Jersey.

⁹ Prior to a 1979 amendment, N.J.S.A. 13:1B-24 included two (2) commercial fisherman, but they were replaced by the chairman of a committee established by the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 and a person knowledgeable on land use management and soil conservation. L. 1979, c. 199, §72, eff. Sept. 19, 1979.

for appointment to the Council by becoming sportsmen, farmers and members of the private organizations designated by the Legislature.

While the Court concluded that the delegation to the designated private organizations pursuant to N.J.S.A. 13:1B-24 was not in derogation of the due process and equal protection rights of the plaintiff organizations, in the end, the Court acknowledged that a better balance would be achieved by the presence of public members on Council that could advocate the interests of public interest groups and individuals other than farmers, sportsmen, and commercial fisherman. Id., 70 N.J. at 579-580. In fact, Justice Pashman who dissented in Humane Society concluded that the NJSFSC and other private interest groups had a much narrower interest in advocating the mission of their organizations that was unquestionably adverse to the interests of environmentalists and animal rights groups in conservation of fish and game, and that it was arbitrary and unreasonable to limit the membership of persons supposedly knowledgeable of and interested in the conservation of fish and game to sportsmen, farmers and commercial fishermen. As Justice Pashman opined “To accept the majority’s reasoning that the plaintiffs’ interests may be represented by the Council because they are ‘sportsmen’, is like a suggestion that an umpire’s decision may be equally amenable to the effected parties because they all happen to be ‘baseball players’”. Id. at 584. Even though this dissenting opinion is not binding on the court, it does manifest that the Court was concerned with the policy

underlying the Legislature's earmarking of private special-interest groups for a favored status in a regulatory agency.

While the Humane Society decision may have adjudicated the constitutionality of the appointment provisions in N.J.S.A. 13:1B-24 on the basis that they did not violate the due process and equal protection rights of the plaintiffs therein, the case did not deal with the validity of statutes delegating regulatory authority to the Council. N.J.S.A. 13:1B-27, 28, 30, 31, and 32(a). Acknowledging that the Court in U.S. Sportsmen's Alliance Foundation v. N.J. Dept. of Env. Prot., 182 N.J. 461 (2005) determined that the Council must exercise its regulatory authority pursuant to comprehensive policies approved by the Commissioner of the DEP, the Council nevertheless retained substantial regulatory authority over bear propagation. The Legislature has granted the Council "substantial independence". 182 N.J. at 474-76. The Commissioner has no authority over the day-to-day activities of the Council, nor may the Commissioner veto the regulations formulated by the Council to approve and set the parameters of a bear hunt. In other words, the parameters of a hunt under N.J.S.A. 13:1B-30, -32 fall solely within the purview of the Council. Id., 182 N.J. at 478.¹⁰

¹⁰ The Appellate Division recently ruled that a petition by environmental rights groups to the DEP to repeal certain rules permitting black bear hunting, specifically, N.J.A.C. 7:25-5.6 and -5.24, and the comprehensive black bear management policy, was misdirected to the DEP; instead, the petition should have been submitted to the Council, which had formulated the regulations in the Game Code and the policy in

N.J. Const. (1947), Art. III, Par. 1 provides that “the powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.”. Reposing regulatory authority in an extra-governmental body controlled by private interest groups is antithetical to this constitutional provision. In addition, the delegation of legislative power to a body controlled by private interest groups violates Art. IV, Sec. 1, Par. 1, which provides that “the legislative power shall be vested in a Senate and General Assembly.” More specifically, the delegation of regulatory authority to a body controlled by a private interest group like the NJSFSC that is self-interested in hunting, in contrast to the broader interest in conservation of natural resources and wildlife that is the mission of the DEP violates this constitutional provision.

The courts are also more inclined to invalidate the delegation of licensing power to private entities or individuals than to strictly public entities or individuals. For example, in Group Health Insurance of New Jersey v. Howell, 40 N.J. 436

the CBBMP. In the Matter of Petition to Repeal Rules Permitting Black Bear Hunting Including the Comprehensive Black Bear Management Policy, N.J.A.C. 7:25-5.6 and -5.24 (Docket No. A-0984-20), cited in 2022 WL 2251251 (decided June 22, 2022), certif. den., 253 N.J. 434 (2023). (Pa164) Accordingly, the Council has been delegated substantial independent authority to act as the agency primarily enforcing hunting rules and regulations, despite being controlled by a majority membership of private self-interested hunters and trappers.

(1963), the legislative delegation of licensing power to the State Medical Society, which had to approve the plaintiff corporation's trustees as a condition of receiving a certificate of authority, was deemed to be an unconstitutional delegation of licensing power. Although the Court in Howell concluded that the delegation of authority violated due process under the 14th Amendment to the United States Constitution, it primarily relied on the New York case of Fink v. Cole, 302 N.Y. 216, 97 N.E.2d 873 (Ct. App. 1951), which concluded that the delegation of licensing power to the Jockey Club, a private organization, was such an abdication as to be an unconstitutional relinquishment of legislative power and violation of the provision in the New York Constitution which (similar to New Jersey) provides that "the legislative power of this State shall be vested in the Senate and Assembly." 40 N.J. at 445-46, citing 302 N.Y., at p. 225, 97 N.E.2d, at p. 876. See also New Jersey Dept. of Transp., Division of Aeronautics v. Brzoska, 139 N.J. Super. 510 (App. Div. 1976) (delegation of administrative power to a private airport owner to determine who received a fixed based operator's license held to be invalid in that such private person is not subject to public accountability and is unconstrained by adequate legislative standards inhibiting arbitrary or self-interested action); New Jersey State Firemen's Mut. Benevolent Ass'n v. North Hudson Regional Fire & Rescue, 340 N.J. Super. 577, 592-93 (App. Div.), certif. den., 170 N.J. 88 (2001) (statutes improperly delegated legislative authority to private fraternal organizations

to grant paid leave to members to attend convention). Giving a private organization virtually unbridled authority to implement the legislative intent was also recognized as a potential constitutional infirmity by the New Jersey Supreme Court in Male v. Renda Contracting Co., Inc., 64 N.J. 199, 201 (1974), cert. denied, 419 U.S. 839, 95 S.Ct. 69, 42 L.Ed.2d 66 (1974).

In the case at bar, the plaintiffs assert that it is unreasonable and unconstitutional to delegate substantial regulatory authority to an organization controlled by private interest groups especially when there is already a division in an executive department of government that has the authority and the capacity to carry out the general environmental and conservation policies enunciated by the Legislature. See also Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 163-64 (1978), and cases therein. These cases hold that in order to be constitutionally sustainable, the delegation of legislative authority to private groups or individuals must be narrowly tailored, reasonable and surrounded with stringent standards to protect against the possibility of arbitrary or self-serving action detrimental to third parties or to the public good in general. In other words, the Council must be subordinate to the Commissioner of DEP for rule-making purposes, which is not the case under the enabling statutes.

It is submitted that a delegation to a private organization, or to an agency like the Council which is controlled by a private organization such as the NJSFSC,

requires greater scrutiny as to its constitutional efficacy than a delegation of legislative authority to a governmental agency having only public appointees, the head of which is appointed by the Governor with the advice and consent of the Senate and thus is accountable to the general electorate. The substantial independence of the Council, the membership of which is populated by self-interested private persons with a hunting and trapping bias, is antithetical to the distribution of legislative authority among the three branches of government and is an abdication of the legislative authority residing in the Senate and General Assembly. Consequently, the statutes delegating regulatory authority to the Council are violative of Art. III, Par. 1 and Art. IV, Sec. 1, Par. 1 of the New Jersey Constitution.

As indicated in the Verified Complaint, the self-interest and hunting bias of the Sportsmen's Federation can be gleaned from its website, which is referenced in the Verified Complaint: "The New Jersey Federation of Sportsmen's Clubs is a group of outdoor enthusiasts that maintain hunting, fishing, and trapping are vital resources in natural conservation.". The sportsmen's clubs history of filing lawsuits to overturn black bear hunting bans underscores that pro-hunting bias. The hunting bias disregards the interests of conservation and animal rights policies by arbitrarily elevating a private organization to the status of one of the three branches of government. The wildlife policies enunciated by the Legislature include the

management of all forms of wildlife to ensure their continued participation in the ecosystem. N.J.S.A. 23:2A-2(a). Clearly the Council never fairly considered other non-lethal means to manage the black bear population, but would not satisfy the pro-hunting bias of the NJSFSC.

The trial court decided that validity of the composition of the Council has already been decided by the Court in Humane Society. However, that decision concerned whether the exclusion of the animal rights plaintiff or members of similar groups from membership of the Council under N.J.S.A. 13:1B-24 violated their 14th amendment rights of due process or equal protection. As previously noted, that decision did not adjudicate whether the delegation of regulatory authority to the Council violated Art. III, Par. 1 and Art. IV, Sec. 1, Par. 1 of the New Jersey Constitution or the related private non-delegation doctrine. This distinction was not appreciated by the trial court. No private interest or advocacy group should be specially elevated by the Legislature to a favored status to control a regulatory agency, particularly, as in the case of the NJSFSC, having an opportunity to recommend members to constitute the majority membership of the Council with the ability to control the Council. Even if hypothetically the NJSFSC recommended a non-member for appointment, such as an animal rights advocate who also identifies himself or herself as a sportsmen (which would never realistically happen for the reasons discussed below), the Legislature has placed the right to effectively control

the membership of the Council in the hands of a private organization in violation of the Art. III, Par. 1 and Art. IV, Sec. 1, Par. 1 of the New Jersey Constitution.¹¹

The Legislature has the power to control and regulate the taking of game. Hopewell Tp. v. Gruchowski, 29 N.J. Super. 605, 609 (Co. 1954) (Municipalities cannot regulate hunting by ordinance). Prior to 1948, the Legislature itself regulated hunting and trapping of game. United Hunters Assoc. of N.J. v. Bontempo, 53 N.J. Super. 181, 189-90 (App. Div. 1958). N.J.S.A. 23:4-1 provides that the Legislature has the authority to establish hunting seasons and the parameters of taking game unless otherwise established by the State Fish and Game Code. Even if the Council is acting in the capacity of a quasi-legislative body in promulgating the Code, United Hunters Assoc. of N.J. v. Bontempo, supra, at 190, there is a greater reason for such a regulatory agency not to be comprised of members of a self-interested private organization with a majority membership. There is a need for greater scrutiny of

¹¹ The State defendants argued below that Count III of the Complaint based on the private non-delegation doctrine should have been brought in the Appellate Division under R. 2:2-3(a)(2). However, that count is inextricably interwoven with the two constitutional causes of action. It would make no sense to transfer that count to the Appellate Division. Furthermore, the allocation of cases among the various divisions of the Superior Court is a matter of the business of the court. It is not a question of jurisdiction that prevented the court below from deciding the non-constitutional count of the complaint. Pressler & Verniero, Current N.J. Court Rules, Comment 2:2-3[3.2.1]. (GANN.)

the constitutionality of the activities of a quasi-legislative body controlled by a private organization than an agency comprised of only public members.¹²

It is fanciful to argue that the farmers and sportsmen recommended for appointment by the statutorily designated private organizations do not have to be members of those organizations. N.J.S.A. 13:1B-24. Indeed, the Legislature provides certain safeguards to sportsmen's clubs throughout the State "[i]n order to permit for the broadest possible representation of sportsmen in the making of recommendations for appointment of sportsmen to membership in the council..." N.J.S.A. 13:1B-25. Neither the State defendants, nor the NJSFSC presented any evidence that the members recommended by the NJSFSC are not members of that organization, or that there is a residue of sportsmen available for recommendation for appointment who are not members of the NJSFSC or any of the subsidiary clubs comprising that organization. The court should assume that the NJSFSC (or any other private organization given such favored status and an opportunity to control an agency) acts to advance the interests of its own members by recommending only its own members for appointment to the Council. Furthermore, despite that fact that

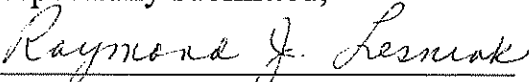
¹² Most administrative agencies perform two delegated functions: they make rules that have the effect of laws -- a quasi-legislative capacity and the power to decide individual cases -- a quasi-judicial capacity. In re Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6, 246 N.J. 462, 490 (2021). Agencies can also act in a hybrid capacity manifesting aspects of rulemaking and adjudication, or in an informal manner without a hearing. Id.


the Governor has the authority to remove a member of the Council for cause, there is no record of the Governor having done so because a member manifests the pro-hunting bias of the NJSFSC. Removal under such circumstances is at best a remote possibility and would still maintain a private non-governmental party's effective control over a majority of the Council. Despite the Governor's appointive authority and right to remove a member of the Council, the legislative scheme accords effective regulatory authority to the NJSFSC through its control over the Council. The result of such delegation to the NJSFSC and the Council is an abdication of legislative responsibility in violation of Articles III and IV of the New Jersey Constitution and the private non-delegation doctrine.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the trial court's order granting that defendants' motions to dismiss the complaint under R. 4:6-2(e) and denying plaintiffs' cross-motion for summary judgment should be reversed, and the matter should be remanded to the Law Division with direction that an order granting the plaintiffs' cross-motion for summary judgment be granted with the following relief: that a declaratory judgment should be entered that the statutes delegating regulatory authority to the Council and establishing the composition of the Council are unconstitutional in that they violate Art. III, Par. 1 and Art. IV, Sec. 1, Par. 1 of the New Jersey Constitution and the private nondelegation doctrine; and that the Council's Resolution of September 6, 2023, approving the Comprehensive Black Bear Management Policy and the Amendments to the Fish and Game Code authorizing a bear hunt pursuant to N.J.A.C. 7:25-5.6, published in the New Jersey Register, Volume 55, No. 19, on October 2, 2023, should be declared to be null and void and of no force and effect, and the bear hunt thereby authorized should be permanently enjoined.

Respectfully submitted,


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Attorney for the Lesniak Institute
for American Leadership


Raymond J. Lesniak, Pro Se

Dated: April 2, 2024



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July 17, 2024

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Re: THE LESNIAK INSTITUTE FOR AMERICAN LEADERSHIP and
RAYMOND J. LESNIAK v. NEW JERSEY FISH AND GAME
COUNCIL, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL
PROTECTION, DIVISION OF FISH AND WILDLIFE, GOVERNOR
PHILIP D. MURPHY, GOVERNOR OF NEW JERSEY and NEW
JERSEY STATE FEDERATION OF SPORTSMEN'S CLUBS
Docket No. A-1687-23T4

On Appeal from the Superior Court of New Jersey, Law Division
Sat Below: Hon. Robert T. Lougy, A.J.S.C.

Letter Brief on Behalf of State Respondents New Jersey Fish and Game
Council, New Jersey Department of Environmental Protection, Fish &
Wildlife, and Governor Philip D. Murphy, in his capacity as Governor
of New Jersey.

Dear Mr. Orlando:

Please accept this letter brief on behalf of Respondents New Jersey Fish
and Game Council, New Jersey Department of Environmental Protection



(“DEP”), Fish & Wildlife, and Governor Philip D. Murphy in his capacity as Governor of New Jersey.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

The New Jersey Fish and Game Council is a state regulatory agency within the Division of Fish & Wildlife within DEP. The Council consists of eleven members “chosen with due regard to [their] knowledge of and interest in the conservation of fish and game[,]” each of whom are appointed by the Governor

¹ Because they are closely related, these sections are combined for efficiency and the court’s convenience.

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with the advice and consent of the Senate. N.J.S.A. 13:1B-24. Three of the eleven members are farmers recommended by the Agricultural Convention for appointment by the Governor; six are sportsmen recommended by the New Jersey State Federation of Sportsmen's Clubs ("NJSFSC") for appointment by the Governor; one is the chairman of the Endangered and Nongame Species Advisory Committee ("ENSAC"); and the final member is a person knowledgeable in land use management and soil conservation practices. Ibid. There is no requirement that the farmers or sportsmen recommended for appointment be members of the Agricultural Convention or the NJSFSC. Ibid. The Governor may remove individuals from the Council for cause once appointed. N.J.S.A. 13:1B-26.

By statute, the Council is tasked with promulgating the State Fish and Game Code ("Game Code") for the "purpose of providing an adequate and flexible system of protection, propagation, increase, control and conservation of fresh water fish, game birds, game animals, and fur-bearing animals in [New Jersey], and for their use and development for public recreation and food supply." N.J.S.A. 13:1B-30; see also N.J.A.C. 7:25-5.1 to -5.39. The Council also "formulat[es] comprehensive policies for the protection and propagation of fish, birds, and game animals and for the propagation and distribution of food

fish and for the keeping up of the supply thereof.” N.J.S.A. 13:1B-28. Those policies are “subject to the approval of the [DEP] commissioner.” Id.

In New Jersey, black bear hunts occur pursuant to the Game Code, in accordance with a duly promulgated Comprehensive Black Bear Management Plan (“CBBMP”). N.J.A.C. 7:25-5.6(a). A CBBMP is a “comprehensive polic[y],” N.J.S.A. 13:1B-28, that must be promulgated as an administrative rule. N.J. Animal Rights Alliance v. N.J. Dep’t of Env’tl. Prot., 396 N.J. Super. 358, 364, 370 (App. Div. 2007). On September 6, 2023, the Council adopted the 2022 CBBMP as well as related Game Code amendments.² 55 N.J.R. 2056(a) (Oct. 2, 2023).

On September 21, 2023, the Lesniak Institute for American Leadership and Raymond J. Lesniak (collectively “Lesniak”) filed a Verified Complaint for Declaratory and Injunctive Relief with an Order to Show Cause, challenging the constitutionality of the Council, and by virtue, the 2022 CBBMP and 2023 black bear hunt. The Complaint’s First Count rests on Article III, paragraph 1 of the New Jersey Constitution, which divides “the power of the government . . . among three distinct branches.” (Pa8).³ The Second Count invokes Article IV,

² The 2022 CBBMP is the subject of a separate challenge before this court, brought by different Appellants. See Docket No. A-0672-23T4.

³ “Pa” refers to Lesniak’s appendix. “Pb” refers to Lesniak’s brief.

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Section 1, paragraph 1, which provides that “the legislative power shall be vested in a Senate and General Assembly.” (Pa10). And the Third Count alleges that the “delegation of regulatory authority . . . to the Council constitutes an improper delegation to a private entity or to a body controlled by private entities and individuals and is arbitrary and unreasonable.” (Pa11). Lesniak’s arguments in support of each of these claims, however, all rely on a private nondelegation theory. See infra at 8-10. Lesniak requested the court: (1) declare the statutes delegating regulatory authority to and establishing the composition of the Council unconstitutional and an invalid intrusion on authority already granted to DEP; (2) enjoin the implementation of the 2022 CBBMP and related Game Code amendments; and (3) enjoin the 2023 black bear hunt authorized by the Game Code and 2022 CBBMP. (Pa9-11). On October 4, 2023, the trial court denied Lesniak’s request for injunctive relief. (Pa50-70).

On November 2, 2023, the State Defendants moved to dismiss the complaint based on Lesniak’s failure to state a claim upon which relief can be granted as all counts were foreclosed by controlling case law. (Pa80-83). NJSFSC initially answered but subsequently filed a motion to dismiss. (Pa71-79, 84-87). On November 21, 2023, Lesniak opposed the motions to dismiss and filed a cross motion for summary judgment arguing that private control of

the Council was a novel issue before the court. (Pa89-93).

On January 10, 2024 the Honorable Robert T. Lougy, A.J.S.C. ruled in favor of Respondents, dismissing Lesniak's complaint with prejudice for failing to state a claim, and likewise denied Lesniak's cross-motion for summary judgment. (Pa113-132). Judge Lougy agreed with Respondents that each of Lesniak's claims were foreclosed by controlling case law establishing that the Council is not a private entity nor has the potential to be controlled by one and that thus, there was no violation of the constitutional doctrines of separation of powers and private nondelegation. He also concluded that Lesniak's third "arbitrary and unreasonable" count was not properly raised because there is no support or precedent for such a challenge to a legislative act. (Pa113-132).

On February 8, 2024, Lesniak filed the instant appeal of the trial court's decision, repeating the same challenges raised below. (Pa133).

ARGUMENT

THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT FOR FAILURE TO STATE A CLAIM BECAUSE THE COUNCIL IS A STATE REGULATORY AGENCY AND ITS AUTHORITY IS CONSTITUTIONALLY SOUND. (Responding to Lesniak's Point I-V).

This Court reviews the decision below de novo. "Rule 4:6-2(e) motions to dismiss for failure to state a claim upon which relief can be granted are

reviewed de novo.” Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). “A reviewing court must examine ‘the legal sufficiency of the facts alleged on the face of the complaint,’ giving the plaintiff the benefit of ‘every reasonable inference of fact.’” Id. (quoting Dimitrakopoulos v. Borrus, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). However, “if the complaint states no claim that supports relief . . . the action should be dismissed,” Dimitrakopoulos, 237 N.J. at 107, even for constitutional challenges. Teamsters Local 97 v. State, 434 N.J. Super. 393, 413 (App. Div. 2014) (“[New Jersey] courts have not hesitated to dismiss complaints with prejudice when a constitutional challenge fails to state a claim.”). De novo review is likewise applicable to the denial of Lesniak’s summary judgment cross motion. Samolyk v. Berthe, 251 N.J. 73, 79 (2022). A reviewing court must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co of Am., 142 N.J. 520, 540 (1995).

The trial court correctly concluded that well-settled precedent forecloses all of Lesniak’s claims. At the heart of each these claims, no matter how they are styled, is the theory that the Council is not a state agency, but a private entity

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wielding public power merely because most of its members are recommended to the Governor by a private organization. But case after case says precisely the opposite: the Council is a public agency that exercises regulatory authority pursuant to a valid legislative delegation and is subject to the DEP Commissioner's oversight when formulating policies. The Council's membership reflects a legitimate legislative decision to vest regulatory authority in those with relevant expertise, and that decision offends neither the separation of powers nor due process. Accordingly, the decision below must be affirmed.⁴

A. These Private Nondelegation Challenges Fail Because Precedent Confirms That The Council is a State Regulatory Agency, Not a Private Entity (Responding to Lesniak's Point II-V).

Underlying the entirety of Lesniak's suit is the unfounded assertion that the Council is a private entity or controlled by a private entity, the NJSFSC, and

⁴ While the dismissal of the entire Complaint on the merits should be affirmed, this suit is also procedurally defective. Dismissal under Rule 2:2-3 would have been appropriate to the extent Lesniak is effectively appealing agency rulemaking. The State Defendants also argued below that any challenge to the Council's agency decision to adopt the 2022 CBBMP can only be maintained (with minor exceptions not applicable here) in the Appellate Division. R. 2:2-3; see, e.g., Infinity Broad. Corp. v. N.J. Meadowlands Comm'n, 187 N.J. 212, 225 (2006); Prado v. State, N.J. Dep't of Labor, 186 N.J. 413, 421 (2006). The Appellate Division's exclusive jurisdiction does not turn on the theory of the challenging party's claim or the nature of the relief sought even if a plaintiff frames the challenge as a request for declaratory judgment, as in the present case. Beaver v. Magellan Health Servs. Inc., 433 N.J. Super. 430, 442-43 (App. Div. 2013).

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that authority delegated to the Council is therefore improper. (Pa1-11 ¶¶ 1, 3, 16, 35, 41; Pb17-37). However, Humane Soc’y of U.S., N.J. Branch, Inc. v. N.J. State Fish & Game Council, 70 N.J. 565 (1976), and other cases firmly establish that the Council is neither a private entity nor controlled by one. Moreover, the Legislature’s decision to include sportsmen as Council members, who are recommended by the NJSFSC to the Governor and appointed upon advice and consent of the Senate, is appropriate and reasonable given the specialized nature of the Council’s responsibilities. Humane Soc’y, 70 N.J. at 573-74.

The Council’s enabling statutes make clear that it is a public agency. Pursuant to N.J.S.A. 13:1B-24, all of the Council’s members are appointed by the Governor with the advice and consent of the Senate. See supra at 2-3. While the NJSFSC recommends the six sportsmen-members, nothing in N.J.S.A. 13:1B-24 mandates that those sportsmen be members of NJSFSC itself. And the NJSFSC’s responsibility of recommending nominees is not a delegation of legislative power. See Group Health Ins. v. Howell, 40 N.J. 436, 447-48 (1963). Nothing requires the Governor to accept and nominate every candidate recommended by NJSFSC or requires the Senate to confirm every nominee. Once appointed, Council members are special state officers subject to the

Conflicts of Interest Law and State Ethics Code, N.J.S.A. 52:13D-13(e), and further subject to removal by the Governor for cause, N.J.S.A. 13:1D-26.

The Legislature was well within its authority to require that sportsmen comprise a significant portion of the Council given their “knowledge of and interest in the conservation of fish and game” and the Council’s statutory charge to manage the state’s wildlife for “recreational and commercial” purposes. Humane Soc’y, 70 N.J. at 569, 573-74 (“Legislature may prescribe such qualifications as reasonably relate to the demands of a specialized office.”) (citing Alongi v. Schatzman, 57 N.J. 564, 577-78 (1971)). In that respect, the Legislature’s conclusion is similar to those made for several other regulatory entities whose members include individuals with particular expertise or qualifications. See id. at n. 4, 5 (citing N.J.S.A. 45:9-1 (doctors for medical boards); N.J.S.A. 45:11-24 (nurses for nursing boards); N.J.S.A. 13:1B-15.120, -15.123 (trustees of the New Jersey Natural Lands Trust)); see also N.J.S.A. 4:1-4 (members of the State Board of Agriculture).

Given the statutory basis for its authority and membership, courts have long held that the Council is a “unit of government” and “a specialized body, with statutorily prescribed duties and statutory limits on its powers and activities,” and have rejected equal protection and due process challenges to its

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composition. Humane Soc’y, 70 N.J. at 572; accord Animal Prot. League of N.J. v. N.J. Dep’t of Env’tl. Prot., 423 N.J. Super. 549, 557 n.3 (App. Div. 2011); Mercer Cnty. Deer Alliance v. State Dep’t of Env’tl. Prot., 349 N.J. Super. 440, 450 (App. Div. 2002). Indeed, Humane Society already rejected the claim that “the statutory delegation of the power of appointment to a private organization such as the [NJSFSC] violates due process.” 70 N.J. at 571. While N.J.S.A. 13:1B-24 empowers individual sportsmen – who represent interests “most directly affected by the Council’s regulations and possess the requisite expertise for achievement of the statutory objective” of managing populations of game animals – it does not require membership in the NJSFSC itself. Id. at 570, 577. That sportsmen-members might be NJSFSC members does not offend the Constitution, but merely “permit[s] ‘the broadest possible representation of sportsmen in the making of recommendations for appointment of sportsmen to membership in the council.’” 70 N.J. at 575 (quoting N.J.S.A. 13:1B-25). Nor does it change the fact that the Legislature carefully “circumscribed” the Council’s powers. Id. at 577.

The trial court correctly rejected Lesniak’s claims that the Council is a private organization, or is effectively controlled by one, where the applicable statutes and binding case law firmly establish the opposite. Judge Lougy echoed

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the reasoning of Humane Society and his decision “rests on firm footing in rejecting [Lesniak’s] arguments.” (Pa125). Specifically, the court found that sportsmen Council members are not required to be members of the NJSFSC, and further found that Council members are public officials who must be appointed by the Governor and approved by the Senate. (Pa129). The trial court further noted that, with respect to the CBBMP, it is the Council which ratifies the policy, subject to DEP Commissioner approval – not the NJSFSC. (Pa131). Each of Lesniak’s below challenges fail because they are based on an underlying falsehood already rejected by the Supreme Court.

Lesniak’s counterarguments fall short. He argues the Council de facto transfers regulatory authority to the NJSFSC because it is “absurd to assume that a sportsman” recommended by the NJSFSC for nomination “would not be a member” of that private organization. (Pb22-23). But Humane Society already explained that not only does N.J.S.A. 13:1B-24 not require membership, 70 N.J. at 570, but that “the legislative arrangement” suggests the Legislature intended “the numbers of sportsmen” eligible for appointment “be substantial,” and that granting NJSFSC recommendation authority is merely a means of meeting that objective, id. at 575.⁵ The non-binding Humane Society dissent, and policy dicta

⁵ Lesniak’s assertion that the term “sportsmen” in N.J.S.A. 13:1B-24 to -25, “if

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in the majority opinion that was separate and independent of its constitutional holding, gets Lesniak no further. (Pb28). The decision below was correct, based on settled precedent, and should be affirmed.⁶

B. Even If The Council Was Effectively A Private Entity, Lesniak Still Fails To State A Claim. (Responding to Lesniak’s Point II-V).

Even if the Council was a private entity – and it is not – Lesniak’s nondelegation theory would still lack merit because the Legislature set adequate checks on the Council’s authority. Humane Society rejected a substantially similar due process challenge to the “nominating process” for Council members,

not tied to membership in the NJSFSC,” is vague, (Pb23 n. 5), is similarly foreclosed by Humane Society. The Supreme Court found that this classification includes hunters and fishermen and does not per se exclude environmentalists, campers, hikers, and backpackers. 70 N.J. at 570 n. 2. Furthermore, the plain meaning of the term is clear and does not require persons of “common intelligence [to] guess at its meaning.” State v. Lashinky, 81 N.J. 1, 17 (1979).

⁶ Similarly, there is no support for Lesniak’s allegation that the Council has a “pro-bear hunting bias” that is “manifested in [its] policies,” (Pa101, Pb13, 19-20), particularly because the Council has a statutory obligation to “provid[e] an adequate and flexible system of protection, propagation, increase, control and conservation of” various animals including bears, “and for their use and development for public recreation and food supply.” N.J.S.A. 13:1B-30 (emphasis added). Lesniak may disagree with the Legislature’s decision to allow for the utilization and take of game animals specifically as it relates to black bears, (Pa130), but “such disagreement cannot satisfy the high burden required to invalidate on constitutional grounds,” Gangemi v. Berry, 25 N.J. 1, 10 (1957). The trial court properly concluded that Lesniak’s bias allegations have no bearing on the validity of the underlying counts of the complaint. (Pa125).

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noting that “[e]ven delegation of legislative authority to private parties may withstand constitutional challenge if sufficient safeguards exist to prevent an arbitrary concentration of power in persons or groups [m]otivated by self interest.” 70 N.J. at 579; see also Male v. Renda Contracting, 64 N.J. 199, 201 (1974) (“The test is whether the particular delegation is reasonable under the circumstances considering the purpose and aim of the statute.”); Ridgefield Park Ed. Ass’n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 163 (1978) (same). Time and again, the Supreme Court has found such “sufficient safeguards” in place for the Council. See U.S. Sportsmen's Alliance Found. v. New Jersey Dep't of Env't Prot., 182 N.J. 461, 474 (2005) (“[The] Council clearly does not function as a completely autonomous body, unaccountable to the department head. Rather, the Commissioner must approve the . . . Council's comprehensive policies. It is the Commissioner’s approval that, in turn, insures that those policies comport with department-wide goals for environmental protection.”); Humane Soc’y, 70 N.J. at 579 (“[T]here does not reside [] the potential for such aggrandizement of the Council members’ interests as would be repugnant to due process.”).

Case law recognizes that the Legislature circumscribed the Council’s authority through definitive standards. See N.J. Bell Tel. Co. v. Commc’ns

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Workers, etc., 5 N.J. 354, 370 (1950); supra at 2-4 (describing the Council's enabling statutes). Each and every Council member, including those recommended by the NJSFSC, must possess "knowledge of and interest in the conservation of fish and game" and be appointed by the Governor with advice and consent of the Senate. N.J.S.A. 13:1B-24. The Legislature properly "entrusted" the Council with regulatory authority "confined" to this specialized area of wildlife management. United Hunters Assoc. of N.J. v. Bontempo, 53 N.J. Super. 181, 186 (App. Div. 1958); Humane Soc'y, 70 N.J. at 575. Once appointed, Council members remain subject to removal for cause. N.J.S.A. 13:1B-26. Additionally, recommended sportsmen are not required to be members of the NJSFSC. Humane Soc'y, 70 N.J. at 570. Regarding black bears, specifically, CBBMPs require Commissioner approval. U.S. Sportsmen's Alliance, 182 N.J. at 474 (although Commissioner does not have veto power over the Council's daily activities, Council lacks "total hegemony"). And, as a regulatory agency, the Council is subject to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and judicial review, as demonstrated by the extensive case law challenging CBBMPs and related Game Code provisions as cited above. See also N.J. Animal Rights Alliance, 396 N.J. Super. at 370. In short, the Council is subject to a system of checks and balances where it is

“circumscribed by other agencies [] and existing statutory norms” and must condition its regulations on the “essential purpose [it is] designed to serve.” Humane Soc’y, 70 N.J. at 576-77.

Lesniak’s separation of powers claim – to the extent it is distinct from his nondelegation theory – fails for substantially the same reasons. Article III of the New Jersey Constitution, invoked in the First Count of the Complaint, (Pa8), provides that “the powers of the government shall be divided among three distinct branches” and no “branch shall exercise any of the powers properly belonging to either of the others.” It is well-settled that this doctrine does not bar cooperation amongst branches of government, but rather “guarantee[s] a system of checks and balances.” See In re Zicarelli, 55 N.J. 249, 264-65 (1970); State v. Leonardis, 73 N.J. 360, 370 (1977). As such, the Legislature may delegate rulemaking authority to an administrative agency within the Executive Branch, such as the Council, to “implement[] policy in a specialized area . . . with the staff, resources, and expertise to understand and solve those specialized problems.” Bergen Cnty. Pines Hosp. v. Dep’t of Human Services, 96 N.J. 456, 474 (1984). And Article IV, Section I, paragraph 1 of the New Jersey Constitution, invoked in the Second Count, (Pa10), provides that legislative power be vested in a Senate and General Assembly.

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The Council's enabling statutes do not offend these separation of powers principles. If the Legislature can, within limits, permissibly delegate legislative power to a private entity, see supra at 14-17, it necessarily follows that it can delegate rulemaking authority to an agency in the Executive Branch, such as the Council, see Bontempo, 53 N.J. Super. at 189-90 (Legislature properly delegated to the Council the authority to promulgate the Game Code and formulate wildlife management policies with DEP Commissioner approval). And the Legislature did so here for the reasons explained above. Moreover, NJSFSC's recommendation authority is not tantamount to delegated legislative power. See Howell, 40 N.J. at 447-48; supra at 8-10.

Nor is there any support for the remaining claim that the Council's statutory authority and composition are "arbitrary and unreasonable" as enacted by the Legislature due to the statutory differences between the Council and DEP. (Pa11; T17:20-19:8). Lesniak failed to articulate how, in delegating authority to the Council, the Legislature impermissibly intruded on DEP's authority or otherwise acted beyond the limits of legislative power. Indeed, the Supreme Court has already thoroughly addressed the legislative history and countenanced the relative roles and responsibilities of the Council and DEP. See U.S. Sportsmen's Alliance, 182 N.J. at 471-74. The overall legislative design is that

the Council promulgates the Game Code, but DEP implements and enforces it. N.J.S.A. 13:1B-30. Additionally, the Council requires the approval of the Commissioner before a CBBMP can be promulgated. U.S. Sportsmen's Alliance, 182 N.J. at 471-74. Lesniak's misunderstanding or disagreement with these roles and responsibilities is not a claim upon which relief can be granted nor can it support summary judgment against the Council.

Once again, Lesniak's counterarguments lack merit. For one, he errs in claiming that Humane Society is inapplicable here because its holding did not directly concern private nondelegation principles. (Pb29). But that case rejected, among other claims, a due process challenge to the Council's composition, finding that "sufficient safeguards exist to prevent an arbitrary concentration of power . . . motivated by self interest." Humane Soc'y, 70 N.J. at 579. Not only is the private nondelegation doctrine grounded in due process principles, see Ridgefield Park, 78 N.J. at 163-64, but the argument Humane Society decisively rejected is virtually the same theory Lesniak presses here.

For another, Lesniak claims the Council is unique and distinguishable from "professional licensing boards cited by the defendants" because those boards "regulate themselves and not the public in general." (Pb20). But even if that characterization of other licensing boards was correct, it cannot overcome

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the clear findings in case law that the Council's power is appropriately limited. Finally, the nondelegation cases Lesniak cites do not support his claims. See (Pb30-32); see also N.J. Dep't of Transp. Div. of Aeronautics v. Brzoska, 139 N.J. Super. 510, 513 (App. Div. 1976) (invalidating authorization of private airport owners to grant licenses to flight instructors because there were no legislative standards or safeguards in place); N.J. State Firemen's Mut. Benv. Ass'n v. North Hudson Reg'l Fire & Rescue, 340 N.J. Super. 577, 594 (App. Div. 2001) (invalidating authorization of private organization to grant convention leave because there were no legislative standards or safeguards in place). In sum, the court below properly dismissed the Complaint for failure to state a claim and correctly rejected Lesniak's cross-motion for summary judgment.

CONCLUSION

For the foregoing reasons, the trial court's January 10, 2024 order must be upheld in its entirety.

Respectfully submitted,

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ATTORNEY GENERAL OF NEW
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July 17, 2024
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001687-23 T4

THE LESNIAK INSTUTUTE FOR	:	Civil Action
AMERICAN LEADERSHIP and,	:	
RAYMOND LESNIAK	:	
	:	
Plaintiffs/Appellants,	:	On Appeal from the Final Order
	:	of the Superior Court, Law Division
V.	:	Mercer County
	:	Sat Below: Hon. Robert T. Lougy,
	:	A.J.S.C.
NEW JERSEY FISH & GAME COUNCIL	:	
NEW JERSEY DEPARTMENT	:	
OF ENVIRONMENAL PROTECTION,	:	
DIVISION OF FISH AND WILDLIFE,	:	
GOVERNOR PHILIP D. MURPHY,	:	
GOVERNOR OF THE STATE OF NEW	:	
JERSEY and NEW JERSEY STATE	:	
FEDERATION OF SPORTSMEN’S	:	
CLUBS,	:	
	:	
Defendants/Respondents.	:	
	:	

**APPELLATE BRIEF OF DEFENDANT/RESPONDENT NEW JERSEY
STATE FEDERATION OF SPORTSMEN’S CLUBS**

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PRELIMINARY STATEMENT

In this litigation, Appellants/Plaintiffs, The Lesniak Institute of American Leadership and Raymond J. Lesniak, (“Appellant”) seek to challenge the New Jersey Division of Fish and Wildlife Council’s (“Council”) statutory authority and its implementing Comprehensive Black Bear Management Policy (“CBBMP”).

In so doing, Appellants recast the same legal arguments posed by the plaintiff in *Humane Soc. Of U.S., New Jersey Branch, Inc. v. New Jersey State Fish & Game Council*, 70 N.J. 565 (1976). In his Honor’s comprehensive opinion, the Honorable Robert T. Lougy, A.J.S.C. held that *Humane Society* remains binding legal precedent and concluded that Appellants presented no new legal grounds for overturning it.

Because New Jersey trial and appellate courts are bound by New Jersey Supreme Court precedents, the principle of stare decisis is controlling and warrants the affirmance of Judge Lougy’s opinion below. See, *White v. Twp. of N. Bergen*, 77 N.J. 538, 549-550 (1978)(stating that trial and intermediate appellate courts are “bound, under the principle of stare decisis, by formidable precedent” of the Supreme Court).

There is no basis for overruling *Humane Society* as Appellants have not presented any evidence in their pleadings that the Supreme Court’s prior decision from 48 years ago is “unsound in principle, unworkable in practice, or implicates reliance interests. *State v. Shannon*, 210 N.J. 225, 227 (2012).

The Appellate Panel should further consider that Respondent/Defendant New Jersey Federation of Sportsmen’s Clubs (“New Jersey Sportsmen”) purpose and mission statement has not changed since *Humane Society* was decided. It is not strictly a private organization whose interests are limited to “hunting rights”. Rather, the New Jersey Sportsmen is committed through its Rules and By-Laws to broader ecological and conservation purposes. (Pa20-45).

PROCEDURAL HISTORY

Appellant filed its Verified Complaint on September 21, 2023 challenging the Council’s statutory authority on grounds that it violates Article III, Par. 1 and Article IV, Sec. 1 Par. 1 of the New Jersey State Constitution and constitutes an arbitrary of unreasonable delegation of authority by the New Jersey Legislature. (Pa1-13).

On October 4, 2023, Judge Lougy denied Appellant’s request for injunctive relief that would have prevented the Council from implementing the new CBBMP and stay the 2023 black bear hunting season. (Pa50-70).

On October 18, 2023, New Jersey Sportsmen filed an answer. (Pa71-78).

In November, 2023, the Respondents/Defendants State of New Jersey (“State”) and New Jersey Sportsmen filed motions to dismiss. (Pa80-88). Appellant filed a cross-motion for summary judgment that same month. (Pa89-101).

By Opinion and implementing Order, dated January 10, 2024, Judge Lougy granted the State and New Jersey Sportsmen's motions to dismiss for failure to set forth a cause of action. (Pa115-133).

STATEMENT OF FACTS

The New Jersey Sportsmen was organized and incorporated in 1935. (Pa29). As set forth in its Article 2 of its Constitution and By-Laws (Pa31), the New Jersey Sportsmen's purpose and objectives are as follows:

- a. To promote the long-term conservation, protection and wise use of fish wildlife, and other natural resources in New Jersey, nationally and worldwide.
- b. To promote a forum for organizations and individuals interested in the long-term conservation, protection and wise use of fish, wildlife, and other natural resources in New Jersey, nationally and worldwide through which proposed legislation can be addressed and through which new legislation can be proposed regarding fish and wildlife conservation and protection of natural resources.
- c. To inform and educate the public through dissemination of facts and information that may contribute to a fuller understanding of problems involved in the restoration, management and conservation of wildlife and other natural resources.
- d. To promote environmental education, encourage the training of environmentally important subjects including the importance of restoration, wise use, management and conservation of wildlife and other natural resources and provide educational material on the restoration, management and conservation of wildlife and other natural resources.

- e. To provide a forum for fisherman, hunters & trappers to educate and inform New Jersey Legislators, US Congressmen & Senators on the wise use of New Jersey's fish, wildlife and other natural resources.
- f. To promote the highest standards of sportsmanship and ethics through educational programs and to strengthen landowner-sportsmen understanding and cooperation through a comprehensive educational program based upon scientific, technical and legal study and analysis.
- g. To prevent the pollution of New Jersey's lands and waters and to promote the restoration of lands and waters previously degraded. Such habitats are shared by fish, wildlife and the people of New Jersey.
- h. To promote the growth and development of New Jersey in such a manner that will protect the long term viability of our fish and wildlife populations and maintain our quality of life.
- i. To cooperate with local, state and federal agencies and other private organizations in promoting responsible, far-sighted natural resource management.

In granting the dismissal of Appellant's complaint under a "rational basis" constitutional challenge to a Statute, Judge Lougy extensively cited numerous excerpts from *Humane Society*:

- The Council's appointment criteria "reasonably relate to the demands of a specialized office." *Humane Soc. Of United States, New Jersey Branch, Inc. v. New Jersey State Fish & Game Council*, 70 N.J. 565, 573 (1976). Additionally, and while not crediting Plaintiffs' assertion that the Council is, in effect, a private entity, the Supreme Court noted that "[t]he delegation of nominating authority to private persons is not in derogation of the Constitution where that document is silent as to the appointment of public officials." *Id.* at 579. Such delegation does not offend the Constitution if "the particular delegation is reasonable under

the circumstances considering the purpose and aim of the statute.” *Ibid.* (quoting *Male v. Renda Consulting*, 64 N.J. 199, 201 (1974).

(Pa125-126).

- Regarding the nominating authority that the Legislature granted the Federation, Justice Pollack commented that “it is difficult to conceive of a group with a keener interest in maintaining a plentiful supply of game, in developing regulations to insure the safety in hunting, and in overseeing the operations of the state’s hatching and game farm and its stocking activities.” *Id.* at 573.

(Pa126).

- In *Humane Society*, the Court did not hesitate to conclude that a “review of the limitations on the Fish and Game Council’s authority, which limitations serve to promote other interests, convinces us that there does not reside in that body the potential for such aggrandizement of the Council members’ interests as would be repugnant to due process.” *Ibid.* It emphasized that “the dominion of the Fish and Game Council is so confined. The wildlife it regulates, as indicated, are limited specifically to those species which are commonly the subjects of hunting and fishing, and even then the regulatory power is restricted.” *Id.* at 575. Thus, the Court concluded, “[t]he consignment of the specialized powers and duties flowing from this legislative scheme to so-called special interest groups has a rational basis, because these entities are most directly affected by the Council’s regulations and possess the requisite expertise for achievement of the statutory objective.” *Id.* at 577.

(Pa126-127).

- The Council’s approval of any CBBMP is therefore subject to numerous constraints. It is subject to the veto power of the DEP Commissioner. Give the legislative instruction mentioned above, the delegation of rulemaking authority to the Council is not unbridled or arbitrary; rather it has a reasonably adequate standard that guides the Council’s policy promulgations. The Council’s authority is circumscribed by statute, and, in exercising its constrained authority to

enlarge or limit those statutory restrictions, “the Council at all times must condition such departures on the essential purpose its regulations are designed to serve – the maintenance of a plentiful supply of game and fish for recreational hunting and fishing.” *Humane Soc.*, 70 N.J. at 576.

(Pa128).

- Plaintiffs cannot avoid this conclusion through challenging the authority of the Council under the New Jersey State Constitution. This is especially true where Plaintiffs here make identical arguments about the Federation’s role in the nominating process as the Plaintiffs in *Humane Soc.* Plaintiff’s, despite declaring the Council a “private regulatory agency,” allege no malfeasance on the part of any members of the Council or provide any indicia of evidence indicating acts by the Council which are contrary to the public interest. *Id.* at 579-580; Pb16.

(Pa128-129).

- Further, the Council is neither a private regulatory organization nor controlled by a private organization. The members are duly appointed public officials: members of the Council must be nominated by the Governor and approved by the Senate. (As *Humane Society* notes, the Legislature did not require that any members be a member of a sportsmen’s club.) Furthermore, the DEP Commissioner must approve any CBBMP for it [to] become effective. This, in addition to the legislative restraints mentioned above on the Council’s authority demonstrates that Plaintiffs’ assertion the Council is controlled by a private interest group lacks merit and is not supported by an indica of evidence.

(Pa129).

- Importantly, the Court in *Humane Society* also observed:

The governmental interest in establishing regulations to ensure a plentiful supply of game animals for consumption and sport is suitably furthered by placing a degree of regulatory control in the hands of a Fish and Game Council composed of sportsmen,

farmers, and commercial fisherman. Opening the Council's membership to persons with differing philosophies might reflect the art of public relations, but is not a constitutional necessity.

[*Id.* at 577.]

(Pa129).

- It is not the role of the judiciary, absent any constitutional violation, to second guess the composition of the Council, especially “because [the entities proscribed in the Council’s nominating statute] are most directly affected by the Council’s regulations and possess the requisite expertise for achievement of the statutory objective.” *Id.* at 577.

(Pa129-130).

- In light of the principles articulated in *Humane Society* regarding the Federation’s role in the nomination process and the above stated legislative instructions limitations on the Council’s authority, the delegation of rulemaking authority to the Council does not violate Article IV., par. 1 of the New [Jersey] State Constitution. For these reasons, Count Two of Plaintiffs’ complaint contains no legally recognizable cause of action, and the Court must dismiss Count Two.

(Pa130).

- The Court brief turns to Count Three of Plaintiffs’ complaint. Plaintiffs offer no support, nor can the Court find any, for the proposition that alleging a legislative act is “arbitrary and unreasonable” presents a legal recognizable cause of action at the trial court level. To the extent that the complaint seeks to allege, by reference to rational basis review, an equal protection or due process claims related to the recommendation criteria, the Court finds that *Humane Society* resolved those claims.

(Pa130-131).

LEGAL ARGUMENT

I. Judge Lougy’s Trial Court Opinion Must Be Affirmed Under The Binding New Jersey Supreme Court precedent in *Humane Soc. of U.S., New Jersey Branch, Inc. v. New Jersey*, 70 N.J. 565 (1976). (Pa115-133)

Applying the “rational basis” standard of judicial review, the Supreme Court upheld the statutory scheme for the appointment of the eleven (11) members to the State Fish and Game Council, including six (6) member nominations from the New Jersey Sportsmen’s Federation.

First, the Supreme Court rejected Plaintiffs’ legal argument that the statutory appointment process effectuated an improper delegation of power:

Here, as in *Saylor*, a particularized unit of government is implicated and the persons who achieve office do not have plenary powers. The Fish and Game Council is a specialized body, with statutorily prescribed duties and statutory limits on its powers and activities. Its members serve by appointment, not by election.

Humane Society at 572.

Finding that a “rational basis” standard of review applies to the statutory challenge, the Supreme Court next concluded:

The burden, then, is on plaintiffs to demonstrate that the impact on them of the Fish and Game Council’s decisions is so significant and substantial as to render a statutory scheme which effectively bars them from appointment to the Council patently arbitrary and capricious.

Humane Society at 572.

Applying the “rational basis” standard of review (i.e., whether a state of facts exists that can reasonably justify the legislative scheme), the Supreme Court concluded:

The Legislature may prescribe such qualifications as reasonably relate to the demands of a specialized office. [citation omitted]. Logic is not offended by the classes included in the challenged statute. We have already stressed the discrete character of the Fish and Game Council, charged as it is with certain responsibilities and powers pertinent to ensuring the statutory objective of an abundant supply of game for recreational and commercial hunting and fishing. Sportsmen, farmers, and commercial fisherman feel directly the impact of decision-making in this area and are likely to have the necessary expertise to make the required decisions competently.

Humane Society at 573.

The statute specifies that six of the eleven Council members must be sportsmen. Assuming this category consists of the hunters and fisherman of the state, it is difficult to conceive of a group with a keener interest in maintaining a plentiful supply of game, in developing regulations to insure safety in hunting, and in overseeing the operations of the state’s hatching and game farm and its stocking activities.

Humane Society at 573.

To the extent that sportsmen and farmers have special interests which may at times conflict, the presence of both groups on the Council is at once a rational legislative decision. For the same reason it is appropriate that these Council members be recommended to the Governor by organizations consisting of their peers.

Humane Society at 574.

The legislative arrangement suggests that the numbers of sportsmen for purposes of the appointment process should be substantial, inasmuch as eligibility for membership in the Sportsmen’s Federation is provided to every duly organized sportsmen’s club in the state with twenty-five or

more members specifically for the purpose of permitting ‘the broadest possible representation of sportsmen in the making of recommendations for appointment of sportsmen to membership in the council.’ *N.J.S.A.* 13:1B-25.

Humane Society at 575.

Rejecting Plaintiff’s “bias argument” against the Sportsmen’s Federations’ particularized interests, the Supreme Court concluded:

Plaintiffs...have neither alleged nor proven that their interests are antithetical to the [Sportsmen’s] Federation or that, should they attempt to join, they would be rejected.

Humane Society at 575.

Further rejecting Plaintiff’s “improper delegation of power” argument, the Supreme Court found:

More compelling, however, is the fact that the dominion of the Fish and Game Council is so confined. The wildlife it regulations, as indicated, are limited specifically to those species which are commonly the subjects of hunting and fishing, and even then the regulatory power is restricted. See, E.g., *N.J.S.A.* 23:4-49, defining game birds to include twenty-two species; *N.J.S.A.* 23:4-1, prohibiting hunting of most of these birds except in the open season fixed by federal regulations. See also *N.J.S.A.* 23:4-18. The hunting season and, where applicable, the bag limits for certain birds and small game, *N.J.S.A.* 23:4-1, *N.J.S.A.* 23:4-2, and *N.J.S.A.* 23:4-32, certain furbearing animals, *N.J.S.A.* 23:4-39, deer, *N.J.S.A.* 23:4-43, foxes *N.J.S.A.* 23:4-58.1, and certain fish, *N.J.S.A.* 23:5-1, are set forth by statute where no provision in these instances otherwise appears in the State Fish and Game Code. While it enjoys, in the discharge of this function, a certain flexibility permitting enlargement or limitation of the statutory designations, nevertheless the Council at all times must condition such departures on the essential purpose its regulations are designed to serve – the maintenance of a plentiful supply of game and fish for recreational hunting and fishing. Notice and public hearings as well as scientific investigation and

research must precede adoption of and any changes in Code regulations and amendments thereto, *N.J.S.A. 13:1B-31 et seq.* The statutory scheme expressly subjects ‘(a)ny regulation, or amendments thereto, or repealer thereof’ to judicial review. *N.J.S.A. 13:1B-35....*

The Council does not have unfettered authority to decide that hunting or fishing will take place on private property, see *N.J.S.A. 23:7-1*, or on state-owned lands.

Humane Society at 575.

Lastly, the Supreme Court rejected the legal argument that a private group’s significant role in the statutory nomination process on the eleven (11) member New Jersey Fish and Game Council was inherently arbitrary and capricious:

Finally, plaintiffs contend that the role played by the Agricultural Convention and Sportsmen’s Federation in recommending nine of the eleven appointees amounts to an ‘inbred nomination process’ offensive to due process because it produces a Council incompletely representative of the public interest. [citations omitted].

The delegation of nominating authority to private persons is not in derogation of the Constitution where that document is silent as to the appointment of public officials. [citations omitted]. Even delegation of legislative authority to private parties may withstand constitutional challenge if sufficient safeguards exist to prevent an arbitrary concentration of power in persons or groups motivated by self-interest. ‘The test is whether the particular delegation is reasonable under the circumstances considering the purpose and aim of the statute.’ *Male v. Renda Contracting*, 64 *N.J.* 199, 201, 314 *A.2d* 361 362, Cert. den., 419 U.S. 839, 95 S.Ct. 69, 42 L.Ed.2d 66 (1974).

...

Our review of the limitations on the Fish and Game Council’s authority, which limitations serve to promote other interests, convinces us that there does not reside in that body the potential for such aggrandizement

of the Council members' interests as would be repugnant to due process.

Humane Society at 579.

Based upon the above precedent, the claims advanced by the Appellants have already been rejected by the Supreme Court. Indeed, our Supreme Court concluded that, "it is difficult to conceive of a group with a keener interest in maintaining a plentiful supply of game, in developing regulations to insure safety in hunting, and in overseeing the operations of the state's hatching and game farm and its stocking activities. Farmers, who are represented by three Councilmembers, own a major part of the hunting lands in the state." *Id.* at 573.

Furthermore, the Supreme Court explained:

The Legislature may prescribe such qualifications as reasonably relate to the demands of a specialized office. Logic is not offended by the classes included in the challenged statute. We have already stressed the discrete character of the Fish and Game Council, charged as it is with certain responsibilities and powers pertinent to ensuring the statutory objective of an abundant supply of game for recreational and commercial hunting and fishing. Sportsmen, farmers, and commercial fishermen feel directly the impact of decision-making in this area and are likely to have the necessary expertise to make the required decisions competently.

[*Id.* at 573 (internal citations omitted)].

The Court also dismissed similar due process claims in *Humane Society* stating, "a delegation of legislative authority to private parties may withstand constitutional challenge if sufficient safeguards exist to prevent an arbitrary

concentration of power in persons or groups motivated by self-interest. The test is whether the particular delegation is reasonable under the circumstances considering the purpose and aim of the statute.” *Id.* at 579 (quoting *Male v. Renda Contracting*, 64 N.J. 199, 201 (1974)).

CONCLUSION

For the forgoing reasons, the Trial Court’s decision granting the Defendants/Respondents Motion to Dismiss must be affirmed.

Respectfully submitted,

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August 12, 2024

VIA ELECTRONIC FILING:

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Re: THE LESNIAK INSTITUTE FOR AMERICAN LEADERSHIP and
RAYMOND J. LESNIAK v. NEW JERSEY FISH AND GAME
COUNCIL, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL
PROTECTION, DIVISION OF FISH AND WILDLIFE, GOVERNOR
PHILIP D. MURPHY, GOVERNOR OF NEW JERSEY and NEW
JERSEY STATE FEDERATION OF SPORTSMEN’S CLUBS
Docket No.: A-001687-23-T4

On Appeal from the Superior Court of New Jersey, Law Division
Sat Below: Hon. Robert T. Lougy, A.J.S.C.

Reply Letter Brief on Behalf of Appellants, The Lesniak Institute for
American Leadership and Raymond J. Lesniak

Dear Mr. Orlando:

Please accept this letter brief on behalf of Plaintiffs-Appellants, The Lesniak
Institute for American Leadership and Raymond J. Lesniak (“Plaintiffs” or
“Lesniak”) in response to the opposition Briefs of the Defendants-Respondents, New
Jersey Fish and Game Council, New Jersey Department of Environmental
Protection, Division of Fish and Wildlife, Governor Philip D. Murphy (together

“State Defendants”) and New Jersey State Federation of Sportmen’s Clubs (“NJSFSC”).¹

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ARGUMENT

POINT I: THE HUMANE SOCIETY DECISION IS DISTINGUISHABLE FROM THE PRESENT APPEAL AND SHOULD NOT BE CONSIDERED BINDING PRECEDENT (Responding to Sb8-13 and SCb-1, 8-13).

The Defendants argue that this Court must reject the Plaintiffs’ arguments based upon binding precedent enunciated by New Jersey Supreme Court nearly 50 years ago in Humane Society of United States v. N.J. State Fish and Game Council,

¹ Lesniak’s original brief will be referenced as “Pb.” The State defendants’ brief will be referenced as “Sb” and the NJSFSC’s brief as “SCb.”

70 N.J. 565 (1976), appeal dismd., 429 U.S. 1032, 97 S.Ct. 723, 50 L.Ed. 2d 744 (1977).² It is submitted that the analysis of due process and equal protection violations under the Fourteenth Amendment to the United States Constitution in Humane Society is not the same as a determination of whether there have been violations of the separation of powers and the distribution of legislative power under Art. III, Par. 1 and Art. IV, Sec. 1, Par. 1 of the New Jersey Constitution. The Plaintiffs do not contend that their due process and equal protection rights (or for that matter the due process and equal protection rights of any interest group or individual) have been violated by exclusion from the Council in favor of a particular private organization such as the NJSFSC. It is the Plaintiffs' position that no private interest group should be delegated the power to effectively control a regulatory agency by designating the majority of the members of that agency so that the agency

² The NJSFSC even argues that Humane Society should be considered *Stare decisis*. (SCb1). To begin with, *Stare decisis* is inapplicable because the gravamen of the Humane Society decision was whether the delegation of nomination authority to a private organization violated the due process and equal protection rights of the animal rights plaintiffs in that case. It did not deal with the separate New Jersey constitutional issues of separation of powers and distribution of legislative authority under Articles III and IV of the New Jersey Constitution. Furthermore, "*Stare decisis* is a principle to which we adhere for the sake of certainty and stability. (***)". It is nevertheless a 'flexible channel marker for guidance' which should not be permitted to foreclose reanalysis where it is warranted." (Internal citations omitted). State v. Shannon, 210 N.J. 225, 226 (2012). As stated by former Chief Justice Vanderbilt in his dissenting opinion in Fox v. Snow, 6 N.J. 12, 14 (1950) "...the common law would be sapped of its life blood if *stare decisis* were to become a god instead of a guide...", cited with approval in White v. North Bergen Tp., 77 N.J. 538, 550 (1978).

becomes a privately controlled agency. The Humane Society case and other cases do not, within the context of the separation of powers and delegation of legislative authority, “...firmly establish that the Council is neither a private entity nor controlled by one.” (Sb9).

Furthermore, it is not a question of whether or not it is “appropriate and reasonable” to appoint only “sportsmen” recommended by the NJSFSC to the Council given the “specialized nature of the Council’s responsibilities.” (Sb9). It is not a question of whether or not the Legislature’s decision to designate “sportsmen” as the controlling majority on the Council is appropriate, because “sportsmen” are supposed to have “knowledge of and interest in the conservation and fish and game” N.J.S.A. 13:1B-24.³ Rather, it is the delegation of regulatory power to an agency controlled by a private organization in violation of Articles III and IV that is the constitutional infirmity about which the Plaintiffs’ complain, which is an issue that was not decided by the Humane Society case.

**A. The Council Is A Privately Controlled Agency
(Responding to Sb9 – Sb13).**

The State Defendants argue that the enabling statutes make it clear that the Council is a “public agency” because all of the Council members are appointed by the Governor with the advice and consent of the Senate. (Sb9). However, the

³ It is evident that one does not have to be a “sportsman” to have “knowledge of or interest in the conservation of fish and game” especially given the multiple definitions of the term “sportsmen.”

enabling statute governing the Governor's statutory authority to appoint Council members is much more restrictive. The Governor does not have the authority to select any of the six member sportsmen majority on the Council. That authority resides exclusively with a private organization, the NJSFSC. So, the NJSFSC has the unique power of controlling the majority membership on the Council, which is a much greater delegated authority than simply advising the Governor on the choice of "sportsmen".

The State Defendants argue that while the NJSFSC nominates the six sportsmen members, nothing in N.J.S.A. 13:1B-24 mandates that the sportsmen be members of that private organization. (Sb9). Assuming arguendo that the State Defendants are correct, it is the power to control the majority membership that is the violation of Articles III and IV thereby rendering the underlying statute unconstitutional.⁴ The State Defendants argue that the delegation of nominating authority is not a delegation of legislative power, citing Group Health Ins. v. Howell,

⁴ As the Plaintiffs argued in their initial Brief, the legislative intent that the sportsmen appointed to the Council must be members of the NJSFSC can be ascertained by construing N.J.S.A. 13:1B-24 together with N.J.S.A. 13:1B-25, which is intended to foster membership in the amalgamated Sportsmen's Clubs ("[i]n order to permit the broadest possible representation of sportsmen to membership in the Council.") Furthermore, given the multiple definitions of the terms "sportsman" and "sportsmen", it would be absurd to conclude that the Legislature did not intend for the majority membership to consist of hunters and trappers who are members of the NJSFSC. Otherwise, the designation of sportsmen in N.J.S.A. 13:1B-24 would be subject to constitutional challenge for vagueness. See Pb23, n.5 See also, Frank Deford, "What's A Sportsman Anyway?", www.npr.org/2014/12/17/371259218/whats-a-sportsman-anyway, (Heard on Morning Edition, Dec. 17, 2014.)

40 N.J. 436, 447-48 (1963). (Sb9). But, N.J.S.A. 13:1B-24 grants to the NJSFSC much more authority than just recommending sportsmen. While the Governor does not have to accept, and the Senate does not have to confirm, every sportsman nominated by the NJSFSC, the Governor does not have the authority to appoint, and the Senate does not have the authority to confirm, a sportsman that is not nominated by the NJSFSC. The NJSFSC controls that process. And it is not just the process of nominating candidates that is unconstitutional, it is the delegation of regulatory power to an agency controlled by a private organization, the NJSFSC, that violates the separation of powers and the restriction on the delegation of legislative authority in Articles III and IV. This constitutional infirmity is not overcome even if, as the State Defendants argue, the members of the Council are subject to the Conflicts of Interest Law and the State's Ethics Code, or can be removed by the Governor for cause (Sb10), since only sportsmen selected by the NJSFSC can make up a majority of the members of the Council.

Although the legislative designation of "sportsmen" (whatever that term means if untethered from membership in the NJSFSC) to have the majority membership on the Council is delimited by the requirement that the members must have knowledge of and an interest in the conservation of fish and game, however specialized that knowledge or interest may be, the State Defendants overlook the fact that the granting of such regulatory authority over hunting and trapping to a

private organization with majority control of the Council goes far beyond recommending or advising the Governor on nominees.

The State Defendants also conjure up a false equivalence between a sportsman's "knowledge of and interest in conservation of fish and game" and the specialized expertise of professional licensing boards, such as doctors for medical boards and nurses for nursing boards. (Sb10). Unlike professionals who are delegated authority to regulate their own members, the sportsmen on the Council are accorded the authority to regulate the public in general. They have also been accorded majority control, which is not the case for the members of the State Board of Agriculture or the New Jersey Natural Lands Trust. It is the de jure control delegated to the NJSFSC that is offensive to the New Jersey Constitution.

As explained earlier and in the Plaintiffs' original Brief, even if it is theoretically possible for a sportsman nominated by the NJSFSC to not be a member of that private organization, the fact that the Sportsmen's Clubs have been given the power to control the majority membership of the Council is sufficient to render the underlying statutory framework unconstitutional. It is the potential control given to a private organization over a regulatory body that offends Articles III and IV of the New Jersey Constitution. Thus, the enabling statute should be deemed unconstitutional regardless of the nature of the interest group given majority control of the Council.

Additionally, proving the fact that the Council has a ‘pro-bear hunting bias’ that is ‘manifested in [its] policies’ (Sb13, n.6) is not essential to Plaintiffs’ constitutional argument, which applies regardless of the particular interest group given majority control of the Council. That said, it has been nearly 50 years since the Humane Society decision was handed down. During that time, the decisions of the Council clearly manifest a pro-hunting bias that may not have been evident to the New Jersey Supreme Court at that time, when it stated that it had no reason to believe that the Council was biased as result of its sportsmen-majority. As one appellate court stated, the history of the litigation over the approval or prohibition of a bear hunt manifests “[b]ear management is a topic that’s sparks widespread disagreement and strong public sentiments...” N.J. Animal Rights Alliance v. N.J. Depart. of Env’tl Prot., 396 N.J. Super. 358, 372-73, n.3 (App. Div. 2007). During the intervening years, the Council has uniformly exhibited a pro-bear hunting position, as was most recently exemplified in Animal Protection League of New Jersey, et al. v. New Jersey Fish and Game Council, et al, 477 N.J. Super. 145, 152 (App. Div. 2023). In that case, this court invalidated the Council’s emergency rule-making authorizing a bear hunt and its finding that an emergency bear hunt was necessary to avert imminent peril and criticized the Council for manufacturing the emergency by improperly delaying the adoption of the emergency rule. Id. at 164-166. The Court in Humane Society intimated that it might reconsider its conclusion about the pro-hunting bias of the Council, resulting from the majority control of the

NJSFSC, if evidence was later presented that would justify a reexamination. While the Court was convinced at the time that there was not a potential for an “aggrandizement of the Council members’ interests as would be repugnant to due process” (Humane Society, 70 N.J. at 579), there is adequate reason to reexamine that conclusion today in the context of Articles III and IV. Furthermore, since the trial court dismissed the complaint with prejudice in the context of the Defendants’ motions to dismiss under R.4:6-2(e) for failure to state a claim, it should have been more cognizant of the Plaintiffs’ allegation that the Council has acted as an interest group with a pro-hunting bias.

The State Defendants argue that the delegation of regulatory authority to the Council is permissible since the exercise of that authority is hemmed in by sufficient standards. (Sb14). However, even if sufficient standards are set forth in the enabling legislation, the violation of the separation of powers clause and the limitation on delegation of legislative authority in the New Jersey Constitution cannot be overcome when the regulatory agency is controlled by a private interest group.

B. The Private Non-Delegation Doctrine Is Grounded in The Separation of Powers Not Due Process. (Responding to Sb18)

The State Defendants argue that the private non-delegation doctrine raised by the Plaintiffs is grounded in due process principles, which was rejected in the Humane Society case. (Sb18). For that proposition, the State Defendants erroneously cite Ridgefield Park Ed. Ass’n v. Ridgefield Park Bd. of Ed., 78 N.J.

144, 163-64 (1978). However, Ridgefield Park does not say that the private non-delegation doctrine is grounded in due process principles. Indeed, numerous cases state that the private non-delegation doctrine is based on separation of powers principles, not due process. See, National Horsemen's Benevolent & Protection Ass'n v. Black, 53 F.4th 869, 880-81 (5th Cir. 2022).⁵ See also, Sedlak v. Dick, 256 Kan. 779, 887 P.2d 1119, 1130 (1995) (“...a doctrine of nondelegation has been treated by some courts as a facet of separate of powers...”). The State Defendants seem to argue that separation of powers is a subset of the private non-delegation doctrine, which is not the case. That doctrine flows from the separation of powers, rather than the other way around. It is completely distinguishable from the due process claims about the Council's composition upon which the Humane Society decision was grounded.

The Plaintiffs do not dispute the proposition that the separation of powers does not bar cooperation among the branches of government, provided that there are sufficient checks and balances, or that rule-making authority may be delegated by

⁵ The 5th Circuit modified the Black decision after HISA was amended by Congress to accord the Federal Trade Commission plenary control over the Horse Racing Integrity and Safety Authority as to the regulatory authority of the agency but not as to enforcement authority. The court continued to uphold the principles underlying the private non-delegation doctrine. National Horsemen's Benevolent and Protective Association v. Black, 107 F.4th 415 (5th Cir. 2024). The private non-delegation doctrine was reinforced by the court after a rehearing en banc in Consumers' Research v. Federal Communications Commission, ___ F.4th ___, 2024 WL 3517592 (5th Cir., July 24, 2024).

the Legislature to an executive agency with specialized expertise and staffing if there are sufficient standards in the enabling statute to guide the agency's actions. (Sb16). The Plaintiffs' position is that such legislative rule-making authority cannot be delegated to a private agency, or an agency controlled by a private organization, particularly when, as in this case, the agency has substantial independent authority that is not subservient to the overriding authority of an executive department or official.

It is important to note that an agency's interpretation of the statute it is responsible to implement and enforce and its own promulgated regulations is generally accorded deference by a reviewing court, see, e.g., In re Freshwater Wetlands Protection Act Rules, 180 N.J. 415, 431 (2004); In re Freshwater Wetlands General Permit Number 16, 379 N.J. Super. 331, 341 (App. Div. 2005).⁶

The decisions of administrative agencies are usually given special weight by courts in deciding challenges to agency action by members of the public. Consequently, for this reason, the separation of powers principles set forth in Article III and the limitation on the delegation of legislative authority set forth in Article IV should be strictly enforced to invalidate the statute delegating legislative authority when the

⁶ But see, Loper Bright Enterprises v. Raimondo, ___ U.S. ___, 144 S. Ct. 2244, ___ L. Ed. 2d ___ (2024) (overturning the Chevron doctrine of deference to administrative agencies with specialized expertise to interpret the statutes delegating regulatory authority to them).

agency is controlled by a private interest group like the NJSFSC that is not adequately accountable to the public.⁷

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should reverse the Trial Court's Orders granting the Defendant's motions to dismiss under R.4:6-2(e) and denying the Plaintiffs' cross-motion for summary judgment, and remand the matter to the Law Division with directions to enter an Order granting to the Plaintiffs the relief requested in the Conclusion to their original Brief. (Pb38).

Respectfully submitted,

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⁷ The State Defendants suggest in a footnote that the Plaintiffs' Complaint is procedurally defective under Rule 2:2-3 to the extent that the Plaintiffs are effectively appealing agency rulemaking. (Sb8, n. 4). The State Defendants' suggestion totally misses the point. The Plaintiffs are challenging the constitutionality of the underlying statutes governing the composition of and the delegation of regulatory authority to the Council, as distinguished from the validity of agency rulemaking per se. Consequently, the lawsuit was properly filed in the Trial Court instead of the Appellate Division. See cases cited in Plaintiffs' original Brief at Pb21, n. 4. To the extent that the Plaintiffs had challenged the reasonableness or arbitrariness of the Council's regulations without reference to the constitutionality of the underlying statute, that claim was withdrawn by Lesniak before the Trial Court. T18-16 to 19-8.

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