FRATERNAL ORDER OF POLICE NEWARK LODGE NO. 12, Plaintiff-Respondent, VS. CITY OF NEWARK Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-003298-17T3 Civil Action On Appeal From: Superior Court of New Jersey Chancery Division Essex County Docket No. Below: ESX-C-177-16 Sat Below: Honorable Donald A. Kessler, J.S.C.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AND NEWARK COMMUNITIES FOR ACCOUNTABLE POLICING

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INTRODUCTION

This case concerns Newark's creation of a civilian complaint review board ("CCRB" or "Board") to remedy long-standing problems in the way that the Newark Police Department ("NPD") handles complaints of police misconduct. In 2014, after a three-year investigation of the NPD, the United States Department of Justice ("DOJ") found "a pattern or practice of constitutional violations," Da4 (DOJ, Investigation of the Newark Police Department, Report (July 22, 2014)("DOJ Report")), compounded by a "system for investigating civilian complaints [that] appears to have been structured to curtail disciplinary action and stifle investigations into the credibility of the City's police officers," Da38 (*id.*) (internal citation and quotation marks omitted). As the New Jersey Attorney General has recognized, this kind of failure in the internal affairs function has "a negative impact on the administration of criminal justice and the delivery of police services," with resulting "los[s] [of] the respect and support of the community" and possible civil lawsuits. Ra37 (Attorney General, Internal Affairs Policy & Procedures (Rev. 2014) ("AG Guidelines")).

In response to the DOJ Report, Newark enacted Municipal Ordinance 6PSF-B ("the Ordinance"), which created a CCRB composed of 11 members of the public and designed to represent

the Newark community. The Ordinance grants the Board a number of powers and responsibilities for the express purpose of "creating protections for the citizenry, as well as instilling confidence in the resolution of the investigation [of complaints of police misconduct] and providing transparency of the process." Da139 (Ordinance, Preamble). In particular, the CCRB is empowered to receive and investigate civilian complaints, make findings of fact, recommend discipline, review NPD internal affairs investigations, and make recommendations concerning NPD policies and practices, among other functions. Da142-43 (Ordinance at III.i-ix). Newark's CCRB thus stands to "restore public confidence in the integrity of the police and judicial system" by virtue of giving voice to civilians in determining allegations of police misconduct. Sa'id Wekili & Hyacinth E. Leus, "Police Brutality: Problems of Excessive Force Litigation," 25 PAC. L. J. 171 (1994); *see also* Merrick Bobb, "Civilian Oversight of the Police in the United States," 22 ST. LOUIS PUB. L. REV. 151, 152 (2003) (civilian boards address public concerns that police are biased in matters of self-regulation). In enacting a CCRB, Newark seeks to join 80% of the nation's most populous cities which, by the year 2000, had created a CCRB. *See* Samuel Walker, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 5 (Sabra Horne et al. eds., 2001).

Shortly after Newark's passage of the Ordinance, and before the CCRB could begin operations, Plaintiff Fraternal Order of Police, Newark Lodge No. 12, brought suit. Ultimately, the trial court granted partial summary judgment to Plaintiff, stripping the CCRB of the ability to investigate, hold hearings, make findings, and recommend discipline in response to complaints. Specifically, the trial court determined that the Ordinance: (1) infringes on the duties of the Newark Chief of Police, contrary to N.J.S.A. 40A:14-118; (2) denies due process to subject officers; (3) is preempted by N.J.S.A. 40A:14-181 and the AG Guidelines; and (4) unlawfully bestows subpoena power.

The trial court's decision was in error. Ruling largely *sua sponte*, the court rendered a lengthy, rambling and difficult-to-follow oral decision, which is based upon speculation and misinterpretations of law. But contrary to the lower court's decision, the Ordinance is in fact a lawful exercise of Newark's authority. Indeed, the Ordinance was carefully constructed to respect the rights of subject officers and the statutory duties of the NPD, and to otherwise fit within existing legal parameters. Moreover, New Jersey's commitment to home rule encourages such municipal problem-solving, and the CCRB is a necessary remedy to a vexing local issue. Accordingly, and as detailed herein, the decision below should be reversed and the Ordinance upheld in full.

INTEREST OF *AMICI CURIAE*

Amici Curiae are the American Civil Liberties Union of New Jersey ("ACLU-NJ") and Newark Communities for Accountable Policing ("N-CAP"). Both are community-based groups that have long advocated for greater police accountability and a civilian voice in the process.

The ACLU-NJ is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitutions of the United States and New Jersey. Founded in 1960, the ACLU-NJ has tens of thousands of members or supporters throughout New Jersey. The ACLU-NJ works through the courts, the legislature, and public education to protect the civil rights of New Jerseyans.

N-CAP is a private, non-profit organization formed in 2014 for the purpose of building a respectful, accountable, and transparent NPD. N-CAP works for reforms that promote community safety and lead to community policing practices that uphold and respect the rights of all people of Newark.

Both organizations have a lengthy history of involvement in this matter. The ACLU-NJ first called for a CCRB in 1965. Since then, the organization has invested significantly in building a movement for such reform; ultimately, it was the ACLU-NJ's petition that resulted in the DOJ opening an investigation of the NPD in 2011. For its part, N-CAP formed with a primary

purpose of supporting creation of a civilian board. Both groups, having studied similar boards in other cities and advocated for a Board that reflected best practices nationally, including board membership drawn from community-based organizations; jurisdiction over a broad scope of civilian complaints; the authority to independently investigate civilian complaints; an assurance of discipline in cases where serious complaints are sustained; the power to audit police department policies; an assurance of due process for subject officers; and a guarantee of public access and regular reporting. *See generally* Udi Offer, "Getting It Right: Building Effective Civilian Review Boards to Oversee Police," 46 SETON HALL L. REV. 1033 (2016) (former director of ACLU-NJ discussing critical components of civilian boards, which were advocated for and implemented in Newark). In sum, *Amici* urged creation of a CCRB that would have legitimacy within the community, and would provide accountability and transparency while assuring fair outcomes to police officers. *Id.*

After the Ordinance was drafted, both groups mobilized members to attend public hearings in support of the Ordinance, and at those hearings, many members testified. And as drafted, the Ordinance grants the ACLU-NJ as well as several N-CAP member organizations the right to nominate a member to sit on the CCRB.

For these reasons, ACLU-NJ and N-CAP sought and received permission to participate as *amici curiae* in the parallel Public

Employment Relations Commission (PERC) unfair labor practice proceeding between the parties in this matter, *Fraternal Order of Police, Newark Lodge No.12 v. City of Newark*, PERC Case No. 2016-196 (filed Mar. 28, 2016). And both organizations sought and received permission to participate as *Amici* in this case below, taking part in all facets of the litigation, including briefing and argument on Plaintiff's preliminary injunction motion, discovery matters, and cross-motions for summary judgment. Both organizations are firmly committed to defending the Ordinance and its lawful creation of a necessary, long-overdue CCRB.

STATEMENT OF PROCEDURAL AND FACTUAL HISTORY[1]

In 2014, following a three year investigation of the NPD, the DOJ found:

> [A] pattern or practice of constitutional violations in the NPD's stop and arrest practices, its response to individuals' exercise of their rights under the First Amendment, the Department's use of force, and theft by officers. The investigation also revealed deficiencies in the NPD's systems that are designed to prevent and detect misconduct, including its systems for reviewing force and investigating complaints regarding officer conduct.

[Da4.]

With regard to the NPD's internal affairs function, the DOJ found recurrent problems, including the failure to collect

[1]For the convenience of the Court, this brief combines its recitation of the facts and the procedural history because those matters are inextricably intertwined for purposes of this analysis.

evidence from complainants; the "fail[ure] to probe officers' accounts or assess officer credibility;" the "fail[ure] to give statements from complainants and witnesses sufficient weight;" the "reliance on complainants' criminal histories while discounting officers' disciplinary histories;" the needless use of *Miranda* warnings in interviewing complainants and witnesses with the effect of "intimidat[ing] and discourage[ing] victims' and witnesses' participation in the complaint process;" and a disciplinary system lacking "transparent [and] objective criteria," resulting in "arbitrary" decisions. Da41-45. As a consequence, only one civilian complaint of excessive force was sustained by the NPD over a six-year period (a rate the DOJ called "implausible on its face") and only two complaints of theft by officers were sustained over a three-year period. Nor was the "low rate of sustaining civilian complaints ... limited to allegations of theft or excessive force;" instead, it was true of all civilian complaints. Da38. As a result, the DOJ concluded, "officers with high numbers of credible complaints that have not been adequately investigated by the NPD . . . have continued to work on the force . . . without any discipline or other corrective action," yielding an "IA [internal affairs] system [that] tacitly permits officers to engage in such conduct." Da37-38.

Furthermore, the DOJ found that the NPD was aware of these issues and had proven recalcitrant. Thus, in a federal suit against the City under 42 U.S.C. § 1983, an expert testified that the NPD "pay[s] little or no attention to complaints from citizens, especially those regarding the use of force," and the court found this opinion credible in a 2011 opinion. Yet, the NPD reduced staffing in internal affairs by more than half in 2011 and 2012, and otherwise failed to address underlying issues throughout the DOJ's three-year investigation. Da39 (DOJ Report) (citing *Garcia v. City of Newark*, 2011 WL 689616, at *4 (D.N.J. Feb. 16, 2011)).

Newark created the CCRB to address these problems through the Ordinance, enacted March 17, 2016. Da139. The CCRB is empowered to "receive, investigate, hear, make findings and recommend action upon complaints by members of the public." Da142 (Ordinance at III.i). The Board's jurisdiction over such complaints is "concurrent" with the NPD, and so does not "obviate the responsibility of the NPD to investigate citizen complaints or incidents," DA144 (*Id.* at IV(d)). Further, the CCRB is not obligated to investigate, hear, or make findings of fact in the case of any civilian complaint; rather, it may elect either to investigate and make factual findings in the first instance concurrently with the NPD, or to wait and conduct a review of the NPD's investigation, or it may do both. *See* Da142

(*id.* at III.ii) (authorizing "review of the findings, conclusions and recommendations of the Division of Police"); Da146 (*id.* at V §1-06) (stating Board must notify NPD whether it intends to conduct "parallel investigation . . . and/or [later review of NPD investigation]").

Where the CCRB conducts an investigation in parallel with the NPD, the CCRB's fact-finding is to be given deference by the Public Safety Director, who must accept the CCRB's findings absent "clear error." Da150 (*id.* at V §1-17(b)). If the CCRB finds a complaint sustained, it "shall use an established discipline matrix and guidelines to recommend discipline" to Newark's Public Safety Director, who is then responsible for all disciplinary decisions. Da143 (*id.* at III.x-xi). The discipline matrix is to be "developed by the Public Safety Director and affected bargaining units, in consultation with the CCRB[.]" Da143 (*id.* at III.x).

The CCRB is charged with developing procedures to guide its investigations and fact-finding. Da146 (*id.* V §1-08) (leaving to Board to determine its procedures); Da142-43 (*id.* at III.v) (prescribing rules for "changes and/or amendments to the rules of procedure[]"). The Ordinance requires, however, that such procedures provide due process to subject officers. Da144 (*id.* at IV.d) ("Nor shall the provisions of this section be construed to limit the rights of members of the NPD with respect to

disciplinary action, including, but not limited to, the right to notice and a hearing, which may be established by any provision of law or otherwise."). Further, the Ordinance requires that, in this regard and others, Board members and their retained employees "shall obtain such training [as is] necessary to fulfill [their] responsibilities." Da153 (*Id.* at V §1-24).

In addition to investigating and hearing civilian complaints, the CCRB is tasked with other functions. The Board is authorized to "consider and make recommendations" to the Public Safety Director, Mayor, and City Council regarding the "policies and procedures concerning the general investigation of complaints by [the NPD.]" Da142 (*id.* at III(ii), (iv)). The CCRB may also make recommendations "regarding practices and/or patterns of behavior that are problematic with regard to the interaction of the Division of Police with the public at large, public safety concerns, failures of communication with the public, or any other area regarding police practices and policy or police-community relations." Da142 (*id.* at III.iv). And the Board is further tasked with establishing "a mediation program pursuant to which a complainant may voluntarily choose to resolve a complaint by means of informal conciliation." Da143 (*Id.* at III.vii).

On August 8, 2016, Plaintiff filed a Complaint and sought a preliminary injunction against the Ordinance, raising four

causes of action: (1) the *ultra vires* creation of subpoena power under N.J.S.A. 40:48-25 and N.J.S.A. 40:69A-36; (2) violation of N.J.S.A. 40A:14-181, because the Ordinance allegedly conflicts with the AG Guidelines; (3) violation of the due process rights of subject officers, because the Ordinance does not mandate notice and a hearing, among other protections; and (4) violation of N.J.S.A. 40A-14-118, because the Ordinance infringes on the Newark Chief of Police's statutory right to investigate police misconduct and determine officer discipline. Da154-69 (Complaint). On November 2, 2016, the trial court granted Plaintiff's motion for a preliminary injunction.[2] The ACLU-NJ and N-CAP moved to participate as *amici curiae* on January 13, 2017, which motion was granted on January 19, 2017. As previously noted, *Amici* thereafter participated in all stages of the proceedings.

On January 23, following argument from the parties and *amici*, the trial court entered an amended preliminary injunction, which permitted the CCRB to "meet and confer to discuss preliminary issues only," specifically permitting creation of a budget, hiring of staff, establishment of rules of conduct and training policies, and procurement of office space.

[2]The City failed to appear at the November 2 hearing that preceded this order, resulting in a finding of default which was later lifted, as discussed in the parties' briefing. *See* Def.'s Br. at 13; Pl.'s Br. at 18.

Ra6-8 (emphasis in original). The amended order also permitted the CCRB to "review[] NPD's policies and procedures and develop[] recommendations," but forbid submission of such recommendations to any "outside party without further court order." Ra7. The CCRB was enjoined from all others functions.

After a period of discovery,[3] Plaintiff moved for summary judgment on December 21, 2017. Defendant filed a response and cross-motion on January 11, 2018, and *Amici* filed a brief in support of Defendant's cross-motion. On March 14, the trial court held a hearing on the cross-motions, at the conclusion of which it issued an oral opinion granting partial summary judgment to Plaintiff. As previously noted, the court's decision is lengthy, rambling, and confused; its specific findings are discussed in the pertinent section of the argument, below. In summary, however, the trial court held that the powers bestowed upon the CCRB were invalid with only two exceptions: an

[3]Plaintiff sought communications between the City and various third parties regarding the Ordinance prior to its passage. The City and *Amici* objected on the basis that the plain text of the Ordinance would control the purely legal questions raised by Plaintiff's complaint, making such correspondence irrelevant. *See Reich v. Bor. of Fort Lee Zoning Bd. of Adjustment*, 414 N.J. Super. 484, 499 (App. Div. 2010) ("[T]he interpretation of an ordinance is a purely legal matter."). The trial court, however, granted Plaintiff's discovery requests, and Plaintiff cited the documents produced in support of its motion for summary judgment. Although the court did not rely upon these materials in reaching its decision, Plaintiff continues to reference these irrelevant documents on appeal. *See* Pl.'s Br. at 29-30, 46 n.12, 50-51.

"oversight function," which the court did not define,[4] and consultation with the Public Safety Director and NPD in the creation of a disciplinary matrix. Tr. at 5 ("I want to be clear, I think the oversight function is plainly legal."); *id.*at 74 ("[T]he CCRB participation in development of this disciplinary matrix is certainly an important goal of this body. . . . [T]his court finds that it has such powers of recommendation."). As to all other CCRB functions, the court held the Ordinance invalid.

LEGAL STANDARD

This Court's review of a summary judgment decision is *de novo*, meaning that the Court must determine "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." *Davis v. Brickman, Ltd.*, 219 N.J. 395, 405-06 (2014).

[4]Specifically, it is unclear whether by upholding the "oversight function" the court meant that the CCRB may review NPD investigations of police misconduct, or only that the CCRB may make recommendations regarding NPD policies generally.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THE ORDINANCE IN VIOLATION OF N.J.S.A. 40A:14-118.

A. The Decision Below

The trial court determined that the Ordinance violates N.J.S.A. 40A:14-118 by authorizing the CCRB to investigate police officers and file disciplinary charges,[5] both of which, the court held, are matters reserved for the Newark Chief of Police ("Newark Chief").[6] The court cited *Gauntt v. Mayor and Council of the City of Bridgeton*, 194 N.J. Super. 468 (1984), for the proposition that N.J.S.A. 40A:14-118 creates separate spheres of authority for municipal governments (*i.e.*, the "appropriate authority") on the one hand, and chiefs of police on the other, such that "the police chief [] run[s] the day-to-day operations and [] the appropriate authority [] develop[s]

[5]Under the AG Guidelines, a disciplinary charge is filed if a "serious" complaint is sustained after investigation, giving the subject officer notice and the right to a hearing. Ra54. Filing a disciplinary charge is thus prior to, and not synonymous with, imposing discipline.

[6]Plaintiff argued this issue under a different theory than the one adopted by the court, claiming that the Ordinance conflicts with N.J.S.A. 40A:14-118 because the Ordinance grants the CCRB the power to mete out discipline, which is a function reserved for the Newark Chief under the statute. Pl.'s S.J. Br. at 28-29; Tr. at 11-12. The court did not resolve this claim, and Plaintiff did not cross-appeal, so this issue has been abandoned. *See Town of Belleville v. Coppla*, 187 N.J. Super. 147, 150 (App. Div. 1982) (issue not addressed below and not raised on appeal is abandoned). It is, however, significant that by ruling on the basis of its own theory *sua sponte*, the court reached decisions without the benefit of pertinent briefing or argument.

the rules and regulations as to how those operations should be implemented." Tr. at 86 (citing *Gauntt*, 194 N.J. Super. at 482). Further, the trial court also interpreted *Gauntt* to hold that the functions of investigating police officers and filing disciplinary charges are "day-to-day operations" reserved for the chief of police. Tr. at 92-95 (citing *Gauntt*, 194. N.J. Super. at 475, 487).

The court so ruled despite the fact that the statute clearly "envisions that entities such as the CCRB may be [ap]pointed by the governing body to examine the operations of the department." Tr. at 84 (quoting N.J.S.A. 40A:14—118 ("Nothing herein contained shall prevent the appropriate authority . . . from examining at any time the operations of the police force or the performance of any officer or member thereof."). The court so found because it interpreted the word "examining" within N.J.S.A. 40A:14-118 to mean "an oversight function to examine and remedy systemic problems in the police force." Tr. at 85. Accordingly, the court found that only the CCRB's "oversight function" was permissible under the statute.

B. *Amici*'s Argument on Appeal

The trial court misinterpreted N.J.S.A. 40A:14-118 and the corresponding case law. The statute provides:

> Any such ordinance, or rules and regulations, shall provide that the chief of police, if such position is established, shall be the head of the police force and that he shall be

> directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof, and that he shall, pursuant to policies established by the appropriate authority:
>
> a. Administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel;
>
> * * * *
>
> c. Prescribe the duties and assignments of all subordinates and other personnel;
>
> * * * *
>
> Nothing herein contained shall prevent the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, and the delegation to such committees or commissions of such powers of inquiry as the governing body deems necessary or to conduct such hearing or investigation authorized by law. Nothing herein contained shall prevent the appropriate authority, or any executive or administrative officer charged with the general administrative responsibilities within the municipality, from examining at any time the operations of the police force or the performance of any officer or member thereof.
>
> [N.J.S.A. 40A:14-118.]

N.J.S.A. 40A:14-118 thus expressly retains Newark's authority to create a CCRB, contemplating that municipal agencies may "examin[e] at any time the operations of the force *or the performance of any officer or member thereof.*" *Id.* (emphasis added). The court's holding to the contrary focused on the Legislature's use of the word "examining," which the court said demonstrated that the Legislature intended to allow only "an oversight function to examine and remedy systemic problems," and not investigations of civilian complaints. Tr. at 85. But this

interpretation ignores that the statute expressly allows municipal government to "examin[e] . . . the performance of any officer or member" of the police force. N.J.S.A. 40A:14-118. That is, far from limiting civilian boards to an oversight function, this language contemplates precisely the sort of investigations of individual officers assigned to the CCRB.

Furthermore, the word "examining" appears in a paragraph which begins, "[n]othing herein contained shall prevent the appointment by the governing body of committees or commissions to conduct *investigations* of the operation of the police force[.]" N.J.S.A. 40A:14-118 (emphasis added). Thus, the relevant paragraph expressly contemplates investigations by municipal government bodies. Moreover, even the ordinary meaning of "examine," is "to inspect closely," "to test the condition of," or "to inquire into carefully," with "investigate" listed as the closest cognate. *See* www.merriamwebster.com/dictionary/examine. Thus, the trial court's cramped reading of the investigatory powers reserved for municipal governments under the statute is unfounded and inconsistent with the statute's plain text.

Nor was the trial court correct that the Ordinance intrudes on day-to-day operations that fall within the exclusive control of the Newark Chief of Police. Initially, it is true — as this Court held in *Gauntt*, 194 N.J. at 486 — that the statute draws a

line between the power to make policy on the one hand, which is assigned to municipal governments, *see* N.J.S.A. 40A:14-118 (the "appropriate authority" is responsible for "adoption and promulgation . . . of rules and regulations for the government of the force and for the discipline of its members"), and control of day-to-day police operations on the other hand, which is reserved for chiefs of police, *id.* (the "chief of police, if such position is established, . . . shall be directly responsible . . . for the efficiency and routine day to day operations [of the police force]"). Tr. 83-84.

But the court erred in classifying investigation of officers and filing disciplinary charges as "day-to-day operations." The standard for determining whether a particular decision is a matter of policy or a day-to-day operation was first stated in *Gauntt*:

> [W]e deem the authority to fix policy as one comprehending the formulation of fundamental principles to serve as broad guides to the chief of police in making his decisions with respect to discharging his responsibility for the effiency and routine day to day operation of the police department.
>
> [*Gauntt*, 194 N.J. Super. at 486.]

And in *Falcone v. De Furia*, 103 N.J. 219 (1986), the New Jersey Supreme Court provided further guidance, holding that designation of detectives is a policy decision because, *inter alia*, "[d]etectives are entrusted with . . . [a] sensitive responsibility," and because "the appointment of detectives [is]

permanent, and not subject to changes at the discretion of the chief[.]" *Id.* at 224. Thus, a decision is a matter of policy properly entrusted to the municipal government when it concerns "fundamental principles" intended to serve as "broad guides to the chief of police," *Gauntt*, 194 N.J. Super. at 486, and where the decision concerns a "sensitive responsibility" and is "not subject to changes at the discretion of the chief," *Falcone*, 103 N.J. at 224.

Applying this standard, the Ordinance is a proper exercise of Newark's authority to make policy under N.J.S.A. 40A:14-118. That is, the Ordinance reflects a decision that NPD resolution of civilian complaints has been so flawed as to require creation of a civilian board to operate in parallel, with the board's fact-finding given deference in cases of concurrent investigations. Undoubtedly, this decision is one of "fundamental principle" concerning a "sensitive responsibility" that serves as a "broad guide" for resolving individual complaints. And clearly this decision is "permanent" and not "subject to changes at the discretion of the chief."

Nor does *Gauntt* hold otherwise. First, with regard to investigations, *Gauntt* held that the appropriate authority could not order an internal affairs officer to investigate a particular matter because this power was reserved to the police chief under N.J.S.A. 40A:14-118 subsection (c), the power to

"[p]rescribe the duties and assignments of all subordinates[.]" *See Gauntt*, 194 N.J. Super. at 487 ("Since [the internal affairs officer] is a member of the police force, N.J.S.A. 40A:14–118c mandates that his duties and assignments be prescribed by [police chief.]"). *Gauntt* thus does not hold, as the trial court apparently believed, that N.J.S.A. 40A:14-118 subsection (a), the power to "administer and enforce rules and regulations . . . for the disposition and discipline of the force," assigns to the police chief exclusive control over investigation of police misconduct. Rather, subsection (a) simply gives the Newark Chief the power to "administer and enforce rules and regulations" enacted by the City, and here, Newark has enacted the Ordinance, creating a CCRB.

Second, with regard to filing disciplinary charges, *Gauntt* held that the appropriate authority violated the statute by ordering the chief of police to file a disciplinary charge only because "the rules and regulations governing the City of Bridgeton's police department give the chief of police authority to file police disciplinary charges." 194 N.J. Super. at 491. In other words, filing disciplinary charges was a power assigned to the police chief not by statute, but by local ordinance. Here, Newark has passed a different Ordinance, authorizing the CCRB to sustain complaints and hold hearings. Accordingly, *Gauntt* does not prohibit the Ordinance.

In sum, the Ordinance is a lawful exercise of municipal policy-making under N.J.S.A. 40A:14-118, and the Court should reverse the decision below on this issue.

II. THE TRIAL COURT ERRED IN FINDING THAT THE ORDINANCE VIOLATES DUE PROCESS.

A. The Decision Below

The trial court determined *sua sponte* that the Ordinance violates due process for four (4) discrete reasons.[7] *First*, the court found "a huge risk with the ordinance as crafted that there could be a neutral and detached decision maker." Tr. at 100-01. The court identified two bases for this finding. One was that "several members of the CCRB are the ones that advocated change to the structure of police discipline because it was not effective," adding, "there is a question in this mind as to [whether] organizations which advocated this change should be members of this body". *Id.* The other basis was that "the CCRB is empowered both to investigate and to hear matters. And investigating and hearing matters are completely separate functions which in this Court's view are antithetical to each

[7]Plaintiff claimed the Ordinance violates due process because it "permit[s] the CCRB to make findings of fact and determinations of discipline, including discharge, without providing the officer any kind of hearing[.]" Pl.'s S.J. Br. at 25; *see also* Tr. at 11-12, 55-56. The trial court rejected this argument, finding, "these due process considerations will be something that is developed in cooperation with the police union," Tr. at 55. Nonetheless, the court identified its own due process issues. *See id.* at 95 ("I see the due process issues a little bit differently than both counsel.").

other." *Id.* at 101. In support of this rationale, the court cited "*In re D'Elia*, 216 N.J. 2014,"[8] in which a judge was held to have violated due process where he "questioned litigants when a prosecutor wasn't present. And therefore acted both as the prosecutor, and the hearing officer." Tr. at 102.

Second, the Court found that because "there can be parallel hearings going on at the same time," there is a possibility of "inconsistent result[s] . . . . and because of that, as an operational matter the Court believes that the rules of fundamental fairness are violated[.]" Tr. at 103-04.

Third, the court found that the Ordinance inserts "an extra layer of review" into appeals from agency determinations of police misconduct. Tr. at 105. The court read the Ordinance to provide "that the CCRB can review the findings of [the NPD]," which "intrudes upon the due process guarantees under the civil service law," because review of agency decisions is "*de novo* [] in the Superior Court." Tr. at 106.

Fourth, the Court found a due process violation in the Ordinance's standard of "clear error" for the Public Safety Director's review of CCRB fact-finding or recommendations of discipline. Tr. at 106-09; *see* DA144 (Ordinance at IV.c) (where the Director finds clear error or imposes lesser discipline than

[8]This is the only citation provided by the court, but it is inaccurate. From the court's description of the case, it seems to have been referencing *In re DeLio*, 216 N.J. 449 (2014).

that recommended by the CCRB, "[t]he Board may [] request that the Public Safety Director appear in person before the Board for further explanation or to address questions from the Board."). The court noted that "clear error [] is a very exacting standard," Tr. at 107, and concluded that, "from a due process perspective there is a potential that the actions of the police director would be publicized and that the hearing process would be politicized and this process is unfortunately prone to political abuse." *Id.* at 108.

B. *Amici*'s Argument on Appeal

The trial court's *sua sponte* due process decision is based on multiple errors of law. Under established precedent, each of the bases for the court's decision should be reversed.

1. The CCRB is neutral and detached.

The trial court was wrong that the CCRB cannot be neutral and detached. First, the court's rationale that the CCRB may not be impartial because it includes "members . . . that advocated change," Tr. 100-01, is contrary to established law.[9] In New Jersey, adjudicative bodies are afforded a "'presumption of honest and integrity.'" *In re Carberry*, 114 N.J. 574, 586 (1989)

[9]The court's characterization of the CCRB is also wrong as a matter of fact. That Board members may have advocated for greater accountability in policing is not evidence of bias against police; rather it shows a desire to correct existing bias by restoring fairness to a system that, as the trial court acknowledged, is "profoundly broken." Tr. at 109.

(quoting *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Ed. Ass'n*, 426 U.S. 482, 497 (1976)). Consequently, "actual bias [is] the touchstone of disqualification," and such bias may be inferred only if "the decisionmaker has a pecuniary interest in the outcome of the matter or has been the target of personal criticism from one seeking relief." *Id.* Here, CCRB members do not have a pecuniary interest in officer discipline, nor have they been targets of personal criticism by the NPD.

Even more to the point, "[n]or is disqualification automatically required merely because a decisionmaker has announced an opinion on a disputed issue." *Carberry*, 5785 (Police Superintendent who had implemented drug-testing protocol was not disqualified from determining officer's challenge to protocol); *accord Hortonville*, 426 U.S. at 493 ("Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute[.]"); *see also United States v. Morgan*, 313 U.S. 409, 421 (1941) (Secretary of Agriculture could determine case though he had written opinion piece in the New York Times on the matter)); *see also In re Xanadu Project at Meadowlands Complex*, 415 N.J. Super. 179, 192-93 (App. Div. 2010) (agency head's prior advisory opinion did not create bias that required recusal). That CCRB members may have publicly advocated for

reform is therefore irrelevant, as a matter of law, to the due process analysis.

Relatedly, the trial court was also incorrect that the CCRB cannot be neutral and detached because it will both investigate and adjudicate complaints. *See* Tr. at 101-02. Beyond the principle that a decision-maker is presumed impartial, bias will not, as a matter of law, be inferred from the fact that an adjudicator previously investigated the same matter:

> It has often been argued that casting the same individuals within an agency in these dual [investigative and adjudicative] roles violates due process. However, the general rule is that proof of actual bias is necessary to overturn administrative actions on this basis.
>
> [*Matter of Opinion No. 583 of Advisory Comm. on Professional Ethics*, 107 N.J. 230, 236 (1987) (citations omitted).]

Accord Ende v. Cohen, 296 N.J. Super. 350, 353-54 (App. Div. 1997) ("The combination of investigative, charging, and adjudicative functions in the same administrative tribunal does not, without more, constitute a violation of due process."); *Matter of Bd. of Ed. of City of Trenton, Mercer Cty.*, 176 N.J. Super. 553 (App. Div. 1980) ("[T]he mere fact that the administrative agency has investigated the matter in question does not render it or its members incompetent, consistent with due process, to adjudicate the case as presented at the evidentiary hearing.'") (citations and quotation marks omitted).

The trial court cited *In re DeLio*, 216 N.J. 449, but that decision is not on point, as the court admitted. Tr at 102 (acknowledging decision is "not directly on point"). In *DeLio*, a trial judge denied counsel to defendants, held a trial with the prosecutor absent, assumed the role of prosecutor himself, cross-examined the defendants, found them not credible, and convicted them. *Id.* at 456-61. This "outrageous" conduct, the New Jersey Supreme Court held, "eliminated all indicia of impartiality" *id.* at 480, a far cry from anything that can fairly be ascribed to the CCRB. Further, the case says nothing about inherent bias arising from the dual roles of investigator and adjudicator. Accordingly, the trial court's speculation – for that is all that it is – that the CCRB will not be neutral and detached is contrary to law and should be reversed.

2. The Ordinance will not produce inconsistent results.

In finding that the CCRB and NPD will conduct parallel disciplinary hearings with a potential for inconsistent results, the trial court misinterpreted both the Ordinance and the Attorney General's Guidelines. To be sure, it is possible that the CCRB and NPD may engage in parallel investigations and hearings. But the mere potential for parallel investigations and hearings does not mean that inconsistent results will, or even may, follow. In fact, the Ordinance precludes this possibility,

stating that in cases of concurrent fact-finding, the CCRB determination is given deference.[10] DA150 (Ordinance at V §1-17(b) ("[A]bsent clear error, the Public Safety Director shall accept [CCRB] findings of fact[.]")). No provision of State law or the Attorney General's Guidelines requires similar deference to internal affairs fact-finding. Thus, there is no possibility of inconsistent disciplinary determinations.

Nor does it violate fundamental fairness, as the court intimated, Tr. at 103-04, that the CCRB and NPD may conduct parallel proceedings. New Jersey's fundamental fairness doctrine "'serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily,'" and is invoked as a failsafe "'in those rare cases where not to do so will subject the defendant to oppression, harassment, or

[10]This preference is appropriate in light of the DOJ's conclusion that "NPD's system . . . appears . . . structured to curtail disciplinary action and stifle investigations[.]" DA38 (quotation marks omitted); *see* Reenah L. Kim, Note, "Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils," 36 HARV. C.R.-C.L. L. REV. 461, 478 (2001) ("When many people perceive that internal review within the police department lacks reliability with respect to fairness and effectiveness, external review becomes necessary to maintain the credibility of the complaints process, which symbolizes the integrity of the police as an institution.") Nonetheless, under the Ordinance, CCRB fact-finding will not always control. For example, NPD fact-finding may result in the Public Safety Director rejecting a CCRB conclusion for clear error.

egregious deprivation[.]'" *Doe v. Poritz*, 142 N.J. 1, 108 (1995) (citation omitted).

But parallel proceedings in the present context would not be arbitrary, nor should they be presumed to be for the purpose of harassment. Indeed, parallel proceedings will not necessarily occur at all. Thus, the CCRB may elect whether to investigate a complaint in the first instance, or instead wait to conduct a non-binding review of the NPD's investigation. DA145 (Ordinance at V §1-06). But when the CCRB determines to undertake an investigation, it will presumably be because the CCRB considers the matter of significant public importance, or has reason to believe that the NPD cannot be objective. See DA38-44 (DOJ Report) (identifying deficiencies in NPD practice). Certainly, it would be inappropriate to presume an improper motive.

Moreover, while the NPD is required to investigate all complaints, the "law enforcement executive" has discretion as to whether or not to file disciplinary charges and initiate formal fact-finding. Ra53-54 (AG Guidelines) (executive shall "direct whatever action is deemed appropriate," noting that charges are to be served only "[i]f the complaint is sustained and it is determined that formal charges should be made"). Given that the Ordinance directs the CCRB and NPD to communicate in response to each complaint, DA145 (Ordinance at V § 1-06) (Board must notify the NPD "within a reasonable period of time" whether it will

conduct investigation); DA145 (*id.* at IV.a-b) (NPD must assist in Board investigations upon request), the NPD may elect not to file disciplinary charges where the CCRB is investigating concurrently. If the NPD does conduct a parallel fact-finding, it will, again, presumably reflect a valid reason, such as to improve NPD's diligence and performance, or to provide an alternative report to CCRB fact-findings for review by the Public Safety Director as part of the clear error analysis. Either way, parallel proceedings would serve a laudable purpose, and in any event, would not violate fundamental fairness. *See State v. P.Z.*, 152 N.J. 86 (1997) (finding no violation of fundamental fairness in holding, "[w]e reject the contention that because parallel civil and criminal systems are both operating against a defendant at the inception of proceedings in either court, [defendant] must be accorded rights not now required by constitution or statute").

More generally, "parallel proceedings are unobjectionable under our jurisprudence," provided there is no "prejudice to the parties involved." *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980), *cert. denied* 449 U.S. 993 (1980). And in fact, parallel proceedings of all kinds are extremely common as a matter of state or federal law. *See, e.g., Division of Youth & Family Servs. v. V.J.*, 386 N.J. Super. 71, 80 (Ch. Div. 2004) ("pending parallel [criminal

and civil child abuse and neglect] cases involving the exact same parties, facts, and issues"); *State v. Gruber*, 362 N.J. Super. 519, 527-28 (App. Div. 2003) ("dual sovereign doctrine" permits parallel criminal prosecutions in separate jurisdictions "when a defendant's single act violates the peace and dignity of two sovereigns"); *United States v. Kordel*, 397 U.S. 1, 2 (1970) ("nearly contemporaneous civil condemnation proceeding" and criminal prosecution under the federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*); *In the Matter of Bevill, Bressler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d Cir. 1986) (simultaneous Chapter 11 reorganization under 11 U.S.C. § 1101 and liquidation under Security Investor Protection Act, 15 U.S.C. § 78aaa); *Dresser Industries*, 628 F.2d at 1375 (simultaneous investigations by the Securities and Exchange Commission and federal grand jury). Given this overwhelming precedent, the trial court erred in finding a violation of due process or fundamental fairness in the potential for parallel proceedings or inconsistent results.

3. <u>The CCRB will not determine appeals</u>.

The trial court's conclusion that the Ordinance "provides under certain circumstances an extra layer of review [by the CCRB]," displacing the role of the Superior Court to hear appeals, Tr. at 105-06, reflects a complete misreading of the Ordinance. The court's decision was based on a single sentence

in the Ordinance, which it read into the record, saying "this is the important sentence to me":

> "No finding or recommendation shall be based solely upon an unsworn complaint or statement, nor shall prior unsubstantiated, unfounded or withdrawn complaints be the basis for any such finding or recommendation with regard to a particular complaint, but such findings or recommendations shall be grounded in a residuum of some competent support or evidence."
>
> [Tr. at 106) (quoting DA142 (Ordinance at III(iv).]

However, this sentence appears in a provision of the Ordinance that addresses "The findings and recommendations *of the Board*, and the basis therefore . . . ." DA142 (Ordinance at III.iv) (emphasis added). Thus, the sentence analyzed by the court by its terms refers to the CCRB's own findings and recommendations – that is, it is a constraint on CCRB fact-finding, not an authorization to conduct any kind of intermediate or binding review of findings by the Police Division.

Nor does any other provision of the Ordinance authorize the CCRB to hear appeals. To be sure, the Board has the power to review NPD investigations and make a report to the Public Safety Director. DA142 (Ordinance at III.ii). But such reviews are advisory and non-binding. *Id.* In sum, in this as in other respects, the trial court got it wrong and its decision must be reversed.

4. The deference required to CCRB fact-finding does not violate due process.

The trial court found a due process violation in the Ordinance's requirements that the Public Safety Director accept CCRB fact-finding absent clear error, and be required to publicly answer questions at the CCRB's request if he rejects CCRB findings or recommendations of discipline. Tr. at 107-08 (referencing DA144 (Ordinance at IV.c). The notion that this was error is unsupported in the law.

Though the court stated of the "clear error" standard only that it is "very exacting," Tr. at 107, in any event, due process would not be offended even if the Public Safety Director had no authority to reject CCRB fact-finding at all. After all, State law leaves it to municipalities to determine who shall act as a hearing officer when charges are filed against police officers. *See Gauntt*, 194 N.J. Super. at 489-90 (holding under N.J.S.A. 40A:14-118 that selection of hearing officer is a policy decision for municipal government). Newark could thus have determined that the CCRB will serve as the hearing officer in all cases, with its determinations of fact subject to reversal only on appeal to the Superior Court. The only constraint is that the arbiter must be "neutral and detached," *Nicoletta v. North Jersey Dist. Water Supply Commn.*, 77 N.J. 145, 154 (1978), which the CCRB will be, as previously noted.

That the Ordinance permits the Public Safety Director to reverse in cases of clear error is, then, an *additional* procedural safeguard, not an encroachment on the rights of officers.

Further, there is no due process violation in the requirement that the Public Safety Director answer questions publicly upon request. The trial court cited no authority to the contrary, and none exists. In fact, New Jersey has long recognized that such transparency combats bias and corruption. *See, e.g., New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission*, 155 N.J. Super. 218, 226 (App. Div. 1977) ("'Sunlight is said to be the best of disinfectants[.]'") (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *see also Hammock by Hammock v. Hoffman-LaRoche, Inc.*, 142 N.J. 356, 370 (1995) (noting "'the security which publicity gives for the proper administration of justice.'") (quoting *Cowley v. Pulsifier*, 137 Mass. 392, 394 (1884) (Holmes, J.). Indeed, it is this belief in the power of transparency that undergirds New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1, and Open Public Meetings Act, N.J.S.A. 10:4-1 *et seq. See Burnett v. Cty. of Beren*, 198 N.J. 408, 414 (2009) (Open Public Records Act embodies "the bedrock principle that our government works best when its activities are well-known to the public it serves. With broad

public access . . . , citizens and the media can play a watchful role in . . . guarding against . . . misconduct.").

And the New Jersey Supreme Court recently underscored that the public has a particularly strong interest in transparency related to matters of possible police misconduct. *See North Jersey Media Group, Inc. v. Twp. of Lyndhurst*, 229 N.J. 541, 576-77 (2017) (holding that the public interest favors release of dash-cam video in case of police shooting of suspect because the matter is of "great public concern"). As a result, particularly in light of the DOJ's finding that NPD's handling of complaints has been "'structured to curtail disciplinary action and stifle investigations,'" DA38, the Ordinance's creation of greater transparency is an appropriate means of achieving more just outcomes in this important area of public concern.

III. NEITHER N.J.S.A. 40A:14-181 NOR THE ATTORNEY GENERAL'S GUIDELINES PREEMPTS THE ORDINANCE.

A. The Decision Below

The trial court determined that N.J.S.A. 40A:14-181 and the Attorney General's Guidelines conflict with and preempt the Ordinance under the five (5) preemption factors listed in *Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of Town of W. New York,* 71 N.J. 451 (1976). Under the first factor, whether "the Ordinance conflict[s] with state law, either because of

conflicting policies or operational effect," *id.* at 461, the court identified three conflicts: (1) that the Ordinance authorizes civilian investigations of law enforcement, while the Guidelines assign this function exclusively to internal affairs divisions, Tr. at 122-23; (2) that the Ordinance does not assure the confidentiality required by the Guidelines, *id.* at 134-35; and (3) that the Ordinance threatens the integrity of criminal investigations in breach of the Guidelines, *id.* at 112-13, 133.

Under the second *Overlook* factor, whether "the State law intended, expressly or impliedly, to be exclusive in the field," *Overlook*, 71 N.J. at 461, the court stated only, "given the language of the statute, the cases, and the mandatory nature of the guidelines, they were intended or expressly or impliedly [*sic*], to be exclusive in the field." Tr. at 129.

Regarding the third factor, whether "the subject matter reflect[s] a need for uniformity," 71 N.J. at 461, the court quoted N.J.S.A. 52:17B-98 ("Attorney General [is the] chief law enforcement officer of the State . . . to secure the benefits of a uniform and efficient enforcement of the criminal law"), as well as decisional law citing this statute, and stated:

> The Court reads that [authority] to mean that in order to be uniform and efficient the Attorney General as the Chief Law Enforcement officer of the State is the one who is to set the underlying means by which such investigations [of police officers] will be conducted.
>
> [Tr. at 127.]

Of the fourth *Overlook* factor, whether "the state scheme [is] so pervasive or comprehensive that it precludes coexistence of municipal regulation," 71 N.J. at 461, the court stated only, "certainly the scheme setup by the guidelines is so pervasive that it precludes coexistence of municipal regulation, because of the need for expertise." Tr. at 132.

And finally, under the fifth *Overlook* factor, whether "the ordinance stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature," 71 N.J. at 461 (citation and quotation marks omitted), the court said summarily, "the ordinance would stand as an obstacle to the accomplishment of the execution of the purposes, of the – objectives of the legislature because there is specific expertise is needed." Tr. at 125.

B. *Amici*'s Argument on Appeal

The trial court fundamentally misconceived the purpose and effect of the Attorney General's Guidelines, presuming that because the Guidelines provide minimum standards for police departments in responding to civilian complaints, this function was assigned exclusively to police departments. To the contrary, however, neither N.J.S.A. 40A:14-181 nor the Attorney General's Guidelines signal any intent to preempt municipal regulation in the field of civilian complaints of police misconduct. See *Redd v. Bowman*, 223 N.J. 87, 109 (2015) ("'The ultimate question is

whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act.'") (quoting *Summer v. Teaneck Twp.*, 53 N.J. 548, 555 (1969)). Consequently, municipalities remain free to promote police accountability in ways beyond the internal affairs function in accordance with their particular needs, precisely as Newark has done. And because the Ordinance is fully consistent with the Guidelines, the court's preemption finding should be reversed.

1. The Ordinance does not conflict with State law.

a. State law does not reserve investigation of police officers for the NPD.

The trial court concluded that only police officers may investigate police misconduct, first and foremost, because N.J.S.A. 40A:14-181 and the Attorney General's Guidelines mandate that police departments create internal affairs divisions that operate in accordance with particular standards. Tr. at 109-13. But the mandatory nature of these requirements demands only that police departments be directly accountable to their communities, and that they comply with minimum standards. *See*, *e.g.*, Ra37 (AG Guidelines) (noting that a police department's "[i]ndifference to the internal affairs function

will have a negative impact on the administration of criminal justice and the delivery of police services"). This requirement says nothing about whether the Legislature or, for that matter, the Attorney General, intended to exclude civilian agencies from also investigating civilian complaints. *See Mannie's Cigarette Serv., Inc. v. Town of West New York*, 259 N.J. Super. 343, 348 (App. Div. 1992) (holding that State and municipal regulation in the same field could not, standing alone, support preemption because, "[t]he mere fact of subject matter convergence is not, by itself, determinative of the preemption question.").

The trial court thus presumed the intent to preclude investigation by bodies like the CCRB, but such a presumption was inappropriate: New Jersey law requires "clear evidence" of a conflict with State law. *See Summer*, 53 N.J. at 554 ("[A]n intent to occupy the field must appear clearly. It is not enough that the Legislature has legislated upon the subject[.]") (citation omitted); *see also Kennedy v. City of Newark*, 29 N.J. 178, 187 (1959) ("[I]t must be clear that the Legislature intended to occupy the field or declared a policy at war with the decision made by local government."). No such evidence exists here.

Put differently, "[m]unicipal ordinances are accorded a presumption of validity and a finding of preemption must clearly appear." *Dome Realty, Inc. v. City of Paterson*, 83 N.J. 212,

232-34 (1980). This reflects New Jersey's preference for home rule:

> Home rule is basic in our government. It embodies the principle that the police power of the State may be invested in local government to enable local government to discharge its role as an arm or agency of the State and to meet other needs of the community.
>
> [*Ingamort v. Bor. of Fort Lee*, 62 N.J. 521, 528 (1973).]

See Kennedy, 29 N.J. at 187 (finding no preemption where State legislation "is wholly consistent with the thesis that the area not covered by legislation shall be left to local determination upon the principle of home rule").

Commitment to home rule is reinforced across numerous State authorities, including the constitutional requirement that laws be "liberally construed in [] favor of [municipal authority]," N.J. Const. art. IV, § VII, ¶ 11; the Faulkner Act's statement that "specifically enumerated municipal powers shall be construed as in addition and supplementary to the powers conferred in general terms by this article" and "shall be liberally construed," N.J.S.A. 40:69A-30; and the "necessary and proper" clause of N.J.S.A. 40:48-2, which the New Jersey Supreme Court recognizes is an "express grant of broad governmental and police powers to all municipalities" with an "added grant of [the] incidental powers" that are "necessary" to wield it. *Fred v. Tappan*, 10 N.J. 515, 519 (1952). By presuming an intent to preclude civilian bodies from investigating police misconduct,

the trial court completely ignored the well-established law of preemption, embodying as it does New Jersey's strong commitment to home rule.

Indeed, State law expressly contemplates that municipalities may form agencies like the CCRB. As previously discussed, N.J.S.A. 40A:14-118 presupposes the existence of municipal bodies "to conduct investigations of the operation of the police force" and "examin[e] the operations of the police force or the performance of any officer or member thereof," – precisely the sort of investigations of individual officers assigned to the CCRB. And the Faulkner Act, N.J.S.A. 40:69A-37, authorizes a city council to "investigate the conduct of any department, office or agency of the municipal government."

Nonetheless, the trial court cited *O'Rourke v. City of Lambertville*, 405 N.J. Super. 8 (App. Div. 2008), for the proposition that investigations of police misconduct are statutorily reserved for internal affairs divisions. Tr. at 115-22.[11] *O'Rourke* held it improper for a police officer who was not a member of the department's internal affairs unit to investigate another police officer, but this was because the

[11]The court also found the Ordinance in violation of *O'Rourke* because that decision held that investigation of law enforcement officers must be "fair and objective" under the Attorney General's Guidelines. Tr. at 121. For the reasons previously noted, the CCRB will be neutral and detached, *i.e.* "fair and objective;" certainly it should not be presumed to be otherwise.

City of Lambertsville's *own rules*, not N.J.S.A. 40A:14-181 or the Attorney General's Guidelines, assigned investigation of police officers to the internal affairs division exclusively. *O'Rourke*, 405 N.J. Super. at 18-19 ("'[The investigating officer's] failure to comply with the City's rules warrants [reversal]'"); *id.* at 20-21 ("[I]n this matter it is undisputed that [the investigating officer] failed to adhere to the City's rules[.]"). The trial court rejected this distinction on the basis that "the [City of Lambertville's] rules are ones that are mandated by the guidelines." Tr. at 122. But this was error: N.J.S.A. 40A:14-181 and the Guidelines mandated that Lambertsville's adopt minimum standards for its internal affairs unit; the city was not required to pass the ordinance it did, which limited investigations of police misconduct to that unit. Once again, Newark has here passed a different Ordinance, which provides for concurrent investigations, and so *O'Rourke* is simply not on point.

As a further basis for its decision that only the NPD may investigate police officers, the court highlighted that the Guidelines "require a certain level of expertise" and mandate that internal affairs officers "complete training[.]" The court interpreted this requirement to mean that "there is a level of expertise that is needed by experienced law enforcement officers to properly execute [the internal affairs] function." Tr. at

114-15. But it simply does not follow from the Guidelines' training requirements that only "experienced law enforcement officers" may investigate police misconduct. *Id.* Here again, the trial court improperly presumed that because the Guidelines are mandatory for police departments, the State intended to preclude investigations by civilian agencies. And the CCRB is, in fact, compliant with the Guidelines' training provisions, specifically requiring "such training [as] necessary to fulfill [the Board's] responsibilities[.]" DA153 (Ordinance at V § 1-23). In sum, the trial court's finding that only police officers may investigate other police officers as a matter of State law is unfounded.

b. The CCRB will not defeat the confidentiality required by the Attorney General's Guidelines.

The trial court held that the Ordinance conflicts with the Guidelines' confidentiality requirements simply because, under the Ordinance, the CCRB will obtain civilian complaints and investigatory materials that otherwise would have gone to the police department only. Tr. at 135 ("[I]n each and every instance of [CCRB] investigations the underlying names of individuals are mandated to be provided to the CCRB[.]"). But the court's interpretation again erroneously presumed that the Guidelines meant to assign the internal affairs function exclusively to police departments; in fact, the Guidelines' confidentiality requirements are simply minimum standards for

protection of sensitive information by whoever investigates police misconduct. And the CCRB will comply with these standards: the Ordinance mandates publication only of statistical data with any personally identifying information redacted. DA151 (Ordinance at V §1-21(a)(f)); *see* Ra75-76 (AG Guidelines) (requiring periodic publication of statistical information with identifying information redacted); *see also Paff v. Bergen Cty.*, 2017 WL 957735, at *4-6 (App. Div. Mar. 13, 2017) (in response to OPRA request for internal affairs files, county was in compliance with N.J.S.A. 40A:14-181 and the AG's Guidelines in providing "the number of complaints pending, the source of the complaint and the noted disposition . . . [, and] the type of complaint among categories," while redacting personal identifying information).

The trial court also found that the CCRB would not assure the requisite confidentiality in one specific regard, because the Ordinance states, "[i]f [a civilian] complaint is substantiated and is referred to a CCRB hearing, the complainant's identity may be released in the course of any public hearing about the alleged misconduct." Tr. at 133-34 (quoting DA146 (Ordinance at §1-07)). However, the Ordinance does not, in fact, require such disclosure, nor does it necessitate public hearings. Instead, the Ordinance is permissive ("*may* be released"). That said, any inconsistency

between the Ordinance and the provisions of State law, should they be so extreme as to demand preemption, are certainly severable, and may thus be excised by the Court in keeping with the Ordinance's severability clause, DA153 (Ordinance at SECTION 2), or under the Court's inherent powers to perform a narrowing judicial surgery. *Ingamort*, 72 N.J. at 423 (severance is proper "where the invalid portion is independent and the remaining portion forms a complete act within itself"); *see, e.g.*, *Bruneti v. Bor. of New Milford*, 68 N.J. 576, 603 (1975) ("The invalidity of the provisions does not affect the enforceability of the remainder of the ordinance since they are clearly severable."). As a result, the Ordinance's treatment of confidentiality need not conflict with the Guidelines, and does not support Plaintiff's preemption argument.

c. The CCRB will not taint criminal investigations.

The trial court determined that "the CCRB's investigation may taint a criminal prosecution" because the Ordinance does not mandate that the CCRB defer investigations in cases of possible criminality unless requested to do so by State or county law enforcement authorities. Tr. at 113. By contrast, the Guidelines require internal affairs divisions to automatically stay investigations under these circumstances. Ra36.

However, the tension between these provisions is illusory: the CCRB must alert the Essex County Prosecutor immediately in cases of possible criminality, and the Prosecutor need only request that the matter be deferred, in which case that occurs automatically. Da144 (Ordinance at IV.f). Thus, the stay mandated by the Guidelines will be timely obtained under the Ordinance in all cases in which the County Prosecutor deems it necessary, making any distinction between the Ordinance and State law irrelevant, as a practical matter. *See C.I.C. Corp. v. Twp. of East Brunswick*, 266 N.J. Super. 1, 11 (App. Div. 1993) (no preemption where alleged practical conflict between ordinance and state law was at most "insignificant"); *Asbury Park City v. Castagno Tires*, 13 N.J. Tax 488, 504 (1993) (upholding ordinance in spite of procedural discrepancy with enabling statute because ordinance was "not flatly inconsistent" with statute and ordinance "effectively accomplished" purpose of statutory procedure); *Orange Taxpayers Council, Inc. v. City of Orange*, 169 N.J. Super. 288, 301-02 (App. Div. 1979) (holding ordinance "responsive to the local problems and conditions" of municipality was not preempted by "minimal conflicting impact" with State law where there was "no irreconcilable conflict between the two"). In sum, the first *Overlook* factor weighs against preemption.

2. State law was not intended, expressly or impliedly, to be exclusive in the field.

The trial court concluded summarily "that given the language of the statute, the cases, and the mandatory nature of the guidelines, they were intended expressly or impliedly, to be exclusive in the field." Tr. 129. *Amici* discuss, supra at 37-42, how the language of N.J.S.A. 40A:14-181 and the mandatory nature of the Guidelines do not support the court's finding of intent to preclude all municipal regulation. To the contrary, as set forth at length above, State law does not express a "clear intent" to occupy the field, leaving municipalities free to regulate as well, provided they adhere to the Guidelines' minimum standards. With regard to "the cases" referenced by the trial court, while it is not clear to which decisions the court was referring, there is no case holding that only internal affairs divisions may investigate police misconduct. Accordingly, this Overlook factor weighs against preemption.

3. The need for uniformity does not support preemption.

The trial court found that the Ordinance would undermine the need for uniformity because:

> [I]n order to be uniform and efficient[,] the Attorney General as the Chief Law Enforcement officer of the State is the one who is to set the underlying means by which such investigations will be conducted.
>
> [Tr. at 127 (citing N.J.S.A. 52:17B-98, *In re Carroll*, 339 N.J. Super. 429 (App. Div. 2001), *O'Shea v. Twp. of West*

Milford, 410 N.J. Super. 371 (2009), and *Carberry*, 114 N.J. 574.).]

The court thus appeared to conclude that the need for uniformity weighs in favor of preemption because the Attorney General is responsible for establishing procedures for investigating police misconduct under State law.[12]

The court's analysis reflects the same error previously discussed: it is wrong to presume from the fact that the Attorney General is charged with promulgating minimum standards to be adopted by internal affairs divisions that the State has a uniformity interest in such investigations being conducted only by police officers. To the contrary, the Guidelines suggest only an interest in the uniformity of the standards to be employed. And, of course, the CCRB will adhere to these standards.

Moreover, there is no basis upon which to conclude that the State's interest in uniformity requires limiting the investigation of police misconduct to internal affairs divisions. Under established precedent, "even if the evil is of statewide concern, [] practical considerations may warrant different or more detailed local treatment to meet varying conditions or to achieve the ultimate goal more effectively."

[12]The trial court also found that the Ordinance would undermine uniformity in light of the alleged conflicts identified above, including the potential for inconsistent results, and issues related to "potential criminal conduct" and "expertise and training." *See* Tr. at 126. *Amici* rely on their counterarguments to these findings, *supra*, and do not repeat them here.

Ingamort, 62 N.J. at 528; *see*, *e.g.*, *Summer*, 53 N.J. at 553 (holding with regard to statewide problem of racial "blockbusting," "it may be useful to permit municipalities to act, for, being nearer the scene, they are more likely to detect the practice and may be better situated to devise an approach to their special problems"). And here, while police misconduct is certainly of Statewide concern, it is also a problem that "depends very much upon the local scene and varies accordingly in its intensity and hurt," *Summer*, 53 N.J. at 553, as the DOJ Report makes clear. Thus, "different or more detailed local treatment" is plainly warranted, and Newark has done so thoughtfully through the Ordinance. *Ingamort*, 62 N.J. at 528. Thus viewed, the Ordinance is not contrary to any State interest in uniformity, but rather is an appropriate expression of a local interest in better policing.

4. The state scheme is so not so pervasive or comprehensive that it precludes coexistence of municipal regulation.

Under this factor, the court stated only that "certainly the scheme setup by the guidelines is so pervasive that it precludes coexistence of municipal regulation, because of the need for expertise." Tr. at 132. As *Amici* noted above, however, the Board must attain the relevant expertise under the Ordinance. Even more generally, the "pervasive" nature of the Guidelines does not demonstrate an intent to preclude municipal

regulation, but only an effort to provide a detailed set of minimum standards required for investigating police misconduct. *Essex Cty. Corrs. Officers PBA Local No. 382 v. Cty. of Essex*, 439 N.J. Super. 107 (App. Div. 2014) (municipality was not precluded from contracting with private companies for housing and treatment of inmates though N.J.S.A. 30:8-1 through -69 provide extensive standards for operation of county jails without mention of such contracts). Because the CCRB can and will comply with these standards, the pervasive nature of the Guidelines does not counsel preemption.

5. The Ordinance does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature.

Finally, the trial court's conclusion under this *Overlook* factor was also cursory: the court stated only that "the ordinance would stand as an obstacle to the accomplishment of the execution of the purposes, of the – objectives of the legislature because there is specific expertise is needed." Tr. at 125. Again, this issue has been addressed above: the bottom line is that the Ordinance does not impede but instead stands to further the objectives of the Legislature, as the scholarly literature makes clear. *See, e.g.*, John Hollway, *et al.*, "Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time," 62 VILL. L. REV. 883, 894 (2017) ("[CCRBs] can play a useful role as intermediaries

between communities and police departments, providing communities with greater visibility into the police department and a better understanding of the department's views, while providing police departments with a (hopefully) less rancorous dialogue with the community . . . and a platform for explaining [] event[s] in greater detail and with greater nuance.").

Accordingly, the court's finding of preemption was erroneous under each *Overlook* factor. Because State law does not manifest a clear intent to preempt the field, the Ordinance is a lawful exercise of Newark's power to resolve an extremely pressing local problem, consistent with New Jersey's commitment to home rule.

IV. THE ORDINANCE PROPERLY IMBUES THE CCRB WITH SUBPOENA POWER.

A. The Decision Below

The trial court analyzed the question of whether the CCRB could lawfully issue subpoenas in light of its decision that the CCRB is not authorized to investigate civilian complaints:

> For the reasons stated previously regarding N.J.S.A. 40A:14-118 and 14-181, and due process principles[,] the issuance of a subpoena for the purposes of bringing charges against individual officers is contrary to applicable law.
>
> [Tr. at 154.]

Accordingly, the court framed the issue as whether the Ordinance could lawfully endow the CCRB with subpoena power to perform "the oversight role of the CCRB." *Id.* at 146. In this regard, the court assumed that Newark could create a Board with subpoena

power if this were necessary to a matter of public concern under N.J.S.A. 40:48-2, but the court concluded that it could not find the requisite necessity:

> [U]nder the terms of this . . . ordinance, the individual police officers are required to cooperate with the CCRB . . . . They're also required to turn over records. . . . And if someone comes in with an individual complaint, they're going to have access to that individual. No one has explained to me what else you would need under subpoena.
>
> [*Id.* at 146.]

Thus, the court concluded, "under the circumstances here, the Court does not find that the subpoena power is required." *Id.* at 154.

But the court also suggested, without explicitly finding, that existing authorities undercut the notion that N.J.S.A. 40:48-2 might allow the City to give subpoena power to the CCRB. In this vein, the court discussed *City of Newark v. Benjamin*, 144 N.J. Super. 58 (Ch. Div. 1976), N.J.S.A. 40:48-2, and *Traino v. McCoy*, 187 N.J. Super. 638 (Law Div. 1982), noting that these authorities suggest that municipal subpoena power is nondelegable and limited to committees composed of members of the city council. See Tr. at 139-47, 151-54.

B. *Amici*'s Argument on Appeal

Because the trial court was wrong that the CCRB may only perform "oversight functions" for the reasons discussed, *supra* at 19-21, this Court must address the question left unanswered

by the court below: whether Newark may endow the Board with subpoena power to investigate civilian complaints. In doing so, the Court should hold that under several, overlapping sources of law, Newark was authorized to utilize and delegate the subpoena power as an incident of its power to investigate.

Newark has both inherent and statutory authority to issue subpoenas as an incident of the municipal power to investigate its agencies and their members. Thus, the Faulkner Act, N.J.S.A. 40:69A-37, authorizes a city council to "investigate the conduct of any department, office or agency of the municipal government." *See Benjamin*, 144 N.J. Super. at 69-70 (operation of proposed civilian complaint review board was "to some degree coextensive" with city council's power to investigate under N.J.S.A. 40:69A-37). As previously noted, N.J.S.A. 40A:14-118 expressly recognizes this authority, leaving intact municipal power to conduct "investigations of the operation of the police force" and "examining the operations of the police force or the performance of any officer or member thereof." And, as the New Jersey Supreme Court held in *Matter of Shain,* 92 N.J. 524 (1983), inherent in the power to investigate is the power to issue subpoenas. *Id.* at 533 ("A reasonable incident of the Council's power to investigate under N.J.S.A. 40:69A-37 is the power to compel testimony, *i.e.*, to issue subpoenas.").

An additional, statutory source of subpoena authority may be found in the statutory "necessary and proper," clause, N.J.S.A. 40:48-2, which as previously discussed, confers an "express grant of general police powers" and "is itself a reservoir of police power." *Ingamort*, 62 N.J. at 536.[13] And use of the subpoena power to investigate police misconduct is certainly necessary to the "order and protection of persons . . . , and for the preservation of the public health, safety and welfare." N.J.S.A. 40:48-2; *see* Ra37 (AG Guidelines) (discussing perils of "indifference to the internal affairs function," including diminution of police services and police-community-relations).

Further, Newark has the power to delegate its subpoena power to a civilian board. One source of such authority is the same "necessary and proper" clause of N.J.S.A. 40:48-2. Thus, in express reliance on this authority, New Jersey municipalities, including Newark, frequently imbue municipal agencies with

[13]Under federal law, the United States Supreme Court has specifically held that the parallel "Necessary and Proper Clause" of U.S. Const. Art. I, § 8 permits Congress to delegate subpoena power. *See Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1946) (Congress could authorize the United States Department of Labor to issue administrative subpoenas when investigating an alleged wage and hour violation under authority of Necessary and Proper Clause). This is persuasive authority particularly because *Shain* adopted the reasoning of *McGrain v. Daugherty*, 273 U.S. 135 (1927), among other federal precedents, in determining that subpoena power inheres in the power to investigate. *Shain*, 92 N.J. at 530, 533.

subpoena power.[14] *See*, *e.g.*, Newark, N.J., Bus. and Occupations Code 8:7-29(c) (Newark Director of Finance "may, and at the request of the . . . licensee shall, subpoena witnesses" in charity-license revocation hearings); Paterson, N.J., Mun. Code 381-5 (Paterson Rent Leveling Board may "issue subpoenas requiring the production of witnesses and documents" to calculate the appropriate rent in landlord-tenant disputes); Elizabeth, N.J., Mun. Code 2.48.110 (Elizabeth's Department of Planning and Community Development has "the authority to conduct hearings . . . [regarding consumer fraud and may] issue subpoenas"); Camden, N.J. Mun. Code 332-25 (Camden Chief License Inspector may "compel the attendance of witnesses and parties in interest by issuance and service of subpoena"); Jersey City, N.J. Mun. Code 254-17 (Jersey City Chief of Division of Construction may "compel the attendance of witnesses and parties in interest by issuance and service of subpoena" to investigate housing code violations). And Newark's delegation of subpoena power to a civilian board is clearly "necessary and proper" for the welfare of the community, because, as discussed at length, *supra*, and as the DOJ report makes clear, Newark's internal

[14]The grant of subpoena power in these Ordinances was valid pursuant to N.J.S.A. 40:48-2 (though there is no case law so holding as these Ordinances have never been challenged) because there is no more specific statutory authority permitting the grant of subpoena power in the case of any of these Ordinances.

affairs division has long failed to properly investigate civilian complaints.

Moreover, legislative bodies also have inherent authority to delegate a portion of their power, provided that the delegation includes standards for use of the power delegated. *Greggio v. City of Orange*, 69 N.J. Super. 453, 461 (Law Div. 1961) ("[W]hen the Legislature delegates a portion of its legislative power to a municipal body or an administrative agency, the Legislature must prescribe the standards that are to govern the exercise of those delegated powers. The same rule of law applies to delegation by the municipality to either an official or governmental board.") (citations omitted); *see also Weiner v. Borough of Stratford, County of Camden*, 15 N.J. 295, 299 (1954) ("[P]rovisions of . . . ordinance vesting discretion in licensing officials to grant or deny a license [must] provide adequate standards to govern the deliberations[.]"). Whether a municipal delegation of authority provides sufficient standards is determined from the relevant ordinance and its purpose and context; in this regard, courts are relatively permissive given the necessity of delegation in modern government. *Movant v. Bor. of Paramus*, 30 N.J. 528, 553 (1959) ("The whole ordinance may be looked to in the light of its surroundings and objectives for the purpose of deciding whether there are standards and if they are sufficient. They need not be minutely detailed. . . . [T]he

exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulatory enactments under the police power[.]") (citations and quotation marks omitted).

With this legal backdrop, the Ordinance's delegation of subpoena power is lawful. The Ordinance authorizes the CCRB to issue subpoenas "[u]pon a majority vote of members of the Board" where "necessary for the investigation of complaints submitted to the Board." DA142 (Ordinance at III.vi); *accord* DA147 (Ordinance at V §1-10(d)). In turn, the Ordinance specifies that the Board is empowered to investigate civilian complaints alleging, *inter alia*, "excessive use of force, abuse of authority, unlawful arrest, unlawful stop, unlawful searches, discourtesy or use of offensive language, . . . and theft." DA145 (Ordinance at V §1-02(a)). And the purpose of this delegation is the same as the purpose of the Ordinance as a whole — to remedy the ills uncovered by the DOJ investigation and report, which residents of Newark have long experienced firsthand. In this manner, the text and purpose of the Ordinance provide sufficient guidance for Newark's delegation of the subpoena power to the CCRB.

Nor do the authorities discussed by the trial court hold otherwise. Beginning with *City of Newark v. Benjamin*, that decision concerned Newark's creation of a CCRB by voter

initiative with elected members, 144 N.J. Super. at 63-64, whereas the present CCRB has appointed members and was created by Ordinance. DA140 (Ordinance at I.1, I.2(a)). These distinctions were the basis of the *Benjamin* holding, making that decision inapplicable here. First, *Benjamin* held that the Legislature had expressly conferred investigative and subpoena powers on the city council by statute, and therefore that such authority could not be exercised or amended by the public through the initiative process. *See Benjamin*, 144 N.J. Super. at 68-69 (power "explicitly conferred" on city council is not proper subject of initiative); *see also Smith v. Livingston Twp.*, 106 N.J. Super. 444, 457 (Ch. Div. 1969) ("[T]he Zoning Act, N.J.S.A. 40:55—30 *et seq.*, constitutes an exclusive grant of legislative power to the governing bodies of the respective municipalities preventing the voters from exercising the power of initiative."); *McCrink v. Town of West Orange*, 85 N.J. Super. 86, 91-92 (App. Div. 1964) ("The ordinance proposed for adoption by the voters of West Orange at the November election would fetter the free and future exercise of the local legislative power."). Indeed, *Benjamin* was careful to note, "what is involved here is not whether the Newark council had the power to enact an ordinance for civilian review of police conduct, but whether it can be done by initiative[.]" *Id.* at 68.

Second, equally essential to the *Benjamin* holding was the fact that the board there at issue was publicly elected. 144 N.J. Super. at 69 ("[T]he proposed ordinance would create another elected body [with similar powers]. . . . [T]his would be an impermissible infringement upon the authority conferred upon the municipality by the Faulkner Act."). But here again, *Benjamin* noted the limits of its holding, stating, "[i]t may well be that the City of Newark could create a civilian review board under its power to appoint subordinate officers . . . . However, this is not what is proposed here." *Id.* at 71. Accordingly, where Newark has here created a CCRB of appointed members by legislative ordinance, *Benjamin* in no way restricts the City's authority to confer subpoena power.

Finally, to the extent that the Law Division in *Traino v. McCoy*, 187 N.J. Super. 638 (L. Div. 1982) suggested that municipalities may not delegate subpoena power to civilian boards, that decision is wrong and should be rejected. *Traino* based its decision on the fact that N.J.S.A. 40:48-25 grants subpoena power to "a committee of [the governing body's] members," concluding from this that "[t]he 'total power' granted to the governing body by statute is to appoint a committee of its members with power to issue subpoenas; there is no residue of subpoena power which could be sub-delegated to a committee[.]" 187 N.J. Super. at 650 (citation omitted).

But *Traino* thus ignored that New Jersey constitutional and statutory law hold that express grants of municipal power do not preclude the exercise of powers not so codified. *See* N.J. Const. art. IV, § VII, ¶ 11 ("The powers of . . . municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto[.]"); N.J.S.A. 40:42-4 ("[A]ll courts shall construe [statute regulating municipal form of government] most favorably to municipalities, it being the intention to give all municipalities . . . the fullest and most complete powers possible[.]"); N.J.S.A. 40:69A-30 ("Any specific enumeration of municipal powers contained in [the Faulkner Act] or in any other general law shall not be construed in any way to limit the general description of powers contained in this article, and any such specifically enumerated municipal powers shall be construed as in addition and supplementary to the powers conferred in general terms by this article[.]"); *see Casamasino v. City of Jersey City*, 158 N.J. 333, 342 (1999) (Faulkner Act was intended "to confer upon municipalities the greatest possible power of local self-government").

In other words, consistent with New Jersey's commitment to home rule, express grants of municipal power, like the subpoena power in N.J.S.A. 40:48-25, are *not* exclusive. Rather, the

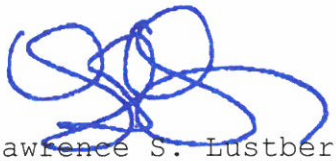
Legislature intends that municipalities have the broadest possible authority to address local concerns. Accordingly, *Traino* notwithstanding, the Ordinance properly imbues the CCRB with subpoena power.

CONCLUSION

Newark has shown bold initiative in responding to the DOJ's findings by attempting to address the problematic relationship of its police force to the community through the well-established, nationally recognized vehicle of a Citizens Complaint Review Board. The CCRB it has created not only promises to mend this divide, but also to bring both security and criminal justice to a City desperately in need of both. That CCRB should be given the chance to perform this salutary function, even as it seeks to honor the rights of subject officers at every turn. Indeed, although the police union is resisting this reform, *Amici* anticipate that both the NPD and its officers will, given the care and diligence with which the Ordinance was conceived and drafted, greatly benefit from the independence and objectivity that such a Board will bring, and the healing it will accomplish in Newark, which will join the many other cities that have established similar bodies. The Board is thus not only completely lawful, but an urgently needed, beneficial reform. For these reasons, the trial court's decision granting partial summary judgment to Plaintiff stands

in the way of both history and good public policy and should be reversed.

Respectfully submitted,



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