

FRATERNAL ORDER OF POLICE,  
NEWARK LODGE NO. 12,

Plaintiff-Petitioner,

VS.

CITY OF NEWARK,

Defendant-Respondent.

SUPREME COURT OF NEW JERSEY

Docket No. 083197

Civil Action

On Appeal From:

Superior Court of New Jersey,  
Appellate Division

Honorable Carmen Messano, P.J.A.D.

Honorable Douglas M. Fasciale,  
J.A.D.

Honorable Lisa Rose, J.A.D.

---

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

---

Lawrence S. Lustberg (023131983)  
Michael R. Noveck (901172012)  
Gibbons P.C.  
One Gateway Center  
Newark, New Jersey 07102  
(973) 596-4500

Jeanne LoCicero (024052000)  
Alexander Shalom (021162004)  
ACLU New Jersey Foundation  
P.O. Box 32159  
89 Market Street  
Newark, NJ 07102  
(973) 642-2084

*Counsel for Amici Curiae*

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	iii
TABLE OF ABBREVIATIONS.....	viii
PRELIMINARY STATEMENT.....	1
INTEREST OF <i>AMICI CURIAE</i> .....	3
STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	6
I. Newark Responds To A Scathing DOJ Report By Creating a Civilian Complaint Review Board.....	6
A. The DOJ Report.....	6
B. Creation of the CCRB.....	9
II. Chancery Division Proceedings.....	12
III. Appellate Division Proceedings.....	13
ARGUMENT.....	17
I. The Ordinance Does Not Conflict with N.J.S.A. 40A:14- 118.....	19
A. The Statutory Text and History Show That N.J.S.A. 40A:14-118 Is Only a Limited Constraint on Municipal Authority over the Day-To-Day Functions of the Police Department.....	19
B. The Ordinance Does Not Improperly Intrude on the Police Chief’s Authority over Day-to-Day Operations.....	22
C. The Unnumbered Paragraph at the End of N.J.S.A. 40A:14-118 Does Not Restrict Municipal Power to Conduct Oversight of Police Departments.....	25
II. Neither N.J.S.A. 40A:14-181 Nor the Attorney General’s Internal Affairs Guidelines Preempt the Ordinance.....	30
A. The Ordinance Is Not Preempted Because N.J.S.A. 40A:14-181 Governs Law Enforcement Agencies, Not Separate Municipal Entities.....	33

Table of Contents (continued)

	<b>Page</b>
B. Because the AG Cannot Control the CCRB, the Conflicts Between the IAPP and the Ordinance Cannot Invalidate the CCRB.....	37
1. The IAPP cannot preclude the CCRB from conducting an investigation parallel with an IA investigation.....	39
2. The "inherent conflicts" restrictions of the IAPP are overbroad and sweep beyond this Court's jurisprudence.....	43
3. The IAPP's requirement that CCRB members and staff pass a criminal history check is unauthorized by law.....	45
III. The Ordinance Properly Provides the CCRB With Subpoena Power As a Necessary Component of Its Investigative Powers.....	48
IV. The Ordinance Does Not Violate Police Officers' Due Process Rights.....	55
A. The Ordinance Does Not Abridge Officers' Due Process Rights in Disciplinary Proceedings.....	55
B. There Are No Facial Due Process Violations Arising out of the CCRB's Membership.....	58
CONCLUSION.....	61

TABLE OF AUTHORITIES

Page(s)

**Cases**

*In re Att’y Gen.’s “Directive on Exit Polling: Media and Non-Partisan Interest Grps.”*, issued July 18, 2007, 200 N.J. 283 (2009) .....38

*In re Bevill, Bressler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d Cir. 1986) .....41

*Brunetti v. Borough of New Milford*, 68 N.J. 576 (1975) .....39

*In re Carberry*, 114 N.J. 574 (1989) .....*passim*

*City of Jersey City v. Jersey City PBA*, 154 N.J. 555 (1998) .....40, 55, 59

*City of Newark v. Benjamin*, 144 N.J. Super. 58 (Ch. Div. 1976), *aff’d*, 144 N.J. Super. 389 (App. Div.), *aff’d*, 75 N.J. 311 (1978) .....16, 49, 53, 54

*In re D.J.B.*, 216 N.J. 433 (2014) .....28, 29

*Div. of Youth & Family Servs. v. V.J.*, 386 N.J. Super. 71 (Ch. Div. 2004) .....41

*Doe v. Poritz*, 142 N.J. 1 (1996) .....39, 56

*Dolan v. City of E. Orange*, 287 N.J. Super. 136 (App. Div. 1996) .....58

*Dome Realty, Inc. v. City of Paterson*, 83 N.J. 212 (1980) .....33

*Falcone v. De Furia*, 103 N.J. 219 (1986) .....20, 22, 24, 28

*Fed. Trade Comm’n v. Cement Inst.*, 333 U.S. 683 (1948) .....60

<i>Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark,</i> 459 N.J. Super. 458 (App. Div. 2019) .....	13
<i>Garcia v. City of Newark,</i> No. 08-1725 (SRC), 2011 WL 689616 (D.N.J. Feb. 16, 2011) .....	7
<i>Gauntt v. Mayor of Bridgeton,</i> 194 N.J. Super. 468 (App. Div. 1984) .....	<i>passim</i>
<i>Gen. Motors Corp. v. City of Linden,</i> 150 N.J. 522 (1997) .....	56
<i>Grabowsky v. Twp. of Montclair,</i> 221 N.J. 536 (2015) .....	28
<i>Hartmann v. Police Dep't of Ridgewood,</i> 258 N.J. Super. 32 (App. Div. 1992) .....	30
<i>Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n,</i> 426 U.S. 482 (1976) .....	58, 59
<i>Inganamort v. Borough of Ft. Lee,</i> 62 N.J. 521 (1973) .....	33, 39, 42, 50
<i>Jordan v. Harvey,</i> 381 N.J. Super. 112 (App. Div. 2005) .....	36
<i>Kennedy v. City of Newark,</i> 29 N.J. 178 (1959) .....	34
<i>La. Pub. Serv. Comm'n v. F.C.C.,</i> 476 U.S. 355 (1986) .....	38
<i>Levin v. Parsippany-Troy Hills Twp.,</i> 82 N.J. 174 (1980) .....	28
<i>Mack Paramus Co. v. Mayor of Paramus,</i> 103 N.J. 564 (1986) .....	42
<i>Masters-Jersey, Inc. v. Mayor of Paramus,</i> 32 N.J. 296 (1960) .....	43, 44
<i>N.J. Shore Builders Ass'n v. Twp. of Jackson,</i> 199 N.J. 38 (2009) .....	50

<i>N.J. State Bd. of Optometrists v. S.S. Kresge Co.,</i> 113 N.J.L. 287 (Sup. Ct. 1934), <i>aff'd as modified</i> , 115 N.J.L. 495 (E. & A. 1935) .....	26
<i>N.J. State League of Municipalities v. Dep't of Cmty.</i> <i>Affairs,</i> 310 N.J. Super. 224 (App. Div. 1998) .....	43
<i>Nini v. Mercer Cty. Cmty. Coll.,</i> 202 N.J. 98 (2010) .....	26
<i>O'Rourke v. City of Lambertville,</i> 405 N.J. Super. 8 (App. Div. 2008) .....	34, 35, 36
<i>Okla. Press Publ'g Co. v. Walling,</i> 327 U.S. 186 (1946) .....	52
<i>Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of</i> <i>W.N.Y.,</i> 71 N.J. 451 (1976) .....	33, 37
<i>Prado v. State,</i> 186 N.J. 413 (2006) .....	26
<i>In re Promulgation of Guardianship Servs. Regulations,</i> 103 N.J. 619 (1986) .....	56
<i>Redd v. Bowman,</i> 223 N.J. 87 (2015) .....	33, 37
<i>Sabri v. United States,</i> 541 U.S. 600 (2004) .....	56
<i>Sec. &amp; Exch. Comm'n v. Dresser Indus.,</i> 628 F.2d 1368 (D.C. Cir. 1980) .....	40
<i>Serv. Armament Co. v. Hyland,</i> 70 N.J. 550 (1976) .....	26
<i>In re Shain,</i> 92 N.J. 524 (1983) .....	16, 49, 50
<i>State Farm Mut. Auto. Ins. Co. v. State,</i> 124 N.J. 32 (1991) .....	58
<i>State v. Caliguiri,</i> 158 N.J. 28 (1999) .....	38, 46

<i>State v. Gruber</i> , 362 N.J. Super. 519 (App. Div. 2003) .....	41
<i>State v. Profaci</i> , 56 N.J. 346 (1970) .....	56
<i>Summer v. Twp. of Teaneck</i> , 53 N.J. 548 (1969) .....	33, 34, 42
<i>Town Tabacconist v. Kimmelman</i> , 94 N.J. 85 (1983) .....	56
<i>Traino v. McCoy</i> , 187 N.J. Super. 638 (Law Div. 1982) .....	53
<i>United States v. Kordel</i> , 397 U.S. 1 (1970) .....	40
<i>United States v. Morgan</i> , 313 U.S. 409 (1941) .....	59
<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982) .....	56
<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442 (2008) .....	56
<i>In re Xanadu Project at Meadowlands Complex</i> , 415 N.J. Super. 179 (App. Div. 2010) .....	59
<b>Statutes</b>	
11 U.S.C. § 1101.....	41
15 U.S.C. § 78aaa.....	41
21 U.S.C. § 301.....	41
N.J.S.A. 2B:20-1(e).....	46
N.J.S.A. 2C:51-2.....	46
N.J.S.A. 18A:12-1.....	46
N.J.S.A. 19:6-2(b).....	46
N.J.S.A. 40:42-4.....	52

N.J.S.A. 40:48-2.....	16, 50
N.J.S.A. 40:48-25.....	16, 52, 53
N.J.S.A. 40:69A-30.....	27, 53
N.J.S.A. 40:69A-36.....	49
N.J.S.A. 40A:14-118.....	<i>passim</i>
N.J.S.A. 40A:14-152.....	36
N.J.S.A. 40A:14-152.1.....	36
N.J.S.A. 40A:14-152.2.....	36
N.J.S.A. 40A:14-181.....	<i>passim</i>
N.J.S.A. 52:13D-21.2(2)(d).....	44
N.J.S.A. 52:17B-98.....	34, 40
N.J.S.A. 52:17B-102.....	34

**Other Authorities**

<i>Assemb. Judiciary, Law, Pub. Safety &amp; Def. Comm.</i> <i>Statement to S. 1243 (L. 1981, c. 266) .....</i>	28
<i>Sutherland Statutory Construction § 22:30 (7th ed.</i> <i>2007) .....</i>	28
Udi Ofer, "Getting It Right: Building Effective Civilian Review Boards to Oversee Police," 46 Seton Hall L. Rev. 1033 (2016) .....	5, 47
<i>Uniform Crime Report, State of New Jersey 2016 19</i> <i>(2016) .....</i>	47

**Rules**

<i>Rule 1:13-9(f).....</i>	15
----------------------------	----

**Constitutional Provisions**

<i>N.J. Const. art. IV, § 7, ¶ 11.....</i>	27, 50, 52
<i>U.S. Const. Art. I, § 8.....</i>	52



**TABLE OF ABBREVIATIONS**

Da:	Defendant's Appellate Division Appendix
Pbc:	Plaintiff's Brief in Support of Petition for Certification
AGbc:	Attorney General's Brief in Support of Certification
Tr.:	Transcript of Oral Argument Before Hon. Donald A. Kessler, J.S.C., Docket No. C-177-16, Mar. 14, 2018

## PRELIMINARY STATEMENT

Civilian oversight of municipal law enforcement is a core principle of New Jersey law. Such oversight provides the public with assurance of police accountability and engenders trust between residents and law enforcement. That trust, in turn, enhances public safety by encouraging residents to report criminal conduct and cooperate with police investigations, and serves to deescalate civilian-police interactions and prevent unnecessary conflicts. A municipality is thus not merely authorized to conduct oversight of its police department, consistent with traditional municipal law; rather, a city that does *not* provide for appropriate oversight is derelict in its responsibility to ensure the health, safety, and welfare of its citizens.

The City of Newark ("City" or "Newark") has, unfortunately, a long history of tension between its residents and its police department. Most recently, these issues culminated in a federal investigation by the United States Department of Justice ("DOJ"), which began in May 2011 and concluded with a July 2014 report that was sharply critical of the Newark Police Department ("NPD"). DOJ found that the NPD had a pattern and practice of unconstitutional conduct and, importantly for this case, a deficient process for investigating officer misconduct against civilians. DOJ thus concluded that the NPD had lost the public trust needed to conduct effective policing and ultimately filed a civil rights complaint

against Newark and entered into a consent decree based upon its findings.

Following the DOJ report, Newark justifiably sought to address these significant issues through effective municipal oversight. As relevant here, Newark enacted Ordinance 6-PSFB ("the Ordinance"), which established a civilian complaint review board ("CCRB" or "Board"). Creating the CCRB was not only a condition of the consent decree resolving the litigation with DOJ, but also a result for which *amici curiae* had forcefully advocated over the course of many years. To help restore oversight and transparency to the investigation of officer misconduct, and as a supplement to the NPD's internal investigations, the City provided the CCRB with the authority to conduct its own investigations of civilian complaints in parallel with the NPD's internal affairs function, and also to review the NPD's internal investigations after they are completed. And to make the CCRB's investigations effective, the City empowered the CCRB to subpoena witnesses and documents.

The Fraternal Order of Police, Newark Lodge No. 12 ("FOP"), which is the bargaining unit for NPD officers, filed suit to prevent the CCRB from operating. A Chancery Division judge largely granted the FOP's request, believing that the CCRB would unlawfully interfere with police functions. But the Appellate Division reversed, recognizing that the CCRB is not a law enforcement agency intended to interfere with the police department, but rather that

it serves a municipal oversight and transparency function designed to provide the public with assurance that its police department is functioning lawfully and appropriately. The Appellate Division thus (with minor exceptions) upheld the CCRB's ability to conduct investigations - including investigations in parallel with internal affairs - and affirmed the CCRB's ability to issue subpoenas.

*Amici curiae* respectfully urge the Court to affirm the Appellate Division's decision. Establishing the CCRB is well within Newark's power to conduct oversight of its police department, and, as more fully described below, no provision of state law prohibits the CCRB from conducting individual investigations in parallel with internal affairs investigations, or from reviewing the NPD's own investigations. Far from unlawful, the CCRB serves laudable, salutary purposes in furtherance of the health, safety, and welfare of Newark residents. It should be permitted to function 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) (collectively, *Amici*). Both have long advocated for greater police accountability and a civilian voice in the process, particularly in Newark.

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 consists of a number of organizational members, including the ACLU-NJ, and 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 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 review board in Newark. Both groups, having studied similar boards in other cities, 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; the guarantee of due process for subject officers; and public access and regular reporting. See generally Udi Ofer, "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.

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

For these reasons, both organizations sought and received permission to participate as *Amici* in this matter at the trial level, taking part in all facets of the litigation. *Amici* also participated in briefing and, with the court's permission, argument in the Appellate Division. Both organizations are firmly committed to defending the Ordinance and its lawful creation of a necessary, long-overdue CCRB.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>1</sup>

### I. NEWARK RESPONDS TO A SCATHING DOJ REPORT BY CREATING A CIVILIAN COMPLAINT REVIEW BOARD

#### A. The DOJ Report

On July 22, 2014, the United States Department of Justice issued its findings from a three-year investigation of the Newark Police Department. See Dal-52 (Investigation of the Newark Police Department, United States Department of Justice, July 22, 2014 ("DOJ Report")).<sup>2</sup> After a comprehensive review, DOJ found that the NPD had engaged in "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." Da4 (DOJ Report at 1). The DOJ Report additionally criticized the NPD's Internal Affairs Unit ("IA Unit"), finding "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." *Ibid.* DOJ concluded that "[t]he NPD's policing practices have eroded the community's trust, and the perception of the NPD as an agency with insufficient

---

<sup>1</sup> These sections, which are, in any event, inextricably intertwined, are combined for the Court's convenience.

<sup>2</sup> The DOJ Report is also available online at [https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark\\_findings\\_7-22-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf).

accountability has undermined the confidence of other Newark criminal justice stakeholders as well." *Ibid.*

In concluding that "there are serious deficiencies in the NPD's handling of civilian complaints that translate to a lack of accountability for serious misconduct," Da38 (*id.* at 35), the DOJ Report made a number of specific findings. For example, DOJ noted that "IA sustained only one misconduct complaint of excessive force in the six-year time period from 2007 to 2012," which DOJ found to be "implausible on its face." *Ibid.* DOJ also found low rates of sustaining civilian complaints on issues other than excessive force, making it "exceedingly rare for the NPD to sustain citizen complaints of misconduct, particularly serious misconduct." Da38-39 (*id.* at 35-36). DOJ's finding was buttressed by a federal court's February 2011 ruling, which "found that the NPD condoned police officers' use of excessive force by failing to adequately investigate civilian complaints." Da39 (*id.* at 36) (citing *Garcia v. City of Newark*, No. 08-1725 (SRC), 2011 WL 689616, at \*4 (D.N.J. Feb. 16, 2011)).

The DOJ Report further indicated that "IA investigators failed to make consistent attempts to follow up with complainants to clarify critical facts," with complainants "receiving little or no subsequent contact from investigators." Da41 (*id.* at 38). Additionally, DOJ concluded that the IA Unit improperly credited the accounts of police officers over those of citizen complainants,



as investigators "failed to probe officers' accounts or assess officer credibility" and "failed to give statements from complaints and witnesses sufficient weight." *Ibid.* The DOJ Report also found that the IA Unit "impugn[ed] complainants' credibility" based on criminal history (including arrests not resulting in conviction) while not similarly accounting for officer disciplinary history. Da42-43 (*id.* at 39-40).

Next, DOJ criticized the NPD for a practice of giving *Miranda* warnings to complainants and witnesses, which "inappropriately suggests . . . that they are being questioned as suspects in a criminal case instead of as potential victims or witnesses of police misconduct" and "can intimidate and discourage victims' and witnesses' participation in the complaint process." Da44 (*id.* at 41). With regard to officer discipline, DOJ referred to the NPD's application of punishment as "seriously flawed," lacking in transparency and consistency, and contributing "to the widespread belief, both within and outside the [NPD], that discipline is meted out, at least in part, based on how well-liked or well-connected an officer is." Da44-45 (*id.* at 41-42). Finally, DOJ found that "the NPD has failed to appropriately train its [IA Unit] investigators," even though a consultant had noted the need for training as far back as 2007. Da48-49 (*id.* at 45-46).

Based upon its Report, DOJ filed a federal complaint against the City of Newark on March 30, 2016. See Da53-60. That litigation

was resolved via Consent Decree filed on April 29, 2016. See Da61-138. The Consent Decree required, among many other reforms, the establishment of a civilian review board:

[T]he City shall implement and maintain a civilian oversight entity. The duties and responsibilities of that entity shall, at a minimum, include the substantive and independent review of internal investigations and the procedures for resolution of civilian complaints; monitoring trends in complaints, findings of misconduct, and the imposition of discipline; and reviewing and recommending changes to NPD's policies and practices, including, but not limited to, those regarding use of force, stop, search, and arrest.

[Da74 (Consent Decree ¶ 13).]

#### **B. Creation of the CCRB**

In response to the DOJ Report, and as part of an Agreement in Principle with DOJ in anticipation of the Consent Decree, the Newark Municipal Council passed the Ordinance on March 16, 2016. See Da139-153. The Ordinance "establishe[s] a Civilian Complaint Review Board [CCRB] to address and participate in the resolution of complaints filed by citizens against" police officers. Da140 (Ordinance at I.1). The Board is constituted of eleven members - including several members who are nominated by *amicus* ACLU-NJ and other organizations associated with *amicus* N-CAP - who are appointed by the mayor with the advice and consent of the municipal council. *Ibid.* (*id.* at I.2(a)).

The CCRB is empowered to "receive, investigate, hear, make findings and recommend action upon complaints by members of the

public." Da142 (*id.* 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, when a civilian complaint is brought to the CCRB, 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]").<sup>3</sup> If the CCRB finds a complaint sustained, it "shall use an established discipline matrix and guidelines," which are "developed by the Public Safety Director and affected bargaining units, in consultation with the CCRB," in order "to recommend discipline" for police officers. Da143 (*id.* at III.x). But the CCRB does not impose discipline; instead, "the Public Safety Director shall make all disciplinary decisions." *Ibid.* (*id.* at III.xi).

---

<sup>3</sup> The Ordinance states that when 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 (Ordinance at V. § 1-17(b)). As described below, the Appellate Division struck down this requirement; the City has not appealed or cross-appealed from that ruling.

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, CCRB members and their retained employees "shall obtain such training 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, III.iv). The CCRB may also make recommendations "regarding practices and/or patterns of behavior that are problematic with regard to the interaction of the [NPD] 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).

## **II. CHANCERY DIVISION PROCEEDINGS**

On August 8, 2016, Plaintiff filed a Complaint in the Essex County Chancery Division seeking both preliminary and permanent injunctive relief against enforcement of the Ordinance. See Da154-69 (Complaint). In initial proceedings, the Chancery Division entered a preliminary injunction, granted the ACLU-NJ and N-CAP *amici* status, permitted discovery, and accepted briefing and heard oral argument on the parties' cross-motions for summary judgment.

Immediately following oral argument on March 14, 2018, the Chancery Division judge issued an oral opinion, essentially ruling that the CCRB was limited to an "oversight function" - though the court did not define what that meant. See Tr. at 5 ("I want to be clear, I think the oversight function is plainly legal."). The Chancery Division judge also ruled that the CCRB could make recommendations to the Public Safety Director for creation of a disciplinary matrix. *Id.* at 74. The court otherwise invalidated the Ordinance and enjoined the CCRB's operations, including the Board's powers to investigate individual civilian complaints of

officer misconduct, review the NPD's IA Unit's investigations, and subpoena witnesses and documents.

On March 19, 2018, the Chancery Division approved the parties' proposed form of order and entered final judgment. Da170-71.

### **III. APPELLATE DIVISION PROCEEDINGS**

Newark appealed, and the Appellate Division, in a 70-page published decision, reversed and, with two minor exceptions, reinstated the Ordinance and its grant of powers to the CCRB. *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 459 N.J. Super. 458 (App. Div. 2019).

The Appellate Division's opinion rejected four separate challenges to the Ordinance's legality. First, the Appellate Division held that, except for the requirement that Newark's Public Safety Director give deference to the CCRB's factfinding, the Ordinance does not conflict with N.J.S.A. 40A:14-118, which reserves certain responsibilities to the Chief of Police. *See id.* at 483-94. As the court explained, given that its findings and recommendations are not binding, "the CCRB will not interfere with the Chief's oversight role in investigations by IA." *Id.* at 493. The court thus distinguished *Gauntt v. Mayor of Bridgeton*, 194 N.J. Super. 468 (App. Div. 1984), because "the Ordinance does not prescribe the duties and assignments of subordinates and other personnel" or "divest the Chief of his statutory authority to oversee investigations by IA," and thus "does not divest the Chief

of his responsibility under the statute." *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 494.

Next, the Appellate Division rejected the FOP's facial due process challenge to the Ordinance. See *id.* at 494-99. Instead, the court determined that "[d]ue process considerations are premature at this point because the Ordinance contemplates the development of further procedural safeguards once the CCRB is up and running." *Id.* at 495. The Appellate Division also rejected the claim that the Ordinance violates due process because of the Board's composition, holding that even though the organizations that nominate CCRB members may have advocated for policy changes relating to police misconduct, there is "no evidence of [actual] bias on the part of prospective CCRB members, or an inability of the CCRB to be neutral or detached." *Id.* at 496 (citing, *inter alia*, *In re Carberry*, 114 N.J. 574, 585 (1989)). The court concluded by noting that its review at this point was limited to a facial challenge, and "as applied challenges to this part of the Ordinance may be made on a more fully developed record if warranted." *Id.* at 499.<sup>4</sup>

---

<sup>4</sup> The Appellate Division also "perceive[d] no facial concerns with" the Ordinance's requirement that the Public Safety Director "provide an explanation, in writing, and potentially in person before the CCRB, when he or she disagrees with the CCRB's findings of fact, or chooses to impose discipline that is of a lower level than that recommended by the CCRB." *Fraternal Order of Police, Lodge No. 12*, 459 N.J. Super. at 498. The FOP's petition for certification does not address this holding or raise it as an issue for review.

Third, the Appellate Division dismissed the claim that the Ordinance conflicts with N.J.S.A. 40A:14-181 and the Attorney General's ("AG") Internal Affairs Policy & Procedures ("IAPP").<sup>5</sup> See *id.* at 499-508. As a threshold matter, the court "reject[ed] the idea that preemption principles invalidate the Ordinance on its face," because the IAPP applies only to law enforcement agencies and not to other entities like the CCRB. *Id.* at 502. In the alternative, the court conducted a traditional preemption analysis and concluded that there is "no inconsistency of consequence between how the CCRB operates under the Ordinance and how the IA investigations occur under the requirements imposed by the [IAPP] or N.J.S.A. 40A:14-181." *Ibid.*; see also *id.* at 503-08 (analyzing preemption factors). As with the due process analysis, the court indicated that additional preemption issues "can be addressed, if warranted, on an as applied challenge on a more fully developed record once the CCRB commences its oversight role under the Ordinance." *Id.* at 508.<sup>6</sup>

---

<sup>5</sup> As described below in *Amici's* argument, the AG issued a Directive and amended the IAPP in December 2019. By letter from the Clerk of Court dated December 17, 2019, the Court requested that the parties and *Amici* submit supplemental briefing by January 24 "addressing the impact, if any, of the Directive and revised IAPP on the appeal now pending before the Court." However, *Amici's* position, as described in more detail below, is that the IAPP does not preempt or otherwise invalidate the Ordinance as a matter of law, an issue that can be briefed within the time period normally allowed for *amicus* submissions. *Amici* thus submit this brief within the time frame set forth in Rule 1:13-9(f). *Amici* will, however, certainly file a brief responding to the submissions of other parties or *amici* on or before February 10, as provided in the Court's supplemental briefing schedule.

<sup>6</sup> The court invalidated the Ordinance's provision permitting disclosure of a complainant's identity as part of a public hearing, reasoning that such



Finally, the Appellate Division upheld the Ordinance's grant of subpoena power to the CCRB. *Id.* at 508-12. The court noted that a municipality has the general power to investigate, incidental to which is the power to issue subpoenas. *See id.* at 509-10 (quoting *In re Shain*, 92 N.J. 524, 533 (1983)). The court further found authority to grant subpoena power to the CCRB in the statutory delegation of subpoena power to municipal councils, *see id.* at 510 (citing N.J.S.A. 40:48-25), and in the authorization of all "necessary and proper" municipal ordinances, *id.* at 511 (citing N.J.S.A. 40:48-2). Finally, the court distinguished *City of Newark v. Benjamin*, 144 N.J. Super. 58 (Ch. Div. 1976), *aff'd*, 144 N.J. Super. 389 (App. Div.), *aff'd*, 75 N.J. 311 (1978), both because that case dealt with a separately elected body and because it predated N.J.S.A. 40A:14-118. *See Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 511-12.

The FOP filed a timely petition for certification, as well as a motion with the Appellate Division to stay the ruling pending appeal. The Appellate Division denied the stay motion, and this Court granted certification on October 21, 2019.

---

disclosure "could thwart an IA investigation, criminal investigation, or prosecution, or could disclose the name of an informant, and could taint an officer who was wrongfully accused," and "could also discourage complainants from coming forward, or encourage unwarranted complaints from people seeking notoriety." *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 507. The City has not appealed or cross-appealed from that ruling.

## ARGUMENT

New Jersey law has long recognized the power of municipalities to regulate their police departments. The Ordinance, which provides municipal oversight of police misconduct, fits squarely within that traditional role. Thus, the FOP and AG's arguments against the Ordinance all fail.

First, the police chief statute, N.J.S.A. 40A:14-118, provides only limited restrictions on a municipality's oversight, restrictions that are not relevant here. The statute was designed to prevent municipal interference with the day-to-day conduct of the police department, such as assignment of officers to particular locations, which is the sole purview of the Chief of Police. But the Ordinance, which provides investigations and oversight of the police department, does not affect the department's day-to-day activities in this sense. Indeed, the statute specifically contemplates and endorses municipal commissions like the CCRB. The CCRB's role thus does not conflict with the statute.

Second, the AG's IAPP, and the statute it is promulgated under, does not preempt or otherwise control the CCRB. To the contrary, the statute, N.J.S.A. 40A:14-181, authorizes the AG to govern only the conduct of a "law enforcement agency" like the police department, and not of a separate municipal entity like the CCRB. The IAPP thus cannot prohibit the CCRB from operating as intended by the Ordinance. Accordingly, recent changes to the

IAPP, placing conditions on the CCRB's ability to obtain IA files, are unauthorized by statute and cannot prevent the CCRB from operating as intended.

Third, the Court should reject the FOP's challenge to the CCRB's subpoena power. The power to issue subpoenas in the course of legislative investigations is well-settled as a matter of constitutional and statutory law. When Newark's municipal council lawfully delegated its investigatory power to the CCRB, it correspondingly delegated this subpoena power as well. Indeed, municipalities throughout the State have frequently delegated their subpoena powers to municipal agencies, and those delegations have never been invalidated. The delegation of subpoena power to the CCRB should likewise be affirmed here.

Finally, the Court should reject the FOP's facial due process attack on the Ordinance. In fact, the Ordinance provides for appropriate due process protections for police officers, as well as for the CCRB to promulgate additional procedures to provide those protections. Moreover, as the Appellate Division properly recognized, an officer can raise due process concerns regarding those procedures on an as-applied basis once the CCRB has begun to operate. And the Appellate Division also correctly rejected the FOP's separate challenge to the composition of the CCRB, as even if Board members have expressed general policy views on issues relating to police misconduct, they cannot be disqualified except

for "actual bias" in a particular matter, and the Ordinance provides an appropriate recusal mechanism where those circumstances arise. Thus, there is no justification for invalidating the Ordinance on its face, although as the Appellate Division recognized, an officer can always raise an as-applied due process challenge in an individual case if warranted.

For these reasons, as more fully argued below, *Amici* urge the Court to reject the facial challenge to the Ordinance and permit the CCRB to conduct its lawful oversight of the Newark Police Department.

**I. THE ORDINANCE DOES NOT CONFLICT WITH N.J.S.A. 40A:14-118.**

The Appellate Division properly held that the Ordinance does not conflict with N.J.S.A. 40A:14-118. Although that statute describes the interplay between the role of the police chief and the oversight of civilian municipal officials, it does not restrict municipal investigations of the type to be conducted by the CCRB. Instead, a proper interpretation of the statute supports the conduct of such investigations.

**A. The Statutory Text and History Show That N.J.S.A. 40A:14-118 Is Only a Limited Constraint on Municipal Authority over the Day-To-Day Functions of the Police Department.**

The current version of N.J.S.A. 40A:14-118 was enacted in 1981. See *L. 1981, c. 266, § 1*. Before then, municipalities retained broad authority to regulate the operations of their police

departments. See *L. 1971, c. 197, § 1* (codifying prior version of N.J.S.A. 40A:14-118); see also *Falcone v. De Furia*, 103 N.J. 219, 221 (1986) ("Before 1981, N.J.S.A. 40A:14-118 gave municipal governing bodies broad authority to regulate the internal affairs of police departments, including the authority to prescribe the duties and functions of police officers."). Thus, the prior statute provided as follows:

The governing body of any municipality, by ordinance, may create and establish a police department and force and provide for the maintenance, regulation and control thereof, and except as otherwise provided by law, appoint such members, officers and personnel as shall be deemed necessary, determine their terms of office, fix their compensation and prescribe their powers, functions and duties and adopt and promulgate rules and regulations for the government of the department and force and for the discipline of its members.

[*L. 1971, c. 197, § 1*; see also *Gauntt v. Mayor of Bridgeton*, 194 N.J. Super. 468, 480 (App. Div. 1984).]

The statute was revised in order to restrict municipal oversight of police departments, but only in certain, carefully delimited respects. Thus, the amended statute requires a municipality that creates a police force to "provide for a line of authority relating to the police function and for the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and the discipline of its members." N.J.S.A. 40A:14-118. But the statute also provides that if a

municipality has a chief of police, then the chief "shall be the head of the police force and . . . shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof." *Ibid.* The Legislature then specifically delineated what those day-to-day responsibilities are:

- a. Administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel;
- b. Have, exercise, and discharge the functions, powers, and duties of the force;
- c. Prescribe the duties and assignments of all subordinates and other personnel;
- d. Delegate such of his authority as he may deem necessary for the efficient operation of the force to be exercised under his direction and supervision; and
- e. Report at least monthly to the appropriate authority in such form as shall be prescribed by such authority on the operation of the force during the preceding month, and make such other reports as may be requested by such authority.

[*Ibid.*]

Consistent with this statute, Newark has established the position of Police Chief, responsible for the NPD's day to day operations, as well as a civilian Public Safety Director, responsible for civilian oversight. See Newark, NJ Code 2:22-3.3.

As courts have recognized, the law largely maintains a municipality's authority, through appropriate civilian officials, to exercise control and oversight of tasks other than these

specifically delineated day-to-day operations. Thus, when the Appellate Division first interpreted the statute in *Gauntt*, it held that a municipality has "the authority to fix policy as 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 efficiency and routine day to day operation of the police department." 194 N.J. Super. at 486. This Court, in *Falcone*, also interpreted the statute as limited to "avoid[ing] undue political influence by a governing body into the operation of the police force." 103 N.J. at 222. As understood by these decisions, the statute appropriately recognizes that municipalities share power with their police chiefs. See *id.* at 225 (noting "the sharing of the power of appointment by the governing body with the police chief").

**B. The Ordinance Does Not Improperly Intrude on the Police Chief's Authority over Day-to-Day Operations.**

Viewed against this legal backdrop, the Ordinance is an appropriate application of Newark's power to oversee its police department, and is not an improper intrusion into the Police Chief's day to day responsibilities. Indeed, the FOP's petition for certification does not identify any of the Police Chief's specific powers that are violated by the Ordinance, instead asserting generally that the CCRB interferes with the disciplinary process. Pbc6-7. But the Ordinance is not intended to replace

the NPD's disciplinary process administered by the Police Chief, through the Internal Affairs division; rather, the Ordinance "shall not be construed to . . . obviate the responsibility of the NPD to investigate citizen complaints or incidents to which the NPD is made known[.]." Da144 (Ordinance at IV.d). In any event, discipline itself is ultimately a subject for the municipality, not the Police Chief, as the Appellate Division recognized in *Gauntt*, where it rejected a police chief's claim that only he could serve as a hearing officer in police disciplinary matters. See *Gauntt*, 194 N.J. Super. at 489-90. Consistent with this case law, the Ordinance leaves the ultimate disciplinary decision to the civilian Public Safety Director (not the CCRB or the Police Chief); the Board cannot require more (or less) discipline than that which the director imposes. See Da143 (*id.* at III.x). The Ordinance thus does not infringe on the Police Chief's limited power to administer the disciplinary process. See *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 493 (concluding that "the CCRB will not interfere with the Chief's oversight role of investigations by IA").

The FOP also incorrectly argues that the Ordinance violates the principles set forth in *Gauntt*. That case criticized only civilian interference from the police director by giving particular directions to police officers and staff: assigning a specific officer to conduct a particular investigation; directing



specific officers to attend particular meetings; requiring a specific officer to attend particular training classes; and assigning a secretary to post a volunteer sign-up list. 194 N.J. Super. at 487-88. And on this subject, the statute was clear. See N.J.S.A. 40A:14-118(c) (giving police chief the power to “[p]rescribe the duties and assignments of all subordinates and other personnel”). This Court laid out the limitations of the rule in *Falcone*, when it held that the designation of a detective is an “appointment” committed to the municipality, not an “assignment” within the purview of the police chief. 103 N.J. at 224-25. The Court thus specifically disapproved of *Gauntt*’s holding that a municipality cannot appoint a specific officer to be head of a detective division. *Id.* at 225. The Ordinance, of course, does not affect individual officers’ assignments at all, and thus does not violate the limited rule set forth in *Gauntt*. See *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 493-94 (distinguishing *Gauntt* and concluding that “the Ordinance does not prescribe the duties and assignments of subordinates and other personnel”). Nor does it run afoul of any of the other provisions of N.J.S.A. 40A:14-118.

**C. The Unnumbered Paragraph at the End of N.J.S.A. 40A:14-118 Does Not Restrict Municipal Power to Conduct Oversight of Police Departments.**

The FOP and *amicus* AG focus their arguments on an unnumbered paragraph at the end of N.J.S.A. 40A:14-118, which reads in relevant part:

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.]

The FOP and AG argue that even though this paragraph gives a commission like the CCRB the authority to "investigate," the inclusion of the phrase "the performance any officer or member thereof" in the second sentence should be interpreted to restrict the CCRB's ability to investigate individual incidents of officer misconduct.<sup>7</sup>

---

<sup>7</sup> The FOP did not make this argument before the Appellate Division. Indeed, the Chancery Division's ruling in the FOP's favor directly contradicts the argument: the judge ruled that the CCRB could only "examine" the police force, which the court defined as "an oversight function to examine and remedy systemic problems in the police force," Tr. at 85, and could not "investigate" the police force, *id.* at 94. The AG's Appellate Division brief, for the first time, reversed the argument, claiming that the CCRB can "investigate" but not

This argument erroneously construes the statute, and indeed, is contrary to several applicable principles of statutory construction. First, the paragraph is not a restriction on the power of municipalities at all. The preceding subparagraphs (a) through (e) are the restrictions of power on a municipality, by delegating certain day-to-day responsibilities solely to the chief of police. Other than these exceptions, the general rule permitting municipal oversight of police departments controls. See *Nini v. Mercer Cty. Cmty. Coll.*, 202 N.J. 98, 109 (2010) (“[E]xceptions in a legislative enactment are to be strictly but reasonably construed, consistent with the manifest reason and purpose of the law.” (alteration in original) (quoting *Serv. Armament Co. v. Hyland*, 70 N.J. 550, 558-59 (1976))). The proviso in the unnumbered paragraph that comes after these specific delegations to the police chief, far from a restriction on municipal power, is designed to ensure that the existing restrictions are not read over-broadly; certainly, as a matter of statutory construction, they ought not be read to add additional restrictions. See *Prado v. State*, 186 N.J. 413, 426 (2006) (noting that “doubt should be resolved in favor of the general provision . . . rather than the proviso or exception” (quoting *N.J. State*

---

“examine” while also claiming that “investigate” did not encompass the ability to investigate individual civilian complaints. The FOP has now adopted that argument for the first time in this Court.

*Bd. of Optometrists v. S.S. Kresge Co.*, 113 N.J.L. 287, 296 (Sup. Ct. 1934), *aff'd as modified*, 115 N.J.L. 495 (E. & A. 1935) (per curiam)).

Indeed, it is particularly inappropriate to read this statute to restrict Newark's power in light of New Jersey's deeply entrenched principle of home rule, which allows Newark to exercise power unless it is specifically prohibited by state statute. See, e.g., *N.J. Const.* art. IV, § 7, ¶ 11 (stating that municipal powers "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, and not inconsistent with or prohibited by this Constitution or by law"); N.J.S.A. 40:69A-30 (stating that specific grant of municipal power does not limit powers not enumerated); see also 2 *Proceedings of the Constitutional Convention of 1947* 1733-34 (noting that as far back as 1916, the Legislature created a commission with instructions "to provide municipalities with the largest possible measure of home rule" (internal quotation marks omitted)). Because the paragraph relied on by the FOP and AG is certainly not a *specific* prohibition on a CCRB, particularly because it unambiguously envisions a commission like the CCRB to "investigate the operation of the police force," N.J.S.A. 40A:14-118, it fails to overcome the "general principle [that] a municipal ordinance is afforded a

presumption of validity." *Grabowsky v. Twp. of Montclair*, 221 N.J. 536, 551 (2015).

Second, because the paragraph of N.J.S.A. 40A:14-118 upon which the FOP and AG rely was added as part of the 1981 amendments to the statute, the Court must interpret it in light of its prior iteration. See *Levin v. Parsippany-Troy Hills Twp.*, 82 N.J. 174, 183 (1980) ("[T]he Court, when construing the statute, must consider statutory history relevant to legislative intent."). That is, a legislative action should not be read "to 'change existing law further than is expressly declared or necessarily implied.'" *In re D.J.B.*, 216 N.J. 433, 446 (2014) (quoting 1A *Sutherland Statutory Construction* § 22:30 at 363-64 (7th ed. 2007)). Thus, the 1971 version of the statute, which gave "broad authority" to municipalities, *Falcone*, 103 N.J. at 221, certainly could not be read to prohibit a separate CCRB. And the paragraph cited by the FOP and AG was, by its express terms, designed *not* to inhibit municipal authority. See N.J.S.A. 40A:14-118 (twice stating that "[n]othing herein contained shall prevent" municipal action). Certainly, it does not provide the kind of express declaration or necessary implication that would be required to change the law. Moreover, to the extent that there is any ambiguity about the language, the legislative history demonstrates that the paragraph was intended to "affirm[] the power of the governing body" that existed under the 1971 statute. See *Assemb.*

*Judiciary, Law, Pub. Safety & Def. Comm. Statement to S. 1243* (L. 1981, c. 266); see also *In re D.J.B.*, 216 N.J. at 445 (declining to read amendment to expungement statute to affect issues not specifically addressed because “[n]owhere does the legislative history reveal an intent to change affect juvenile expungements”). The absence of an explicit prohibition on the CCRB in the 1981 amendments thus means that the prior rule, which would certainly have allowed the CCRB to operate, continued to be the law.

Finally, and perhaps most obviously, even if the Court were to find that only the second sentence permitting the “examining . . . the performance of any officer or member thereof” authorizes a review of individual officer misconduct, the CCRB must be viewed as the “appropriate authority” that is permitted to conduct such an examination. The statute defines “appropriate authority” as follows:

As used in this section, “appropriate authority” means the mayor, manager, or such other appropriate executive or administrative officer, such as a full-time director of public safety, or the governing body or any designated committee or member thereof, or *any municipal board or commission established by ordinance for such purposes*, as shall be provided by ordinance in a manner consistent with the degree of separation of executive and administrative powers from the legislative powers provided for in the charter or form of government either adopted by the municipality or under which the governing body operates.

[N.J.S.A. 40A:14-118 (emphasis added).]

Thus, the statute specifically recognizes that a commission like the CCRB can be - as Newark has made it - the "appropriate authority" under the statute. See *Hartmann v. Police Dep't of Ridgewood*, 258 N.J. Super. 32, 39 (App. Div. 1992) ("The absence from the ordinance of the phrase 'appropriate authority' in describing the village manager is of no consequence on this record because the ordinance clearly delegated to the manager functions assigned to the appropriate authority by N.J.S.A. 40A:14-118[.]").

In sum, for the reasons described above, the Ordinance does not conflict with N.J.S.A. 40A:14-118. In particular, it does not grant the CCRB any powers that are statutorily reserved to the Police Chief. Rather, the Ordinance properly balances Newark's municipal oversight of the police department with preserving the police chief's day-to-day operation of the department. And the final paragraph of the statute should be read, as it is drafted, to preserve a municipality's ability to oversee and investigate its police department. The FOP's claim that the Ordinance is invalid under N.J.S.A. 40A:14-118 should therefore be rejected.

**II. NEITHER N.J.S.A. 40A:14-181 NOR THE ATTORNEY GENERAL'S INTERNAL AFFAIRS GUIDELINES PREEMPT THE ORDINANCE.**

The FOP and AG argue that the Ordinance must be struck down for conflicting with the IAPP, which was promulgated by the AG and adopted by law enforcement agencies under N.J.S.A. 40A:14-181. As the Appellate Division specifically recognized, their arguments

are inapposite because "the statute is directed towards law enforcement agencies (which the CCRB is not)[.]" *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 499. That is, the IAPP affects only the standards for a law enforcement agency's internal investigations and does not control a separate municipal entity like the CCRB.

The Appellate Division also properly found that, under a traditional preemption analysis, the Ordinance was on its face fully consistent with the IAPP in place at that time. See *id.* at 502-08. And it remains the case that, in many respects, the Ordinance and the IAPP are fully consistent with each other. Thus, both the IAPP and the Ordinance "require coordination with the prosecutor's office, and deferral to the prosecutor's office, where potentially criminal conduct is at issue." *Id.* at 506. They both "require training of investigatory staff." *Id.* at 507. And they both have provisions regarding public disclosure of information regarding complaints, which generally track each other. See Da151 (Ordinance at V. § 1-21(a)-(f)); IAPP at 63-64, § 9.11.<sup>8</sup>

---

<sup>8</sup> The Board's public reporting and other public-facing conduct is an important aspect of its role, which is in part to "provid[e] transparency of process." Da139 ("Whereas" clauses of Ordinance); see also Da143 (Ordinance at III.ix) (providing that Board "shall hold public meetings and shall regularly report to the public on its activities and other policing information it determines to be in the public interest"). Indeed, the lack of transparency in the NPD's internal affairs investigation and disciplinary processes was a key criticism of the DOJ Report that led to the Ordinance. See Da4 (DOJ Report at 1) (noting that "the NPD [is] rendered less effective" by "the perception of the NPD as an agency with insufficient accountability"). Notably, the Ordinance exempts from



However, as this Court has recognized in its correspondence with counsel, in December 2019, the AG issued Directive 2019-05, along with a revised version of the IAPP.<sup>9</sup> The revisions to the IAPP create conflicts with the Ordinance with respect to whether, and under what conditions, the CCRB is entitled to review IA files. But they do not otherwise affect the CCRB's work because the AG has no authority to control a municipal agency. In any event, to the extent that the IAPP's restrictions on the CCRB's access to IA files serve to indirectly regulate the CCRB, they exceed the AG's authority under N.J.S.A. 40A:14-181 and cannot preempt the Ordinance.<sup>10</sup>

The Court should thus hold that the Ordinance is valid.

---

disclosure "such records or materials that cannot be disclosed by law." Da144 (Ordinance IV.a.).

<sup>9</sup> The Directive and IAPP have been provided to the Court by the AG's Office; they are also available online at [https://www.nj.gov/oag/excellence/docs/2019-5\\_Internal\\_Affairs\\_Directive.pdf](https://www.nj.gov/oag/excellence/docs/2019-5_Internal_Affairs_Directive.pdf) and [https://www.state.nj.us/lps/dcj/agguide/directives/2019-Internal\\_Affairs\\_Policy\\_and\\_Procedures.pdf](https://www.state.nj.us/lps/dcj/agguide/directives/2019-Internal_Affairs_Policy_and_Procedures.pdf).

<sup>10</sup> Initially, the IAPP appears to control only whether the CCRB can obtain IA files, and not how the CCRB can operate independently of obtaining such files. *See id.* at 57, § 9.7.1 (connecting requirements to the release of IA files). On the other hand, at times the IAPP seems to place requirements on the CCRB irrespective of the CCRB seeking access to the files. *See, e.g., id.* at 58, § 9.7.2(a) (regarding parallel investigations, providing that "[t]his requirement also applies regardless of whether, as a general matter, the Civilian Review Board is granted access to redacted or unredacted internal affairs records"). It is unclear whether this requirement is intended to state that a civilian review board must follow the restriction regardless of whether or not it is granted access to any records, or if it applies only when records are provided regardless of whether those records are redacted or unredacted.

**A. The Ordinance Is Not Preempted Because N.J.S.A. 40A:14-181 Governs Law Enforcement Agencies, Not Separate Municipal Entities**

In preemption analysis, the presumption is that a municipal ordinance is valid unless it is clear that the ordinance conflicts with state law. *Dome Realty, Inc. v. City of Paterson*, 83 N.J. 212, 232-34 (1980) ("Municipal ordinances are accorded a presumption of validity and a finding of preemption must clearly appear."). The Court will accordingly only find that a municipal ordinance is preempted if, "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." *Redd v. Bowman*, 223 N.J. 87, 109 (2015) (quoting *Summer v. Twp. of Teaneck*, 53 N.J. 548, 555 (1969)); see also *Inganamort v. Borough of Ft. Lee*, 62 N.J. 521, 529 (1973) (even for statewide issues, "home rule exists to permit each municipality to act or not to act or to act in a way it believes will best meet the local need"). A threshold issue is whether the state and municipal laws occupy the same field or subject matter, and "[i]f the 'field or subject matter' of the municipal ordinance and state law are not the same, there is no preemption." *Redd*, 223 N.J. at 109 (quoting *Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of W.N.Y.*, 71 N.J. 451, 461 (1976)).

The AG is the "chief law enforcement officer of the State." N.J.S.A. 52:17B-98. He thus has "the powers and duties . . . with respect to the enforcement of the criminal laws of the State" that are "conferred . . . either by the Constitution or by the common or statutory law of the State." N.J.S.A. 52:17B-102. Among those powers, N.J.S.A. 40A:14-181 requires that he promulgate the IAPP. Under the statute, "[e]very law enforcement agency . . . shall adopt and implement guidelines which shall be consistent with" the IAPP. *Ibid.* (emphasis added); see *O'Rourke v. City of Lambertville*, 405 N.J. Super. 8, 19 (App. Div. 2008). But, by expressly limiting N.J.S.A. 40A:14-181 to law enforcement agencies, the Legislature made clear that it did not intend to interfere with the lawful actions of non-law enforcement agencies, and in that sense, that the AG would not occupy the entire field of investigations of police officer misconduct; certainly, the Legislature did not provide the clear statement that the AG was to occupy the field, as the law requires. 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.").

The statute thus authorizes the AG to issue guidelines that govern only how a "law enforcement agency" investigates officer misconduct, but does not address investigations outside of a law enforcement agency. Although the AG may have broad authority to control law enforcement agencies, no statute gives him the power to control a separate municipal body in such a plenary fashion, as he proposes to do here. Thus, the IAPP itself cannot preclude the CCRB, a non-law-enforcement agency separate from the Newark Police Department, from reviewing police misconduct. Indeed, as discussed above, such investigations are specifically contemplated by N.J.S.A. 40A:14-118, which allows a municipal commission to "conduct investigations of the operation of the police force"; at the very least, this establishes that the Legislature certainly did not clearly intend the IAPP to fully occupy that field.

In arguing to the contrary, the FOP and AG claim that the law does not permit a municipality to "replicate" the IA function in non-law enforcement entities. AGbc3; see also Pbc8 n.5. But the cases they cite for this proposition are inapposite. Thus, in *O'Rourke, supra*, the issue was whether the *police department* could conduct an investigation in violation of the city's rules and the IAPP. See 405 N.J. Super. at 19 (describing how "[t]he rules at issue . . . were adopted pursuant to N.J.S.A. 40A:14-181"). Indeed, the city did not dispute that the police director failed to follow its rules and the IAPP when the police director made

allegations of misconduct, investigated them himself instead of referring the investigation to an internal affairs officer, and wrote a report that was not objective. *Id.* at 20-21. The *O'Rourke* court thus did not consider the issue here before the Court: whether the IAPP applies to municipal agencies other than a law enforcement agency. *See id.* at 23 (describing court's holding as, "when a *law enforcement agency* adopts rules pursuant to N.J.S.A. 40A:14-181 to implement the Attorney General's Guidelines, the *agency* has an obligation to comply with those rules" (emphases added)).

Likewise, in *Jordan v. Harvey*, 381 N.J. Super. 112 (App. Div. 2005), the court considered only whether a civilian police director could "participat[e] in law enforcement activities, including carrying a firearm, wearing a police uniform, and personally apprehending suspects." *Id.* at 114. As the court noted, its preemption finding was based on the "regulatory scheme concerning who may *enforce the criminal laws.*" *Id.* at 116 (emphasis added). The court thus cited, for example, "statutes [that] specify who may exercise the power of apprehension and arrest." *Ibid.* (citing N.J.S.A. 40A:14-152, -152.1, and -152.2). Nothing in the court's opinion suggests that it should apply outside the areas of apprehension and arrests, and since the Ordinance obviously does involve those types of powers or activities, *Jordan* does not apply.

In sum, because the IAPP applies only to law enforcement agencies, it does not and cannot preempt the Ordinance which, as set forth above, provides for civilian oversight. See *Redd*, 223 N.J. at 109 (“If the ‘field or subject matter’ of the municipal ordinance and state law are not the same, there is no preemption.” (quoting *Overlook*, 71 N.J. at 461)). The well-reasoned decision of the Appellate Division with regard to this issue as well should therefore be affirmed.

**B. Because the AG Cannot Control the CCRB, the Conflicts Between the IAPP and the Ordinance Cannot Invalidate the CCRB.**

As noted above, the Appellate Division concluded that the Ordinance was consistent with the then-operative version of the IAPP. See *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 502 (“[W]e see no inconsistency of consequence between how the CCRB operates under the Ordinance and how the IA investigations occur under the requirements imposed by the AG Guidelines or N.J.S.A. 40A:14-181.”). On December 4, 2019, the AG released Law Enforcement Directive No. 2019-5 (Directive) and accompanying revisions to the IAPP. As relevant here, the Directive and revised IAPP address several issues related to civilian review boards like the CCRB. Specifically, the revised IAPP permits the release of IA files to a civilian review board, but only under certain circumstances. See IAPP at 57, § 9.6.3(a) (providing that “good cause” exists to release IA files to a

civilian review board "subject to the conditions described in this section"). The revised IAPP also contains several restrictions on civilian review boards like the CCRB, seeking to regulate their ability to conduct investigations in parallel with IA, their requirements of confidentiality, their conflicts of interest policies, and the composition of their staff. See IAPP at 57-60, § 9.7. These restrictions certainly impede the CCRB's "Investigation Review" of the NPD's Internal Affairs investigations. See Dal45 (Ordinance at V. § 1-02(d)). However, these provisions of the IAPP can preempt the Ordinance only if they are within the AG's authority. Cf. *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357 (1986) ("[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority."). Of course, this Court routinely reviews AG directives and rules to determine whether they are consistent with the law. See, e.g., *In re Att'y Gen.'s Directive on Exit Polling: Media and Non-Partisan Interest Grps.*, issued July 18, 2007, 200 N.J. 283 (2009) (reviewing AG directive governing exit polling); *State v. Caliguiri*, 158 N.J. 28 (1999) (reviewing AG directive governing pre-trial intervention). In appropriate cases, the Court has invalidated improper directives and rules. See *In re Att'y Gen.'s Directive*, 200 N.J. at 313 (holding that "[t]he Attorney General did not have a constitutionally sound basis" for directive); *Caliguiri*, 158 N.J.

at 45 (holding that directive "is not consistent with the established requirements for PTI"); see also *Doe v. Poritz*, 142 N.J. 1, 24 n.5 (1996) (identifying deviations between AG guidelines and statute and indicating that guidelines "should be appropriately revised"). Here, that review reveals that several of the provisions of the IAPP, discussed below, extend beyond the AG's authority in N.J.S.A. 40A:14-181 to regulate law enforcement agencies, instead imposing special restrictions on civilian review boards - including restrictions that curtail the Newark CCRB's lawful ability to provide municipal oversight of its police department. As such, the IAPP cannot and does not preempt the Ordinance.<sup>11</sup>

**1. The IAPP cannot preclude the CCRB from conducting an investigation parallel with an IA investigation.**

The new IAPP states that a civilian review board "may not commence an investigation of a particular civilian complaint or incident until after any criminal and/or internal affairs investigations have concluded and any resulting discipline has been imposed." *Id.* at 58, § 9.7.2(a). But this requirement

---

<sup>11</sup> In the alternative, should the Court find any of the Ordinance's provisions to be preempted by the IAPP, it should hold that the invalid provisions are severable from the remainder of the Ordinance. See Da153 (Ordinance at Section 3) ("If any part of this ordinance is declared unconstitutional or illegal, the remaining provisions shall not be affected and shall continue in full force and effect."); *Inganamort*, 72 N.J. at 423 (severance is proper "where the invalid portion is independent and the remaining portion forms a complete act within itself"); *Brunetti v. Borough 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.").



exceeds the AG's authority by regulating the conduct of an independent, non-law enforcement municipal agency, and thus should be invalidated to the extent that it applies to such agencies, as it does here. Although the AG is the State's chief law enforcement officer, N.J.S.A. 52:17B-98, it is also well-settled that municipalities have "necessarily broad" powers to oversee their police departments. *City of Jersey City v. Jersey City PBA*, 154 N.J. 555, 572 (1998). Thus, "[t]he Legislature has vested municipal authorities with the discretion to determine the powers, duties, functions, and efficient operation of police departments." *Ibid.* (citing N.J.S.A. 40A:14-118); see also *id.* at 572-73 (citing cases).

The AG's position seems to be that municipal investigations are permitted, but only subsequent to (and not simultaneous with) an IA investigation. But no authority is set forth in the IAPP, or accompanying Directive, or exists anywhere else, that would authorize the AG to place such a restriction on the CCRB. To the contrary, parallel investigations, as would occur, are commonplace in our legal system, in numerous contexts. See *Sec. & Exch. Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980) ("[P]arallel proceedings are unobjectionable under our jurisprudence[.]"); see also, e.g., *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 re 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); *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”); *Div. 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”).

Importantly, nothing in the Ordinance prevents the NPD’s IA Unit from operating pursuant to the IAPP; that is, the IAPP continues to be a legitimate exercise of the AG’s authority to regulate investigations by the police. The Ordinance does not inhibit the IA Unit from interviewing officers, complainants, and witnesses, collecting and reviewing relevant documents and other materials, or making findings. Further, nothing in the Ordinance inhibits the Public Safety Director from making disciplinary determinations, as the Ordinance specifically leaves those final decisions up to the director. Da143 (Ordinance at III.xi) (“[T]he Public Safety Director shall make all disciplinary decisions.”). And on the other side of the coin, the CCRB can also operate

alongside the IA Unit, in the parallel fashion discussed above. In this regard, there is no conflict whatsoever and thus no preemption of the CCRB by the IAPP at all. See *Mack Paramus Co. v. Mayor of Paramus*, 103 N.J. 564, 576 (1986) ("A conflict between state and local law can occur if the latter . . . prohibits what state law permits.").

Indeed, the specific circumstances of Newark illustrate the rationale for this limitation of preempting municipal action: municipal officials are closer to the ground and thus better able to assess and address specific local impacts of state-wide issues. See *Inganamort*, 62 N.J. at 528 ("[E]ven 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."); *Summer*, 53 N.J. at 553 ("[I]t 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."). Here, the DOJ Report details numerous problems within the Newark Police Department's IA Unit, leading to insufficient investigations, inadequate transparency, and a lack of accountability for police misconduct. Rather than mandating uniformity, this Court should recognize the City's authority to conclude that a separate municipal oversight entity, in addition to the IA Unit, was needed to restore the public's trust in its

police department, militating against preempting local action and instead permitting a sharing of authority between the State and City, as would occur here. *Cf. N.J. State League of Municipalities v. Dep't of Cmty. Affairs*, 310 N.J. Super. 224, 236 (App. Div. 1998) (holding that State regulations were consistent with municipal zoning power because they permitted sharing of power between State and municipality); see also *Masters-Jersey, Inc. v. Mayor of Paramus*, 32 N.J. 296, 299-300 (1960) (noting that principle of home rule permits a municipality to act even where State has legislated on same issues).

**2. The "inherent conflicts" restrictions of the IAPP are overbroad and sweep beyond this Court's jurisprudence.**

The revised IAPP requires a civilian review board to adopt a conflicts-of-interest policy that precludes not only "incident-specific" conflicts, but so-called "inherent conflicts" that bar specific individuals named by the guidelines from being board members or staffers. See IAPP at 60, § 9.7.2(c)(2). The IAPP thus prohibits the CCRB from employing, either "as a Board member or a staffer," the following:

- a. A sworn officer or employee of a law enforcement agency within the Board's jurisdiction, or any person who has held such a position in the last five years;
- b. A sworn officer or employee of any other state, county, or local law enforcement agency;

c. A prosecutor or criminal defense attorney currently practicing in the county within the Board's jurisdiction;

d. A relative of any of the aforementioned individuals, as defined in the New Jersey Conflicts of Interest Law at N.J.S.A. 52:13D-21.2(2)(d);

e. A current candidate for public office; or

f. With respect to Board membership, a current officer or employee of the municipality.

[*Ibid.*]

These restrictions have a direct impact upon Newark's CCRB. The Ordinance provides that the City's Inspector General is a member of the CCRB (which is prohibited by § 9.7.2(c)(2)(f)), and it permits members of the municipal council to serve as CCRB members, even though they could also be candidates for public office prohibited by § 9.7.2(c)(2)(e). Other restrictions would also affect whom the CCRB can hire as staffers.

However, the restrictions embodied by the IAPP are themselves contrary to law and thus cannot serve as a basis for the invalidation of the Ordinance. Indeed, this Court has held that disqualification of administrative agency member must be based on "actual bias," defined as cases where "the decisionmaker has a pecuniary interest in the outcome of the matter or has been the target of personal criticism from one seeking relief." *In re Carberry*, 114 N.J. 574, 586 (1989). Consistent with the law, the Ordinance thus has its own recusal mechanism for those

circumstances. Da150 (Ordinance at V. § 1-19(a)). While the AG could impose additional conflict-of-interest restrictions on a "law enforcement agency," N.J.S.A. 40A:14-181, his authority does not permit him to restrict the membership of a non-law enforcement agency like the CCRB, as the IAPP proposes to do.<sup>12</sup>

Accordingly, because the Ordinance complies with the legal standard for recusal, the IAPP cannot impose requirements beyond those required by law. The City's decision of who should be permitted to serve as a CCRB member or staffer is therefore not preempted by the IAPP.

**3. The IAPP's requirement that CCRB members and staff pass a criminal history check is unauthorized by law.**

The revised IAPP requires that all CCRB members and staff "must undergo a criminal history background check," and "[a] person who has been convicted of a crime or offense may not be granted access to the content of internal affairs records unless both the law enforcement executive and the County Prosecutor consent to that person being granted such access." IAPP at 60, § 9.7.2(d). But although *the Legislature* has prescribed specific circumstances in which a criminal conviction can be disqualifying, there is no statute providing for disqualification from service on the CCRB.

---

<sup>12</sup> The IAPP's provisions are particularly offensive in this regard in that they do not impose the same broad recusal measures on an internal affairs division as they purport to impose on a civilian review board. See IAPP at 17, § 4.2.6 (requiring recusal only where an investigator has an actual conflict or is in the subject officer's chain of command).

And it is not up to the AG to legislate in this arena, as he has done here. The IAPP's restriction on the CCRB is thus contrary to law and certainly cannot preempt the Ordinance on this basis.

To be sure, specific statutes provide that some criminal convictions have collateral consequences in other contexts related to political service. For example, conviction for an indictable offense disqualifies a person from jury service, N.J.S.A. 2B:20-1(e); conviction for certain offenses are disqualifying for service on a board of education, N.J.S.A. 18A:12-1; conviction for a "crime involving moral turpitude" disqualifies a person from serving on a district board of elections, N.J.S.A. 19:6-2(b); and conviction for "an offense involving dishonesty, or a crime of the third degree or above," or "an offense involving or touching [a public] office, position or employment" is disqualifying for that public office, position, or employment, N.J.S.A. 2C:51-2. But these are provisions that *the Legislature* has enacted, and while *the Legislature* could similarly restrict the membership of CCRBs, it has not delegated authority to the AG to impose his own restrictions on non-law enforcement CCRB membership. See, e.g., *Caliguiri*, 158 N.J. at 45 (rejecting Attorney General's authority to issue directive that "inappropriately alter[ed] the criteria . . . jointly governed by statute and court rule").

Indeed, the IAPP rule seeks to impose particularly onerous requirements on CCRBs, greater than those that the Legislature has

deemed appropriate in other circumstances. Thus, unlike the statutes cited above, which apply only to certain convictions, the IAPP applies to *any* conviction for *any* "crime or offense." IAPP at 60, § 9.7.2(d).<sup>13</sup> Yet the IAPP provides no statutory authority for prohibiting access to IA files to all persons with conviction for any crime or offense. In the absence of such authority, this provision should not preempt the Ordinance, which contains no similar restriction on CCRB membership.

\* \* \*

In sum, therefore, while the IA Unit and the CCRB will share the same goal of investigating police misconduct, there is no reason that they cannot operate in tandem. In passing the Ordinance, the City enacted additional oversight of the NPD based in part on DOJ findings that the IA Unit was not sufficiently investigating civilian complaints against police officers. The law endorses, rather than prohibits, this type of proactive municipal oversight of police departments. The Ordinance does

---

<sup>13</sup> Moreover, given the well-established disproportion of blacks who are arrested and prosecuted in New Jersey, *see Uniform Crime Report, State of New Jersey 2016* 19 (2016), this restriction may well affect the racial composition of the CCRB, undermining its ability to reflect the community from which it derives. As the DOJ Report noted, "black people in Newark have been stopped and arrested at a significantly higher rate than their white and Hispanic counterparts. . . . Approximately 80% of the NPD's stops and arrests have involved black individuals, while Newark's population is only 53.9% black." Da19 (DOJ Report at 16). Under these circumstances, it is critical that the CCRB have substantial black membership. *See Ofer, supra*, 46 Seton Hall L. Rev. at 1044 n.39 ("[G]iven the racial disparities associated with arrest and incarceration rates, disqualifying people [from a civilian review board] based solely on their criminal records will have a disproportionate and unfair impact on communities of color.").



not, in critical respects, conflict with the IAPP and, to the extent that it does, the IAPP exceeds the scope of the AG's authority by regulating civilian, as opposed to law enforcement, activities. *Amici* thus respectfully submit that the Ordinance is not preempted by the IAPP, and that aspects of the IAPP that conflict with the Ordinance do not provide a basis for the Ordinance's invalidation.

**III. THE ORDINANCE PROPERLY PROVIDES THE CCRB WITH SUBPOENA POWER AS A NECESSARY COMPONENT OF ITS INVESTIGATIVE POWERS.**

In its petition for certification, the FOP renews its argument that the Ordinance's grant of subpoena power to the CCRB is invalid. Pbc10-12.<sup>14</sup> But as the Appellate Division recognized, the FOP's narrow construction of municipal subpoena power ignores the law embodied in constitutional provisions, statutes and cases all of which provide that subpoena power is authorized as a necessary incident to the municipal council's investigative powers, which the council is empowered to delegate to the CCRB.

First, as described above, *see supra* at 19-30, the CCRB is lawfully empowered to investigate police misconduct. Those investigatory powers are recognized in N.J.S.A. 40A:14-118, which recognizes a municipality's authority to establish a commission to investigate the police force. And the statute specifically authorizes the municipal council to "delegat[e] to such committees

---

<sup>14</sup> The AG does not join in this argument. AGbc2.

or commissions of such powers of inquiry as the governing body deems necessary or to conduct such hearing or investigation authorized by law." *Ibid.*

More generally, this Court has recognized that a municipal council has general investigative powers that are inherently a part of its lawmaking authority. See *In re Shain*, 92 N.J. 524, 530-31 (1983). In *Shain*, the Court affirmed that in a Faulkner Act jurisdiction like Newark, "the elected Council exercises the municipality's legislative power." *Id.* at 530. Further, the Court held that "[t]he legislative power conferred upon the Council by N.J.S.A. 40:69A-36 implicitly includes the power to investigate." *Id.* at 531.

*Shain* went on to describe precisely how the power to issue subpoenas is a necessary part of that investigatory power, even without further legislation. See *id.* at 532 ("No specific statutory grant is necessary to vest a legislative body with subpoena power. . . . The power to compel testimony is inherent in the legislative power to investigate."). As the *Shain* Court recognized, "[u]nless an investigating committee has power to compel testimony, it has no feasible method to obtain all the information it needs to perform its legislative function." *Id.* at 533 (citing *Benjamin*, 144 N.J. Super. at 72). Accordingly, the absence of subpoena power "would prevent the Council from properly

performing its legislative functions in monitoring the operation of the city government." *Ibid.*

The necessity of the subpoena power to the investigation function supports the Ordinance's grant of such subpoena power to the CCRB. *See Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 510 ("For investigations to be conducted by either the executive or legislative branches of municipal government, these entities must have subpoena power."). Under the State Constitution, "[t]he 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. Const.* art. IV, § 7, ¶ 11; *see also Shain*, 92 N.J. at 532 (citing this provision). The Legislature has also recognized the expansion of necessary powers through N.J.S.A. 40:48-2, which permits a municipality to enact such laws "as it may deem necessary and proper for the government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by . . . law." *Ibid.* This Court has recognized the necessary-and-proper statute as an "express grant of general police powers" and "itself a reservoir of police power." *Inganamort*, 62 N.J. at 536; *see also N.J. Shore Builders Ass'n v. Twp. of Jackson*, 199 N.J. 38, 55

(2009) ("Ordinances enacted pursuant to the police power are presumptively valid."). Since subpoenas are necessary tools to render meaningful the power to investigate, these constitutional and statutory provisions are the foundation of the authority to issue subpoenas, as the Appellate Division correctly recognized. See *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 509 ("The power to subpoena comes from constitutional and legislative authority.").

The Ordinance appropriately delegates the legislative subpoena power from the municipal council to the CCRB. Indeed, New Jersey municipal governing bodies frequently grant subpoena power to their municipal agencies. 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). The United States Supreme Court has similarly made clear that Congress may likewise grant its subpoena power to an agency. *See Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 214 (1946) (affirming Department of Labor's authority to issue subpoenas pursuant to Fair Labor Standards Act because "[Congress's] authority would seem clearly to be comprehended in the 'necessary and proper' clause, as incidental to both its general legislative and its investigative powers"); *see also U.S. Const. Art. I, § 8* (containing federal "necessary and proper" clause).

In this vein, the FOP misses the mark by repeatedly citing N.J.S.A. 40:48-25, which explicitly grants subpoena power to a committee of council members, as evidence that the CCRB's subpoena power is unlawful. The statute is a grant of power and not, as the FOP incorrectly claims, a restriction on powers not stated. To the contrary, New Jersey municipal law repeatedly indicates that municipal power is broad, and restricted only where a specific prohibition appears in a statute. *See, e.g., N.J. Const. art. IV, § 7, ¶ 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[.]"). Because N.J.S.A. 40:48-25 does not expressly restrict a municipality from delegating subpoena power to a committee like the CCRB, the statute does not invalidate the Ordinance's grant of subpoena power.<sup>15</sup>

Finally, as the Appellate Division properly recognized, the FOP's reliance on *Benjamin*, 144 N.J. Super. 58, is also unpersuasive. In *Benjamin*, the court held that Newark could not use a voter referendum to create an elected civilian review board, separate from the municipal council, and grant that board subpoena power, because creating a separate elected body by public initiative "would be an impermissible infringement upon the authority conferred upon the municipality by the Faulkner Act."

---

<sup>15</sup> *Traino v. McCoy*, 187 N.J. Super. 638 (Law Div. 1982), cited by the FOP, also incorrectly reads N.J.S.A. 40:48-25 as a restriction on the power of municipal governing bodies to delegate their subpoena powers, and should be rejected by this Court.

*Id.* at 69. But the court made clear that it was not considering the issue that is here before the Court: whether a board with *appointed* members could be created through an ordinance passed by *the city council*. See *id.* at 71 ("It 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."). *Benjamin* thus does not control the outcome of this case. See *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 511-12 (rejecting FOP's reliance on *Benjamin* because "the City established the CCRB by Ordinance with appointed members, not voter initiative").<sup>16</sup>

Accordingly, this Court should affirm the Appellate Division's holding that "the City is authorized to delegate to the CCRB authority to issue subpoenas in accordance with the terms outlined in the Ordinance." See *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 511. The CCRB's subpoena power is authorized as a necessary component of its authority to investigate, appropriately delegated by the municipal council to the CCRB, as authorized under the necessary-and-proper statute and other municipal law granting such powers.

---

<sup>16</sup> The FOP maintains that *Benjamin* separately held that a municipal ordinance can never grant subpoena power. But even if such a sweeping holding were somehow correct - and *Amici* do not believe it is, given the settled law discussed above - the court's statement was merely *dicta*, as it had already ruled that the ordinance as a whole was invalid.

**IV. THE ORDINANCE DOES NOT VIOLATE POLICE OFFICERS' DUE PROCESS RIGHTS.**

Finally, the Appellate Division properly rejected the FOP's argument that the Ordinance violates the due process rights of police officers.<sup>17</sup> Although the constitution and law of New Jersey, including statutes and case law, grant certain protections to police officers in disciplinary hearings, the Ordinance is fully consistent with those protections. In any event, as the Appellate Division stated, alleged conflicts between law governing police officers and the Ordinance can be better addressed in as-applied challenges, rather than striking down the Ordinance on its face.

**A. The Ordinance Does Not Abridge Officers' Due Process Rights in Disciplinary Proceedings.**

As an initial matter, the FOP misconstrues the Ordinance as "permit[ting] the adjudication of major and minor discipline on an officer." Pbc12-13. The Ordinance does nothing of the sort; to the contrary, the Ordinance reserves disciplinary authority to Newark's Public Safety Director. See Dal43 (Ordinance at III.x-xi). Indeed, as the Appellate Division recognized, the CCRB is not a disciplinary body. *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 496. Rather, its function is to conduct municipal investigations and oversight, as permitted by law. See, e.g., N.J.S.A. 40A:14-118; *Jersey City PBA*, 154 N.J. at 572.

---

<sup>17</sup> Again, the AG does not join in this argument.



Nonetheless, the Ordinance does not, on its face, deprive officers of due process. See *Doe v. Poritz*, 142 N.J. 1, 106 (1995) (“The minimum requirements of due process . . . are notice and the opportunity to be heard.”). In a facial due process challenge, courts presume that the statute is “intended . . . to function in a constitutional matter.” *State v. Profaci*, 56 N.J. 346, 349 (1970). Thus, “[f]acial challenges are disfavored for several reasons[,]” including that they “often rest on speculation” and thus “raise the risk of ‘premature interpretation of statutes on the basis of factually barebones records.’” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). A court should not strike down a law based upon a facial challenge unless it is convinced that it would be unconstitutional in “every application.” *In re Promulgation of Guardianship Servs. Regulations*, 103 N.J. 619, 638 (1986); accord *Gen. Motors Corp. v. City of Linden*, 150 N.J. 522, 532 (1997) (in tax context, noting that “statute is not facially unconstitutional if it operates constitutionally in some instances”); *Town Tabacconist v. Kimmelman*, 94 N.J. 85, 98 (1983) (in vagueness context, noting that law should be invalidated on its face only if “the enactment is impermissibly vague in all of its applications” (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982))).

Viewed in light of this standard, the Ordinance clearly will not deprive officers of due process in all circumstances. To the contrary, the Ordinance indicates that it is not intended to deprive police officers of rights required by collective bargaining. Da147 (Ordinance at V. § 1-11(a)). Officers are required to have advance notice of the hearing, *ibid.* (*id.* § 1-11(b)), may be represented by counsel or other representatives, *ibid.* (*id.* § 1-11(c)), and will have their rights read at the outset of any interview, *ibid.* (*id.* § 1-11(d)). And the Ordinance also requires findings to be made only on competent, sworn evidence. Da148 (*id.* § 1-14(a) ("No finding shall be based solely upon an unsworn complaint or statement, nor shall prior unsubstantiated, unfounded or withdrawn complaints filed with the Board, be the basis for any such finding or recommendation with regard to an individual complaint."); *id.* § 1-14(b) ("Panels or the Board shall employ a 'preponderance of the evidence' standard of proof in evaluating cases, and their findings shall be grounded in and by competent support or evidence.")).

The Ordinance also recognizes that the CCRB will promulgate additional procedural rules governing its investigations. Da146 (*id.* § 1-8) ("The procedures to be followed in investigating complaints shall be such as in the opinion of the Board will best facilitate accurate, orderly and thorough fact-finding."). Whether the CCRB violates police officer's due process rights will

undoubtedly depend, therefore, on the development of these procedures, as well as on the CCRB's implementation of them. See *Dolan v. City of E. Orange*, 287 N.J. Super. 136, 144-46 (App. Div. 1996) (reviewing procedures required in police officer disciplinary hearings); see also *State Farm Mut. Auto. Ins. Co. v. State*, 124 N.J. 32, 66-67 (1991) (Garibaldi, J., concurring) (in case rejecting facial challenge, noting that "th[e] statute is still subject to an as-applied challenge" after issuance of governing regulations). Therefore, at the least, any such due process challenge should await the development of these procedures, as the Appellate Division correctly recognized in its opinion. *Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 495 ("Due process considerations are premature at this point because the Ordinance contemplates the development of further procedural safeguards once the CCRB is up and running.").

**B. There Are No Facial Due Process Violations Arising out of the CCRB's Membership.**

Finally, the Appellate Division properly rejected the FOP's claim that the CCRB's membership is improperly biased. To the contrary, the FOP's claim runs counter to the fundamental principle that government bodies are afforded a "presumption of honesty and integrity." *Carberry*, 114 N.J. at 586 (quoting *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 497 (1976)). Although the CCRB is constituted of members some of whom

are nominated by *Amici* and other political advocacy organizations, Da140 (Ordinance at I.2(a)), that does not disqualify them or open the Board to the broad challenge that the FOP brings.

To start, CCRB members all must be appointed by the mayor and approved by the municipal council, who are the civilian officials ultimately responsible for overseeing the NPD. *See ibid.; Jersey City PBA*, 154 N.J. at 572 (1998) ("The Legislature has vested municipal authorities with the discretion to determine the powers, duties, functions, and efficient operation of police departments."). Moreover, the law is clear that decisionmakers are not disqualified even if they have "announced an opinion on a disputed issue." *Carberry*, 114 N.J. at 585-86 (Police Superintendent who had implemented drug-testing protocol was not disqualified from determining officer's challenge to protocol); *see also 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[.]"); *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)); *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). Indeed, those who understand and care about an issue are often the most qualified members of bodies like

the CCRB. *See Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948) (rejecting disqualification of FTC commissioners based upon prior work on similar issues because the "experience acquired from their work as commissioners would be a handicap instead of an advantage").

The only way that CCRB members can or should be disqualified is based on "actual bias," defined as where "the decisionmaker has a pecuniary interest in the outcome of the matter or has been the target of personal criticism from one seeking relief." *Carberry*, 114 N.J. at 586. No such bias could be or is alleged to anything like the degree that would require invalidation of the Ordinance as a whole, and the FOP identifies no other circumstances where any entire committee was dissolved by a court due to this type of alleged bias. Of course, actual bias could give rise to recusal in individual cases - which is why the Ordinance has its own recusal mechanism for those circumstances. Da150 (Ordinance at V. § 1-19(a)). To the extent that a claim of actual bias arises in a particular case, the issue can be litigated in that context, on a fuller record. *See Fraternal Order of Police, Newark Lodge No. 12*, 459 N.J. Super. at 495.

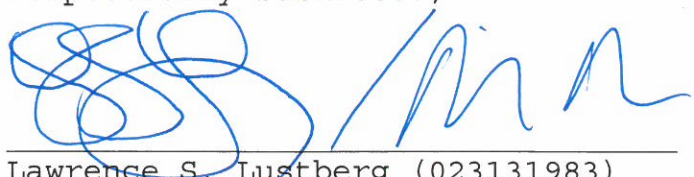
Therefore, for the reasons stated above, the Ordinance does not, on its face, violate due process. The FOP cannot show a violation of officers' statutory rights in the disciplinary process because the CCRB does not impose discipline, and it cannot

overcome the presumption that CCRB members will act in a neutral, unbiased matter. The Court should therefore affirm the Appellate Division's holding on this issue and uphold the ordinance against the police union's attack.

CONCLUSION

In response to serious allegations of misconduct in the Newark Police Department, detailed in a report and complaint from the DOJ, the City empowered its CCRB to investigate police officer misconduct and provide strong oversight regarding its police department. Contrary to the FOP and AG's claims, the CCRB will not displace or interfere with the police department's operations. Rather, the Ordinance is designed to restore public trust between Newark's residents and its local law enforcement, which will benefit all parties' goal to keep residents safe and secure. *Amici* therefore urge the Court to affirm the Appellate Division's decision upholding Newark's authority to establish the CCRB.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lustberg" with a stylized flourish.

---

Lawrence S. Lustberg (023131983)  
Michael R. Noveck (901172012)  
Gibbons P.C.  
One Gateway Center  
Newark, New Jersey 07102  
(973) 596-4500

Dated: January 6, 2020