

No. 20-\_\_\_\_\_

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SUPREME COURT OF THE UNITED STATES

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City of Newark,

*Petitioner,*

vs.

Fraternal Order of Police Newark Lodge No. 12,

*Respondent.*

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On Petition for a Writ of Certiorari to  
the New Jersey Supreme Court

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## **I. Questions Presented**

1. Does a state supreme court violate the Equal Protection Clause by reading state statutes to preclude its largest city from protecting Black citizens from institutionalized, racially-disparate police conduct specifically found unconstitutional by the Department of Justice?
2. Does a state supreme court violate the Necessary and Proper Clause by interpreting state statutes to preclude municipal police review boards from holding subpoena power or accessing certain internal affairs records, when the existing process has been found unconstitutional by the Department of Justice?
3. Does a state supreme court violate the Constitutional Separation of Powers doctrine by holding that the state executive's police oversight regulations preempt the state legislature's delegation of police oversight authority to municipalities?

## II. Related Cases Statement

The City of Newark, by and through counsel Pashman Stein Walder Hayden PC, respectfully petitions this Court for a writ of certiorari to review the August 19, 2020 Opinion and Order of the New Jersey Supreme Court. The directly related matters comprise the underlying United States Department of Justice civil rights litigation, and the proceedings below:

1. New Jersey Supreme Court: *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, Docket No. A-15-19. Resolved by published Opinion dated August 19, 2020.
2. New Jersey Superior Court, Appellate Division: *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, Docket No. A-3298-17. Resolved by published Opinion dated June 18, 2019.
3. New Jersey Superior Court, Chancery Division: *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, Docket No. C-177-16. Resolved by oral ruling dated March 14, 2018.
4. United States District Court for the District of New Jersey: *United States v. City of Newark*, Docket No. 2:16-cv-1731. Resolved by five-year Consent Decree entered May 5, 2016.

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#### **IV. Opinions Below**

The New Jersey Supreme Court opinion is reported at *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75 (2020), and contained in Appendix A. Chief Justice Rabner’s dissenting opinion is referred to herein as Appendix A1. The New Jersey Appellate Division opinion is reported at *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 459 N.J. Super. 458 (App. Div. 2019), and contained in Appendix B. The unpublished, oral opinion of the New Jersey Chancery Court is contained in Appendix C.

#### **V. Jurisdiction**

Newark invokes this Court’s jurisdiction under the Court’s March 19, 2019 Order and 28 U.S.C. § 1257. In its March 19, 2020 Order, this Court expanded the time to file a petition for writ of certiorari from 90 to 150 days. Because it has been filed within one hundred and fifty days of the New Jersey Supreme Court’s August 19, 2020 judgment, this petition is timely filed.

#### **VI. Constitutional and Statutory Provisions Involved**

1. U.S. Const. art. I, § 8, cl. 18: “[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”



2. U.S. Const. amend. XIV, § 2: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
3. N.J.S.A. §§ 40:48-2, 40A:14-118, and 40A:14-181, which are contained in Appendix D.

## VII. Statement of the Case

This case is about the unconstitutionally disparate treatment of Black and white civilians by police, and which stakeholders get to participate in crafting a solution. Specifically, this case is about what the elected officials of a major American metropolis can do to protect their Black citizens from police misconduct, when (1) the Federal government has found the level of racially disparate police conduct in their city to be illegal and unconstitutional, but (2) the State legislature, executive, and judiciary have failed to provide—and, with the decision on appeal, affirmatively withdrawn—the resources necessary for the city to redress these race-based harms.

The City of Newark, New Jersey (“Newark”) has a long and tortured history of tension between its Black residents and its police department (“NPD”). Jim Crow laws permitting discrimination and outright violence against Black men and women defined interactions between Newark residents and the NPD for the early Twentieth Century. *Report of the National Advisory Commission on Civil Disorders*, 57 (Bantam, 1968). After decades of citizen complaints, Newark’s landmark 1959 Mayoral Commission on Group Relations concluded that the “belief about mistreatment of Negroes at the hands of the agency whose primary function is to protect citizens, the police, is so widespread among Negroes as to present a very real problem for the City of Newark.” *Newark: A City in Transition*, Mayoral Comm. on Grp. Relations (Market Plan. Corp., 1959). Tensions eventually erupted into an infamous, six-day “race riot” during the “long, hot summer” of 1967.

Photos of Black children shot, beaten, injured, and killed by police during the 1967 riot made national headlines, including the cover of Life magazine. Subsequent, high-profile events of police brutality by Newark officers—including the public beatings of the 58-year-old Black female vice principal of a local school, a Black pregnant woman, and peaceful Black protesters seeking construction jobs—led to demands for a police review board outside of the law enforcement silo. *See* Kevin Mumford, *Newark: A History of Race, Rights, and Riots in America* (NYU, 2008).

In 1975, Newark attempted to establish a citizen complaint review board (“CCRB”) by municipal ordinance. Then, as now, the ordinance was struck down after the police union challenged its grant of subpoena power to the CCRB. Then, the state courts reasoned that Newark’s 1975 CCRB could not have subpoena power because the board would be exclusively comprised of elected officials, such that politics rather than independent review might determine the board’s findings. *City of Newark v. Benjamin*, 144 N.J. Super. 58, 72 (Ch. Div. 1976), *aff’d*, 144 N.J. Super. 389 (App. Div. 1976), *aff’d*, 75 N.J. 311 (1978). Nothing changed for NPD oversight, and nothing changed for the Black citizens subject to regular unconstitutional mistreatment.

The continuing problem of the NPD’s racially-disparate police conduct culminated in a three-year federal investigation by the United States Department of Justice (“DOJ”), which began in May 2011 and ended with a final report in July 2014 (“DOJ Report”). *Investigation of the Newark Police Department*, United States Department of Justice, July 22, 2014, *available 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). The DOJ Report

concluded that the NPD “engaged in a pattern and practice of constitutional violations,” which disproportionately affected Black civilians by substantial margins. (*Id.*). DOJ’s findings were significant, including that (1) **75% of NPD pedestrian stops were unconstitutional**, and more than 20% of uses of force were unconstitutional; (2) although Newark’s Black population was 54%, **Black civilians comprised 85% of stopped pedestrians and 80% of arrests**, meaning at minimum they were exposed to disproportionately more unconstitutional behavior than non-Black civilians by the NPD; and (3) systemic deficiencies were preventing improvement, including **inadequate internal affairs investigations** into civilian complaints of excessive force and officer misconduct. Perhaps most egregious, DOJ found that the NPD Internal Affairs Unit **sustained only one out of hundreds of excessive force complaints during the six years** from 2007 to 2012. (*Id.*; see also App. A at 8, App. A1 at 2 (C.J. Rabner, dissenting)).

DOJ thus concluded that the NPD had lost the public trust needed to conduct effective policing and, on March 3, 2016, sued Newark for its failure to remedy the NPD’s misconduct “that has deprived persons of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States.” *U.S. v. City of Newark*, 2:16-cv-1731, Dkt. No. 1 (DOJ Compl.), ¶¶29-30. DOJ’s Complaint specifically alleged the NPD’s misconduct abridged the First, Fourth, and Fourteenth Amendment rights of Black citizens. (*Id.*). The litigation was resolved by Consent Decree, which among other remedies, required Newark to establish a CCRB as a “**civilian** oversight entity for the NPD.” (App. A, 8-9). The Consent Decree explicitly

required the creation of a CCRB because it is a mechanism demonstrated to improve police-resident relations in historically traumatized communities like Newark. *U.S. v. City of Newark*, 2:16-cv-1731, Dkt. No. 5 (Consent Decree).

On March 17, 2016, Newark enacted the municipal ordinance establishing the CCRB at issue here (“Ordinance”). (*See* App. B at 11-19). The Ordinance authorizes the CCRB to conduct its own investigations of civilian complaints of police misconduct, as well as review the NPD’s Internal Affairs Unit’s investigations of police misconduct. (App. B at 11). The Ordinance requires the CCRB to refer all complaints to NPD Internal Affairs, and then elect whether to conduct an immediate, parallel investigation or wait to review the NPD’s investigation after it has concluded. (*Id.* at 13). Whether the CCRB investigates complaints of police misconduct immediately or after NPD Internal Affairs, the Ordinance “make[s] its investigations meaningful” by providing the CCRB with subpoena power. (*Id.* at 14).

The CCRB cannot adjudicate complaints or impose discipline under the Ordinance; its expressed purpose is to conduct unbiased investigations into complaints of officer misconduct and make disciplinary recommendations to Newark’s Public Safety Director pursuant to an NPD matrix. (*Id.* at 12). Nonetheless, the Ordinance requires the Chief of Police (“Chief”), who imposes the ultimate discipline, to accept the CCRB’s fact findings as true “absent clear error.” (*Id.* at 17-18). The Ordinance also provides significant constitutional safeguards protecting officers’ rights. (*Id.* at 14-17).

The collective bargaining unit for NPD officers, the Fraternal Order of Police Newark Lodge 12 (“FOP”), filed suit to enjoin and invalidate the Ordinance. (*See generally* App. C). FOP alleged (1) ultra vires creation of subpoena power in violation of N.J.S.A. 40:48-25, (2) conflict between the Ordinance and New Jersey Attorney General (“NJAG”) Guidelines for police internal affairs’ units in violation of N.J.S.A. 40A:14-181, (3) infringement on the Chief’s right to run the NPD day-to-day in violation of N.J.S.A. 40A:14-118, and (4) infringement on officers’ constitutional Due Process rights. (App. B at 22).

The trial court agreed with FOP, and invalidated the Ordinance with two exceptions: (1) the CCRB could perform an “oversight function,” and (2) the CCRB could offer its “consultation” on the NPD discipline matrix. (*Id.*). In its oral opinion, the trial court “expressly prohibited” the CCRB “from engaging in investigations, hearings, adjudications, or the issuance of subpoenas relating to police misconduct and/or discipline.” (App. B at 22-23).

Newark appealed. (*See generally* App. B). New Jersey’s Appellate Division reversed the trial court, and reinstated the Ordinance with one exception: it found invalid the provision requiring the Chief to accept the CCRB’s fact-finding, because such a rule would moot NPD’s own Internal Affairs investigations. (App. B at 37). Significant here, the Appellate Division recognized the Necessary and Proper Clause controlled the scope of the CCRB’s investigatory powers, and that it authorized the CCRB’s subpoena power and concurrent jurisdiction over NPD Internal Affairs investigations. (App. B at 68-69). Likewise, the Appellate Division recognized that

an executive regulation binding law enforcement agencies cannot preempt statutorily-authorized municipal legislation creating an oversight body to independently review law enforcement agency conduct. (*See generally* App. B, 50-60; 54 (“The text of this statute does not expressly state that an executive or legislative agency is barred from concurrently investigating police misconduct . . . when a law enforcement agency has adopted and implemented guidelines consistent with those promulgated by the AG.”); 57-58 (reading NJAG guidelines to preclude civilian municipal investigations of police departments violates a municipality’s fundamental rights to set policy and legislate consistent with its statutory authority). Such recognition undergirds Newark’s Separation of Powers argument before this Court.

FOP appealed. (App. A). Newark argued that the Ordinance remained valid as modified by the Appellate Division. (*Id.*). The New Jersey Supreme Court (“NJSC”) agreed with the trial court in all material respects, and reversed the Appellate Division on August 19, 2020. Relevant here, the NJSC held that (1) the Ordinance provision granting the CCRB subpoena power was invalid, and not saved by the state statute codifying the Necessary and Proper Clause; and (2) the Ordinance provision allowing the CCRB to conduct concurrent, parallel investigations with NPD Internal Affairs was preempted by the NJAG internal affairs guidelines for police.

Since the NJSC’s decision, the CCRB has been able to receive, log, and notify NPD of civilian complaints. It has not yet been able to investigate any complaints or review complete files of NPD Internal Affairs investigations. Newark’s CCRB is focusing on training its civilian investigators in preparation for their independent

investigations. The training materials provided to the CCRB by the NJAG, County Sheriff's Office, and NPD, however, each state that all available evidence—including police reports and notes, 911 communications, footage of incidents and interviews, live interviews, etc.—must be reviewed to reach a “substantiated” conclusion. Without subpoena power, the CCRB is unable to determine the universe of evidence in any given case, let alone obtain it, so **any investigation conducted by the current CCRB can only draw an “unsubstantiated” conclusion.** Certainly, there is no recourse if NPD, its Internal Affairs Unit, or any other law enforcement agency fails to turn over a file. In other words, the CCRB is unable to function, let alone function as a remedial, civilian oversight body for police misconduct as intended. In the meantime, Newark is working with state legislators and the NJAG to implement its vision of a CCRB that can effectively review police misconduct.<sup>1</sup>

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<sup>1</sup> See, e.g., Katie Sobko, *NJ Supreme Court Rules Newark Civilian Board Can Provide Police Oversight With Limits*, northjersey.com (Aug. 19, 2020), available at <https://www.northjersey.com/story/news/essex/2020/08/19/nj-supreme-court-rules-newark-nj-civilian-review-board-can-provide-police-oversight/5603377002/>.



## VIII. Reasons to Grant Certiorari

In this moment, the disparate treatment of Black and white citizens by American police is at the forefront of public discourse. The City of Newark, however, has been wrestling with the problem of racially-disparate police misconduct for decades. Since at least 1975, officials elected by Newark's majority-Black constituency have attempted to establish a police-misconduct review board in which Newark's Black citizens themselves can participate.

This petition concerns Newark's most recent efforts at establishing a CCRB to review the NPD's racially-disparate misconduct, and the unconstitutional hurdles that have prevented Newark's CCRB from operating. Specifically, Newark requests this Court's intervention to remedy the New Jersey Supreme Court's failure to address or resolve the significant Constitutional issues implicated in this matter. Such intervention is particularly necessary because New Jersey's legislative and executive branches have likewise failed to address or resolve these issues at any point before, during, or subsequent to this litigation.

The NJSC's decision violates three fundamental Constitutional precepts. First, its decision requires Newark to act in violation of the Fourteenth Amendment's Equal Protection Clause. Following this decision, Black citizens are forced to continue withstanding the NPD's unconstitutional police misconduct, as well as accept unconstitutionally deficient NPD internal affairs investigations into their complaints of that misconduct. Newark's elected officials are unable to afford their constituents equal protection of the law—as required by the Constitution and the

DOJ Consent Decree—and Newark is left exposed to civil rights liability for that failure.

Second, the NJSC interpreted state statutes in a manner offensive to the Necessary and Proper Clause. The NJSC held that Newark’s CCRB does not have subpoena power, and that the state statute codifying the Necessary and Proper Clause could not rescue the Ordinance provision granting that power. The NJSC ignored that a state statute may provide a floor, but not a ceiling, to a constitutional right. This Court has repeatedly found that subpoena power is necessary and proper to the functioning of a legislative investigation committee, and consistently demands judicial deference to our elected officials on what is necessary and proper to meet a particular goal. The elected officials of Newark—bolstered by empirical data, the DOJ’s conclusion that the existing process was unconstitutional, and a Federal District Court’s Consent Decree—deemed it necessary and proper that the very civilians who are subject to NPD misconduct have sufficient power of inquiry to independently investigate and ensure unbiased internal investigations into that misconduct. The NJSC, however, interpreted state statutes to bar the CCRB’s subpoena power, precluding effective inquiry into police misconduct in violation of the Necessary and Proper Clause.

Third, the NJSC decision forces a legislative body to cede to executive power in violation of the Constitutional Separation of Powers doctrine. The Separation of Powers doctrine requires that the legislature determines policy, the executive enforces that policy, and the judiciary decides whether either’s actions exceed

Constitutional bounds. Here, the NJSC held that the existing internal affairs regulations promulgated by New Jersey Attorney General (“NJAG”) preempted the New Jersey Legislature’s decision to imbue municipalities with broad statutory authority over their local police forces, including the power to establish commissions to investigate those forces. The NJSC reasoned that the NJAG regulations require internal affairs investigations remain “self-contained within the law enforcement” silo, such that a CCRB cannot have concurrent jurisdiction over a misconduct investigation. Not only does this construction wholly undermine the purpose of a CCRB—that is, to have a review process outside of the existing opaque and deficient internal affairs process—Newark’s exercise of properly delegated legislative authority cannot be preempted by an executive regulation. The NJSC’s decision holding that statutorily-authorized municipal legislation is preempted by NJAG regulations violates the Separation of Powers doctrine.

In sum, **the time has come for this Court to address the Constitutional issues raised by America’s institutionalized system of racially-disparate police conduct.** The executive, legislative, and judicial branches of New Jersey have failed to provide its Black citizens with equal protection of the law. Quite literally, Black individuals in Newark remain subject to disproportionate unconstitutional police misconduct from which every government institution has failed to protect them. It is neither lost on nor surprising to those citizens that the government has failed to protect them from decades of harm committed by...the government. **One institution must break the cycle, and it should be this one—the branch charged with protecting the Constitution.**

The people of Newark have been trying for decades to have a seat at the table where decisions affecting their physical safety are made. The highest state court has now affirmatively removed the tools Newark requires to rebuild trust between its police and residents. Although some state legislators are sympathetic to Newark's goals, *see supra* n.1, forcing its citizens to endure unconstitutional action while awaiting additional legislative action at some indefinite future point is itself a constitutional violation. Newark respectfully requests review of this matter on writ of certiorari.

**A. The NJSC Decision Below Violates the Equal Protection Clause.**

At this moment, and as a result of the New Jersey Supreme Court's decision, Newark is being forced to act in violation of the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection clause prohibits any State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONS. amend. XIV, § 1, cl. 4. By its terms, this provision operates to constrain what the State of New Jersey may do to any "person" within its jurisdiction. Both individuals and municipal corporations are "persons" within meaning of the Fourteenth Amendment, and entitled to its protections. *See Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *River Vale Tp. v. Town of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1988). States may provide greater, but not less, protection than the Fourteenth Amendment. *California v. Ramos*, 463 U.S. 992, 1013-14 (1983); *Mills v. Rogers*, 457 U.S. 291, 300 (1982).

History has borne out that America's state actors will find new and inventive ways to violate the equal protection clause, particularly where race is involved. *See*,

*e.g.*, *Dred Scott v. Sanford*, 60 U.S. 393 (1857); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Korematsu v. United States*, 323 U.S. 214 (1944). Although such violations may be ubiquitous, their manifestations across different localities have allowed their severity and/or pervasiveness to go unnoticed or underappreciated. Certainly, the public response to the deaths of George Floyd, Breonna Taylor, Ahmaud Arbery, and others at the hands of police this year suggests that the majority-white, American public was unaware of the severity and pervasiveness of police brutality against our Black community.

As a result, this Court has frequently been called upon to declare unconstitutional the myriad racist practices of our historical predecessors. *See, e.g.*, *Smith v. Allwright*, 321 U.S. 649 (1944) (restrictions on primary elections); *Morgan v. Virginia*, 328 U.S. 373 (1946) (segregation on interstate buses); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (restrictive covenants on real estate); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage restrictions); *Batson v. Kentucky*, 476 U.S. 79 (1986) (prosecutor's peremptory challenges). Significantly, this Court has not shied away from declaring widespread and institutionalized racist practices unconstitutional, even while leaving the crafting of an appropriate remedy to the local government. *Brown v. Board of Education of Topeka Kansas* is an axiomatic example.

In *Brown*, this Court declared that the segregated education of public schoolchildren violated the Equal Protection Clause. To determine whether such a practice violated the promise of equal protection, the Court was required to consider the issue “in the light of its full development and its present place in American life

throughout the Nation.” 347 U.S. 483, 492-93 (1954). Ultimately, the Court concluded that the Equal Protection Clause guarantees all citizens, including Black citizens, “a system of public education freed of racial discrimination.” *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 299 (1955). Nonetheless, the Court left the details of correcting the problem to local officials and their respective subject matter experts. 347 U.S. at 495-96. Before the local officials and subject matter experts could begin making substantive inroads remedying the harms of educational segregation, however, they required the Supreme Court of the United States to first declare the practice, as a whole, unconstitutional. 349 U.S. at 299-300.

The facts of this matter require the same from the Court today. It must be declared a violation of the Fourteenth Amendment for any State to advance laws that maintain the widespread, institutionalized practice of racially disparate police conduct. As to this matter, it must be declared unconstitutional for the State of New Jersey’s executive, legislative, and judicial branches to advance a legal structure that precludes Newark from protecting its Black citizens from racially disparate police conduct—conduct so egregious it has already been found by a Federal Court and the DOJ to violate the Constitution. Although the Court need not outline today a remedy for every American city, American cities must be allowed to protect their Black residents from unconstitutional police action without unconstitutional interference from the State in which they sit. Just as America’s Black schoolchildren are entitled to “a system of public education free of racial discrimination,” so are our Black

civilians entitled to a system of criminal justice free of racial discrimination. *Brown*, 349 U.S. at 299.

Here, Newark has already been sued for its failure to provide its Black residents with equal protection of the law in violation of the Fourteenth Amendment. Newark must be permitted to craft a solution that will remedy the rift of trust between its residents and its police, as determined by its local officials and the experts they trust. It is unconstitutional to require that Newark and its Black citizens wait for additional legislative action, when the legislature has at no point acted to assist Newark's efforts to create a **civilian** oversight committee **since at least 1975**.

Newark's Black residents should not have to wait a moment longer to be met with police interactions that meet minimal constitutional standards. They should not have to wait a moment longer to have a say in whether police officers are punished for instead meeting them with violence. With the NJSC decision at bar, Newark's Black residents are being forced to continue to accept the results of NPD Internal Affairs investigations into their complaints despite that these investigation were found unconstitutionally deficient. Of all possible stakeholders, the State of New Jersey should be the last to prevent Newark from correcting the problem of racially disparate police conduct. Indeed, the Constitution forbids such prevention. The NJSC's decision invalidating the CCRB Ordinance must be overturned.

**B. The NJSC Decision Below Violates the Necessary and Proper Clause.**

The NJSC's August 19, 2020 decision also requires this Court's review because it interpreted state statutes in a manner offensive to the Necessary and Proper

Clause. Article 1, Section 8, Clause 18 of the United States Constitution grants Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States[.]” By its terms, a Congressional law is validly promulgated under the Necessary and Proper Clause if it is (1) necessary, (2) proper, and (3) in furtherance of some other federal Power.

Since America’s founding, this provision has been read to afford Congress great latitude in determining for itself what is both “necessary” and “proper” to carry into execution another of its powers. *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). This deference to our elected leaders to define what is “necessary” and “proper” to achieve a particular policy goal is required by the Constitutional doctrine of the Separation of Powers. *United States v. Harris*, 106 U.S. 629, 635, 1 S.Ct. 601, 27 L.Ed. 290 (1883) (“Proper respect for a coordinate branch of the government requires that we strike down an Act of Congress only if the lack of constitutional authority to pass [the] act in question is clearly demonstrated.”).

As Chief Justice Marshall observed over 200 years ago, the Necessary and Proper Clause is intended “to be adapted to the various crises of human affairs.” *McCulloch*, 4 Wheat., at 415. Significant here, the Necessary and Proper Clause’s “rule-making power may itself be an **adequate source of authority to delegate** a particular function.” *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121–22 (1947) (emphasis added). Chief Justice Hughes noted:

**We have always recognized that legislation must often be adapted to conditions involving details with which it is**



**impracticable for the legislature to deal directly.** We have said that ‘The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.’”

[*Currin v. Wallace*, 306 U.S. 1, 15 (1939) (quoting *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935) (emphasis added)).]

When Congress establishes investigation committees, Congress delegates its own subpoena power pursuant to the Necessary and Proper Clause. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 214 (1946) (authority to delegate subpoena power to Wage and Hour Commission “would seem clearly to be comprehended in the ‘necessary and proper’ clause, as incidental to both its general legislative and its investigative powers”). The investigation committees must be established under an independent Congressional power (e.g., the power to control interstate commerce), but the delegation of subpoena power is only permitted because it is both necessary and proper to the effective functioning of an investigation committee. *Id.* Although supported by jurisprudence, it is an objective, judicially noticeable fact that subpoena power is necessary and proper to the effective functioning of any investigation committee. Certainly, subpoena power must be considered necessary and proper when the existing investigative process has been found unconstitutionally deficient by the DOJ and a Federal Court.

Here, the elected officials of Newark—supported by the DOJ Consent Decree so ordered by the District Court of New Jersey—enacted the Ordinance establishing the CCRB with the specific intent that the CCRB be able to subpoena records and testimony. An investigative body that cannot obtain the evidence necessary to reach a substantiated conclusion cannot function. Certainly, the NPD could not conduct Internal Affairs investigations if it could not compel the presence and records of its officers. The CCRB as it stands now can only log complaints and refer them to the NPD; it cannot investigate or even review NPD Internal Affairs investigations because it cannot compel NPD officers’ presence or records.

The NJSC relied on New Jersey’s statutory codification of Article I’s Necessary and Proper Clause, N.J.S.A. 40:48-2, which provides in relevant part that a New Jersey municipality may make such ordinances not contrary to state or federal law “as it may deem necessary and proper for the good 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.” (App. B, 34).

In holding that N.J.S.A. 40:48-2 could not rescue the Ordinance provision granting the CCRB subpoena power, the NJSC ignored that a state statute may provide a higher ceiling, but not a lower floor, than the Constitution provides. Likewise, the NJSC ignored the objective fact and substantial jurisprudence demonstrating that investigation committees require subpoena power to function as intended. The NJSC also ignored the centuries of law requiring deference to elected officials on what is necessary and proper to meet a particular goal. In particular, it

is difficult to imagine a less deferential solution than the one proposed by the NJSC: that every time the CCRB wants to subpoena records or testimony, the City Council must approve and itself issue the subpoena. Such a cumbersome process is precisely the reason why legislators are permitted to delegate rather than deal directly with effectuating every detail needed to implement their policies.

The elected officials of Newark determined that it is no longer reasonable, practicable, or advisable for a police misconduct review board to be comprised directly of only law enforcement or council members (non-experts in police conduct), nor to require their authorization for every subpoena in every case. Instead, the elected officials of Newark deemed it necessary and proper that ordinary citizens participate in police misconduct review boards when the existing process has been proved unconstitutionally inadequate. The NJSC, however, interpreted state statutes to bar the CCRB's subpoena power, precluding effective inquiry into police misconduct in violation of the Necessary and Proper Clause.

**C. The NJSC Decision Below Violates the Separation of Powers Doctrine.**

The NJSC decision also requires this Court's review because it forces a legislative body to cede to executive power in violation of the Constitutional Separation of Powers doctrine. Specifically, the NJSC held that the Ordinance's grant of subpoena power and concurrent jurisdiction with NPD Internal Affairs were invalid as preempted by the New Jersey Attorney General's Internal Affairs Policies and Procedures Manual ("NJAG IA Manual"). Newark respectfully submits that such a holding violates the Separation of Powers doctrine.

It is the “very structure” of the Constitution, which enumerates and separates the powers of the three branches of government in Articles I, II, and III, that exemplifies the concept of separation of powers. *INS v. Chadha*, 462 U.S. 919, 946, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Although the boundaries between the three branches are not “hermetically sealed,” the Constitution “prohibits one branch from encroaching on the **central prerogatives** of another.” *Miller v. French*, 530 U.S. 327, 341 (2000) (citations omitted). Loosely speaking, the Separation of Powers doctrine requires that the legislature determines policy, the executive enforces that policy, and the judiciary decides whether either’s actions exceed Constitutional bounds.

Here, the New Jersey Legislature has granted municipalities broad “police powers,” including the statutory authority to establish investigatory boards overseeing their local police forces, as well as to delegate all necessary “powers of inquiry” to those oversight boards:

The governing body of any municipality, by ordinance, may create and establish, as an executive and enforcement function of municipal government, a police force, whether as a department or as a division, bureau or other agency thereof, and provide for the maintenance, regulation and control thereof. . . .

**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 (“Section 118”).]

Nonetheless, the NJSC expressly held that Section 118’s phrase “such powers of inquiry as the governing body deems necessary” could not include subpoena power. (App. A at 49). It also found Section 118 insufficient for Newark’s CCRB to investigate police misconduct complaints at the same time as NPD Internal Affairs. (*Id.* at 40).

Specifically, the NJSC found that Section 118 could not overcome the invalidating “conflict” between N.J.S.A. 40A:14-181 (“Section 181”) and the Ordinance. (App. A at 40-45). Section 181 simply requires that law enforcement agencies in New Jersey adopt and implement guidelines consistent with the NJAG IA Manual. In turn, however, the NJAG IA Manual “requires **the IA process must remain a self-contained, confidential process as designed** with respect to the personnel selected and trained to perform such investigations, responsive to the chief who has ultimate responsibility for the IA operation.” (App. A at 42). As a result of this “self-contained, confidential” process, the NJAG IA Manual requires certain records remain within a local police department’s internal affairs unit during an internal investigation. (*Id.*). According to the NJSC, this confidentiality rule in the NJAG IA Manual means that NPD Internal Affairs cannot share its files with the CCRB. (*Id.*). The NJSC therefore invalidated the Ordinance provision allowing concurrent investigations by the CCRB and NPD Internal Affairs—which would require the sharing of files—as impermissibly conflicting with the NJAG IA Manual and its implementing statute, Section 181. (*Id.*).

The NJSC’s decision is constitutionally offensive and sets a dangerous precedent: The NJSC held that if the state executive has established a regulatory process in an area—even if that existing process has been found inadequate to the point of unconstitutionality—legislatively delegated power may not be exercised by a municipality in the same area. But it is the province of the Legislature to determine policy, and of the Executive only to implement those policies. Simply put, Executive regulations *implementing* an unconstitutional internal affairs process cannot preempt the Legislature’s *policy determination* that municipalities may establish commissions to investigate police misconduct and delegate to those commissions the necessary powers of inquiry. Contrary to the NJSC’s holding, Section 181 does not empower the NJAG to override the authority the Legislature granted municipalities and civilian review boards to investigate the operation of local police forces under Section 118.

Instead—and in keeping with Separation of Powers doctrine—this Court should reverse the NJSC’s decision, declare the practice of racially-disparate police misconduct unconstitutional, and allow local elected officials to solve the problem unencumbered by additional unconstitutional State action. Indeed, this Court long ago stated that such deference to our elected leaders to define what is necessary and proper to achieve a particular policy goal is **required** by the Constitutional doctrine of the Separation of Powers. *Harris*, 106 U.S. at 635. This Court must clarify the respective rights of the State and municipalities when resolving the issue of racially-disparate police misconduct.

**D. Public Policy Requires Immediate Consideration of This Case.**

**1. Police-Citizen Relations in Historically Traumatized Communities Are A Matter of Substantial and Increasing Public Importance.**

In the last few years, Americans have seen “a seemingly never-ending series of controversial police use-of-force incidents,” sparking debate within communities and on the national stage about policing and police accountability. Sharon R. Fairley, *Survey Says?: U.S. Cities Double Down on Civilian Oversight of Police Despite Challenges and Controversy*, 20 Cardozo L. Rev. 1, 4 (2020). With the ubiquity of social media, white Americans are bearing increasing witness to what Black Americans have long known: white and Black civilians are not treated equally by the police, Black civilians are regularly met with unnecessary police violence, and the police who harm them consistently walk away without consequence. Images comparing the Capitol police response to Trump supporters on January 6, 2021 and Black Lives Matter protestors in July 2020 provide a vivid, contemporaneous example.

Indeed, the level of distrust and the perceived lack of accountability for police in historically traumatized communities has had a deleterious impact on cities and municipalities throughout America. Understandably, many United States citizens are frustrated and dismayed with the veil of secrecy cast over the process for investigating and punishing police misconduct. In that regard, the public perception that police officers are “above the law” has been at the forefront of many cities’ decisions to increase police accountability by instituting CCRBs as a means of

involving the public in investigating, reviewing, and reforming police conduct. Civil engagement remains a primary means to crafting appropriate solutions.

As a result, citizen involvement in the investigation and discipline of police misconduct is a substantial matter of public importance, now more than ever. Police oversight expert Lynne Wilson has stated, “[p]olice misconduct is a matter of strong public interest . . . **citizens, not police department officials, are the ultimate arbiters of what police behavior is acceptable in a democratic society.**” Lynne Wilson, *The Public’s Right Of Access To Police Misconduct Files*, Police Misconduct and Civil Rights Law Report, vol. 4, no. 7 (Jan–Feb 1994); see also Fairley, *supra*, at 5 (“In the nearly eighty years since the first civilian entity was formed to address police accountability, the concept of civilian oversight has been broadly recognized as a way for community interests to independently check police conduct.”). Given the rising level of public distrust in police—which will only continue to rise with increasing public access to social media technology—CCRBs play a monumental role in restoring police-citizen relations in historically traumatized cities and municipalities. By passing local ordinances instituting or expanding the use of CCRBs, municipal governments have given a direct voice to members of the community, which helps to ease the tensions that arise when the public is not apprised of remedial actions taken through the clandestine internal affairs process. CCRBs provide a transparent process through which the actions of individual police officers and police departments may be judged by citizens – the ultimate arbiters of what is acceptable. Targeting



this issue at the local level allows the most appropriate tailored solutions to a particular community.

To date, there are at least 144 CCRBs nationwide, and almost every large city in the United States have some form of citizen oversight of local police departments. Joseph DeAngelis et al., *Civilian Oversight of Law Enforcement: Assessing the Evidence*, NACOLE, 10 (September 2016). While the organizational structure of CCRBs vary depending upon the precise needs of each local environment, most of these review boards share common goals, which include: “(1) Improving public trust; (2) Ensuring accessible complaint processes; (3) Promoting thorough, fair investigations; (4) Increasing transparency; and (5) Deterring police misconduct.” *Id.* at 8. In the past five years, the United States has seen a marked increase in the use and scope of CCRBs, and many cities instituted extensive reforms to existing CCRBs to enhance the reach and powers of these boards.

For example, new CCRBs have been established and widely utilized over the past decade with newly composed boards now operating in cities including, but not limited to: Anaheim, California; Aurora, Colorado; Omaha, Nebraska; Tampa, Florida; and Wichita, Kansas. Fairley, *supra*, at 15-18. These CCRBs were each established by local ordinance, after much public debate in light of recently exposed patterns of excessive force being used by their police departments. Ultimately, elected officials in each of these cities felt that having a CCRB was an important aspect of regulating police misconduct, and restoring relations between police and the very citizens they are meant to protect and serve.

Even cities that already had CCRBs have reevaluated the scope and reach of these boards in recent years, seeking to expand their investigatory powers. For example, CCRBs have been granted additional powers in cities including: Atlanta, Georgia; Boston Massachusetts; Denver, Colorado; Houston, Texas; San Antonio, Texas; San Francisco, California; and St. Paul, Minnesota . Fairley, *supra*, at 27-30. In each of these cities, the governing bodies expanded the types of cases that CCRBs could address, insulated CCRBs from outside influences to ensure the integrity of their investigations, allowed the boards to publish the results of their investigations, and empowered CCRBs to make recommendations regarding concerning police policies and practices. *Id.*

In the present case, Newark’s Mayor and City Council determined that passing the Ordinance establishing the current CCRB was necessary to ensure the health and safety of its residents, and to begin to restore trust and transparency in the police discipline process. This was especially important considering Newark’s history, which has been long marred by violent and unconstitutional race-based police misconduct. However, this issue is not unique to Newark. Throughout the United States, local governing bodies are met with resistance by police unions when attempting to create or enhance CCRBs.

Police unions should not be deciding law and policy on police accountability to the exclusion of the citizens and their elected representatives, as has happened in New Jersey with this case. It is the people themselves—the citizens of our respective United States, embodied in our democratic society by their selected representatives—

who must be permitted to decide what is acceptable police conduct. It is respectfully submitted that this Court must weigh in on this substantial question of public importance, and determine how the United States Constitution directs states and municipalities, as well as citizens and police officers, to handle the thorny issues of police accountability and the scope of CCRBs.

## **2. Municipalities Have Constitutional Rights as Against the States of Which They Are A Part.**

In New Jersey and many states across the country, the general police power reserved to the states under the Tenth Amendment—that is, the power to regulate and pass ordinances to preserve the health, safety, and welfare of its citizens—has been delegated to local governments to exercise as they see fit. *See, e.g.*, N.J.S.A. 40:48-2 (granting municipalities the power to pass and amend Ordinances as it may deem “necessary and proper . . . for the preservation of the public health, safety, and welfare” of its citizens); see also *Shreveport v. Restivo*, 491 So. 2d 377, 380 (La. 1986); *Homewood v. Wofford*, 232 Ala. 634, 636 (Ala. 1936); *Craig v. Macon*, 543 S.W.2d 772, 774 (Mo. 1976); *Cedar Falls v. Flett*, 330 N.W.2d 251, 255 (Iowa 1983); *Mayor, etc., of Chattanooga v. Norman*, 92 Tenn. 73, 78 (Tenn. 1892); *Brennan v. Seattle*, 151 Wash. 665, 668-669 (Wash. 1929); *Vermont Salvage Corp. v. St. Johnsbury*, 113 Vt. 341, 349 (Vt. 1943); *Porter v. Paris*, 184 Tenn. 555, 558 (Tenn. 1947). The very purpose of States delegating the police power to local municipalities is to ensure narrowly tailored responses to local concerns, and to prevent unconstitutional overreach by state Legislatures. Ilya Shapiro, *State Police Powers and the Constitution*, CATO

Institute (September 15, 2020) <https://www.cato.org/publications/study/state-police-powers-constitution> (last visited January 8, 2020).

A necessary component of delegating such important powers to local governments requires states to grant municipalities the right to challenge arbitrary state action that restricts its state constitutional authority to regulate and pass ordinances to protect the health, safety and welfare of its citizens. Indeed, this Court has recognized situations in which a local governments may bring an action against the state of which they are part. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Likewise, this Court has implied that municipalities “can suffer injury, and therefore have standing, when the state violates the constitutional rights of their residents.” Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 Yale L. & Pol’y Rev. 389, 391 (2013) (citing *Romer v. Evans*, 517 U.S. 620 (1996) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982)). This case presents this Honorable Court with an opportunity to clarify the jurisprudence in this largely unaddressed area of law, and provide much-needed guidance to states and municipalities throughout the United States.

The need to regulate police conduct in a municipality certainly concerns the health, welfare, and safety of local communities. Ordinances creating and enhancing the powers of CCRBs accomplish that very solemn constitutional obligation of a municipality. Municipalities throughout the United States will continue to attempt to protect its citizens by utilizing CCRBs in various forms to ferret out and reform police departments and police officers that engage in misconduct against its citizens.

It is critical that the Court weigh in on this increasingly important issue, and define the rights of local governments as against the States of which they are a part when the State legislative, executive, and judicial branches have deprived the local government of its rights and abilities to perform its duties. This issue is of constitutional dimension, sounding in principals of federalism and the Separation of Powers doctrine. Petitioner respectfully submits that this Court must provide guidance regarding the interplay of local and state governments in the context of CCRBs, to ensure that municipalities and States alike are aware of the constitutional limits of the exercise of their police powers.

## **IX. Conclusion**

For the foregoing reasons, Petitioner City of Newark respectfully requests this Court grant a writ of certiorari to the New Jersey Supreme Court in this matter.

Dated: January 19, 2021

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# **APPENDIX A**

## SYLLABUS

This syllabus is not part of the Court’s opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

### **Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark** **(A-15-19) (083197)**

**Argued April 27, 2020 -- Decided August 19, 2020**

**LaVECCHIA, J., writing for the Court.**

This appeal involves a challenge to the City of Newark’s authority to create by ordinance a civilian oversight board to provide a greater role for civilian participation in the review of police internal investigations and in the resolution of civilian complaints.

Municipal Ordinance 6PSF-B (Ordinance) establishes the Civilian Complaint Review Board (CCRB or the Board), within the Office of the Mayor, to address complaints filed by citizens against the Newark Police Department and its members. The Ordinance authorizes the Board to recommend to the Public Safety Director the discipline to be imposed on individual officers. The Board’s powers and responsibilities can be divided into two categories: investigative powers and policy responsibilities.

With respect to its investigative powers, the Ordinance endows the Board with subpoena power and concurrent jurisdiction with the Newark Police Department to receive and investigate complaints against the Department’s members. The Board’s findings of fact in its investigations are, “absent clear error,” made binding on Newark’s Public Safety Director, who retains final authority over discipline of the police force. The Board is also allowed to recommend the discipline to be imposed. The Ordinance confers on the Board the added power -- at the conclusion of the Newark Police Department’s own investigation into an officer’s behavior -- to review the findings, conclusions, and recommendations that ensue from that internal investigation.

In its policymaking capacity, the Board can recommend to city officials procedures for investigating police conduct. The Board is also tasked with a consultative role in the development of a discipline matrix by the Public Safety Director and the affected bargaining units. Further, the Ordinance directs that Newark’s Division of Police and Department of Public Safety cooperate with the CCRB. Finally, the Ordinance establishes rules and procedures for the CCRB, one of which provides for the confidentiality of complainant identities. However, “[i]f the complaint is substantiated and is referred to a CCRB hearing, the complainant’s identity may be released in the course of any public hearing about the alleged misconduct.”

The Fraternal Order of Police, Newark Lodge No. 12 (FOP) filed a complaint claiming that the Ordinance was unlawful. Based on the record and arguments presented on cross-motions for summary judgment, the court held the Ordinance invalid and enjoined its operation in virtually all respects. The court left intact, however, the Ordinance's grant of authority to the CCRB to conduct general oversight functions, including aiding in the development of a disciplinary matrix for use by the police force.

The Appellate Division affirmed in part and reversed in part, and sustained the Ordinance as modified. 459 N.J. Super. 458, 471 (App. Div. 2019). First, the court invalidated the Ordinance's required treatment of the CCRB's investigatory findings, determining that the binding nature of the CCRB's findings, absent clear error, impermissibly "makes the CCRB's factual findings paramount to the findings of the IA department." *Id.* at 491-92. Second, the Appellate Division held that, facially, the Ordinance's procedures for the CCRB do not violate due process, *id.* at 494, and left to another day an as-applied due process challenge, *id.* at 495. Third, the Appellate Division rejected FOP's argument "that preemption principles invalidate the Ordinance on its face," but did invalidate the Ordinance's provision authorizing disclosure of a complainant's identity. *Id.* at 502, 507. Finally, on the issue of subpoena power, the Appellate Division reversed the trial court. *Id.* at 508.

The Court granted certification, 240 N.J. 7 (2019), and considers the Ordinance as modified by the Appellate Division.

**HELD:** The Ordinance is sustained subject to the Court's further modifications to comply with current legislative enactments. The Court concludes that state law permits the creation by ordinance of this civilian board with its overall beneficial oversight purpose. The Court holds that this review board can investigate citizen complaints alleging police misconduct, and those investigations may result in recommendations to the Public Safety Director for the pursuit of discipline against a police officer. In addition, the review board may conduct its oversight function by reviewing the overall operation of the police force, including the performance of its IA function in its totality or its pattern of conduct, and provide the called-for periodic reports to the officials and entities as prescribed by municipal ordinance. However, to the extent some investigatory powers that the City wishes to confer on its oversight board conflict with existing state law, the Court modifies the Appellate Division's judgment. The board cannot exercise its investigatory powers when a concurrent investigation is conducted by the Newark Police Department's IA unit. An investigation by the IA unit is a function carefully regulated by law, and such an investigation must operate under the statutory supervision of the police chief and comply with procedures established by Newark's Public Safety Director and the mandatory guidelines established by the Attorney General. Concurrent investigations would interfere with the police chief's statutory responsibility over the IA function, and the review board's separate investigatory proceedings would be in conflict with specific



requirements imposed on IA investigations and their results. The Court also invalidates the conferral of subpoena power on this review board.

1. The question presented here is whether Newark has the power to legislate, by ordinance, the creation of a citizen oversight board to have a role in the review of the handling of citizens' police misconduct complaints. Municipalities in New Jersey have the power to act legislatively where such authority has been delegated by the Legislature. The three-part test set forth in Dome Realty, Inc. v. City of Paterson, 83 N.J. 212, 225-26 (1980), applies when determining the validity of challenged municipal action. (pp. 20-23)

2. The threshold issue -- whether Newark has the power to create a citizen oversight board to be involved in the review of police misconduct complaints -- implicates N.J.S.A. 40:48-2, the police powers statute, which provides in part that a municipality may make such ordinances not contrary to state or federal law "as it may deem necessary and proper for the good 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"; N.J.S.A. 40A:14-118, which authorizes municipalities to establish and "provide for the maintenance, regulation and control" of a police force as part of the executive function of local government and further authorizes the appointment of a chief of police with statutorily designated responsibilities; and N.J.S.A. 40A:14-181, which directs locally created law enforcement agencies to adopt procedures for the investigation of complaints of police misconduct consistent with guidelines issued by the State's chief law enforcement officer: the Attorney General. The Court analyzes each statute. In applying the three-part test set forth in Dome Realty to determine the validity of the municipal action challenged in this case, the Court finds the first and second prongs are not the significant issues: there is no constitutional impediment to municipal action that is claimed here, and the broad police powers statute presents legislatively delegated authority to permit municipalities to create an oversight board. Whether the City can create a citizen oversight board at all, and whether it can do so in the form it has enacted, arises under the third prong of the test: "whether any delegation of power to municipalities has been preempted by other State statutes dealing with the same subject matter." See 83 N.J. at 225-26. (pp. 23-36)

3. The Court analyzes N.J.S.A. 40A:14-118 and, in particular, its final paragraph. The first sentence of that paragraph preserves the governing body's authority to appoint committees "to conduct investigations of the operation of the police force." The next sentence preserves for "the appropriate authority" certain other functions, including "examining at any time the operations of the police force or the performance of any officer or member thereof." The Court concludes that the power identified in the second sentence of the last paragraph of section 118 cannot be aggregated to the CCRB. Under Newark's municipal code, the City has designated the Public Safety Director as the "appropriate authority" for section 118 purposes, with ultimate responsibility for the

police force's efficiency and day-to-day operations, including discipline, and the official to whom the police chief reports. There cannot be another entity performing the responsibilities assigned to the appropriate authority under section 118. The Court's interpretation relies on both the language and the history of that statute. (pp. 24-32)

4. The Court also reviews the authority of the Attorney General to provide direction to law enforcement at the local level, which the Attorney General exercised in issuing the Internal Affairs Policy & Procedures (IAPP) to establish uniform procedures for investigating complaints of police misconduct. The Court concludes that section 181 effectively made the AG's IAPP required policy for all municipal law enforcement agencies in New Jersey. (pp. 32-34)

5. The Court construes neither section 118 nor section 181 to preempt the creation of a civilian oversight board in general. But the Court must also consider whether the investigatory or general oversight responsibilities the challenged Ordinance confers upon the CCRB conflict with those statutes. (pp. 37-38)

6. The Court first reviews the investigative functions conferred upon the CCRB. The Court concludes that when no IA investigation is undertaken, the investigatory power conferred on the CCRB by ordinance is valid and poses no conflict with existing statutory law when it is used to investigate a citizen complaint filed with it. And the Court perceives no conflict if the Public Safety Director directs the chief to initiate charges against a police officer after receiving the findings and recommendation of the CCRB, notwithstanding that the IA process was not commenced. However, under present law, the IA process must remain a self-contained, confidential process as designed with respect to the personnel selected and trained to perform such investigations, responsive to the chief who has ultimate responsibility for the IA operation, and separated on a reporting basis from others on the force. The process and the information gathered in such investigations is subject to strict confidentiality requirements, as currently mandated by the IAPP, with which local law enforcement agencies are compelled by section 181 to comply. Under the IAPP, section 181, and section 118, there simply cannot be a concurrent investigation of a citizen's police complaint by a CCRB while an IA complaint is under review. For that to be permissible, present statutes would have to be altered to clearly indicate how the two systems could work compatibly or to indicate that the present insulating features of the IA investigatory process no longer enjoy paramouncy. The Court accordingly holds that the CCRB's authority to conduct concurrent investigations is invalid. (pp. 38-46)

7. Turning to the CCRB's oversight functions, the Court agrees with the Appellate Division, which upheld the Board's roles in creating a disciplinary matrix to be used by the Public Safety Director and conducting oversight reviews and reporting periodically to the Public Safety Director and to the Council. That power, preserved in the first sentence of the last paragraph of section 118, pertains to review of an overall operation of the

police force or, as here, the IA unit's overall operational results, and does not include the ability to review and critique the handling of an individual IA investigation into alleged police misconduct. (pp. 46-48)

8. As to subpoena power, the Council's conferral through this Ordinance of subpoena power on the CCRB cannot be squared with existing statutes. There is no inherent authority for the Council to delegate its subpoena power to a non-legislative body of its creation. To the extent that the Council itself has subpoena power, that power is inherent in and tied to the power to legislate. While a municipal governing body can delegate its own subpoena power to a subcommittee of its members in furtherance of a proper legislative purpose, the first sentence of the last paragraph in section 118 stops far short of supporting that a municipality now has the power to confer subpoena power on any public-member commission it chooses to create. To the extent this CCRB exercises its oversight function, consistent with section 118, the referenced "power[] of inquiry" is not equivalent to "subpoena power." The Legislature would have to act in order for the City to have the ability to confer subpoena power on its CCRB. Nonetheless, the Council retains its own power to issue subpoenas and may be motivated to exercise that power as a result of an oversight report from the CCRB about the performance of the IA function in Newark, viewed in its totality, as the Ordinance calls for. (pp. 48-51)

9. The Court finds FOP's due process challenge premature but notes that the statutory protections trigger if and when the Public Safety Director chooses to impose discipline and that, because the CCRB is not an adjudicative body, traditional notions of due process may not arise in the CCRB's purely investigative setting. (pp. 51-52)

**The Court MODIFIES the judgment of the Appellate Division, AFFIRMING IN PART and REVERSING IN PART. The Ordinance, as modified by the Court's opinion, is SUSTAINED.**

**CHIEF JUSTICE RABNER, dissenting,** believes the Newark City Council chose a valid course when it passed the Ordinance, as modified by the Appellate Division. In Chief Justice Rabner's view, the legislative scheme directly anticipates the delegation of subpoena power to oversight boards in N.J.S.A. 40A:14-118; the "necessary and proper" clause of N.J.S.A. 40:48-2 offers further authority for the Council's action; and N.J.S.A. 40A:14-181 does not empower the Attorney General to override the authority the Legislature granted municipalities and civilian review boards to investigate the operation of local police forces under section 118. Chief Justice Rabner would uphold the Ordinance, which would allow Newark's CCRB to conduct investigations similar to other civilian oversight boards throughout the nation.

**JUSTICES ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and TIMPONE join in JUSTICE LaVECCHIA's opinion. CHIEF JUSTICE RABNER filed a dissent.**

SUPREME COURT OF NEW JERSEY

A-15 September Term 2019

083197

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Fraternal Order of Police,  
Newark Lodge No. 12,

Plaintiff-Appellant,

v.

City of Newark,

Defendant-Respondent.

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On certification to the Superior Court,  
Appellate Division, whose opinion is reported at  
459 N.J. Super. 458 (App. Div. 2019).

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Argued  
April 27, 2020

Decided  
August 19, 2020

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Matthew D. Areman argued the cause for appellant (Markowitz & Richman, attorneys; Matthew D. Areman, of counsel and on the briefs).

Avion M. Benjamin, First Assistant Corporation Counsel, argued the cause for respondent (Kenyatta K. Stewart, Corporation Counsel, attorneys; Avion M. Benjamin, of counsel and on the briefs).

Daniel I. Bornstein, Assistant Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Gurbir S. Grewal, Attorney General, attorney; Daniel I. Bornstein, of counsel and on the briefs).

Vito A. Gagliardi, Jr., argued the cause for amicus curiae New Jersey State Association of Chiefs of Police (Porzio, Bromberg & Newman, attorneys; Vito A. Gagliardi, Jr., of counsel and on the brief, and David L. Disler, on the brief).

Lawrence S. Lustberg argued the cause for amici curiae American Civil Liberties Union of New Jersey and Newark Communities for Accountable Policing (Gibbons and American Civil Liberties Union of New Jersey Foundation, attorneys; Lawrence S. Lustberg, Michael R. Noveck, Jeanne LoCicero, and Alexander Shalom, on the briefs).

CJ Griffin submitted a brief on behalf of amici curiae New Jersey Urban Mayors Association, Latino Leadership Alliance of New Jersey, and Libertarians for Transparent Government (Pashman Stein Walder Hayden, attorneys; CJ Griffin, on the brief).

Alexis Karteron submitted a brief on behalf of amici curiae Urban League of Essex County and Junius Williams, Esquire (Rutgers Law School Constitutional Rights Clinic, attorneys; Alexis Karteron, on the brief).

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JUSTICE LaVECCHIA delivered the opinion of the Court.

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This appeal involves a challenge to the City of Newark's (the City or Newark) authority to create by ordinance a civilian oversight board to provide a greater role for civilian participation in the review of police internal investigations and in the resolution of civilian complaints. Newark was the first municipality in this state to join others across the nation that have created

a civilian oversight or review entity to increase police accountability and create stronger relationships between the community and the police. No two civilian oversight or review entities are alike in their genesis, their roles, or the legal landscape in which they arose and are controlled.

This challenge to Newark's civilian oversight entity must be considered in the context of the landscape here in New Jersey. We conclude that state law permits the creation by ordinance of this civilian board with its overall beneficial oversight purpose. Such boards must operate consistently with current statutes, however. To the extent some investigatory powers that the City wishes to confer on its oversight board conflict with existing state law, we are compelled to modify the Appellate Division's judgment. We also invalidate the conferral of subpoena power on this review board. The civilian review board's powers must comply with current legislative enactments unless the Legislature refines the law to specifically authorize certain functions that Newark intends to confer on its review board.

We hold that this civilian review board can investigate citizen complaints alleging police misconduct, and those investigations may result in recommendations to the Public Safety Director for the pursuit of discipline against a police officer. However, the board cannot exercise its investigatory powers when a concurrent investigation is conducted by the Newark Police

Department's Internal Affairs (IA) unit. An investigation by the IA unit is a function carefully regulated by law, and such an investigation must operate under the statutory supervision of the police chief and comply with procedures established by Newark's Public Safety Director and the mandatory guidelines established by the Attorney General. We conclude that concurrent investigations would interfere with the police chief's statutory responsibility over the IA function and that the review board's separate investigatory proceedings would be in conflict with specific requirements imposed on IA investigations and their results.

Where there is no existing IA investigation, the review board may conduct investigations in its own right. In addition, the review board may conduct its oversight function by reviewing the overall operation of the police force, including the performance of its IA function in its totality or its pattern of conduct, and provide the called-for periodic reports to the officials and entities as prescribed by municipal ordinance.

Thus, the Ordinance, as modified by this opinion, is sustained. We modify the judgment of the Appellate Division, affirming in part and reversing in part the conclusions reached.

## I.

### A.

We begin with some general background on civilian oversight entities to place in context the action taken by Newark.

There exists an ever-growing body of scholarship on the development of civilian review or oversight entities. In the concise description provided through the American Bar Association, a citizen review board may fairly be understood as typically operating as “an agency independent of the police department with responsibility for receiving and investigating citizen complaints” of police conduct. Samuel Walker, The Citizen Review Board Model, in Citizen Oversight of Law Enforcement (Justina Cintron Perino ed., 2006). The establishment of such entities generally has derived from the view that the police IA function is not producing fair and thorough investigations. Ibid. Thus, a civilian review board usually functions as an alternative to investigations conducted by IA units of police departments. Ibid.

However, there exists a broad array of forms and structures for civilian oversight, a term used more broadly to capture that variety. Sharon R. Fairley, Survey Says?: U.S. Cities Double Down on Civilian Oversight of Police Despite Challenges and Controversy, 20 Cardozo L. Rev. de novo 1, 5 (2020) (“In the nearly eighty years since the first civilian entity was formed to address



police accountability, the concept of civilian oversight has been broadly recognized as a way for community interests to independently check police conduct.”). Oversight entities have been categorized, based on a recent survey of the existing forms, as having some or all of the following oversight functions: investigative (review police incidents independently from the police department’s investigation); review (review or monitor police investigations of police incidents); audit (audit a sampling of investigations rather than reviewing each one, or all within a certain category of event); adjudicative (conduct the disciplinary hearing or proceeding and make findings and conclusions); appellate review (review outcomes of disciplinary investigations at request of complainant or accused officer); supervisory (make policy and strategic decisions regarding police department operations); and advisory (make recommendations to the police department concerning high-level policy and operational strategies). Id. at 8. Those categories are described as not mutually exclusive. Ibid.

The first formal civilian oversight entity in the United States was created in the 1940s, but with more recent social change civilian oversight of police departments has proliferated: Twenty-two civilian oversight entities have been created since 2014, including the board created by Newark. Id. at 3-4, 14. A recent survey of the one hundred most populous cities in the nation found that

sixty-one have some form of civilian oversight. Id. at 6, 9 (describing such oversight as having become “a normative element within the police accountability infrastructure”). Many of those entities (38%) review or monitor investigations conducted by the police department, while some entities (21%) conduct independent investigations of police incidents. Id. at 8-9.

That said, examination of “the broad array of models and systems nationwide” revealed that “no two are alike.” Id. at 5. And, as noted, each civilian oversight entity’s structure and function must be considered from the perspective of the legal framework of the state in which it operates. In general, though, civilian oversight boards serve to foster public trust, police accountability, and transparency in the review of police conduct.

## B.

On March 17, 2016, Newark adopted Municipal Ordinance 6PSF-B (Ordinance), establishing the Civilian Complaint Review Board (CCRB or the Board) -- the Ordinance and CCRB at issue here. The background to that follows.

Almost a decade ago, in May 2011, the United States Department of Justice, Civil Rights Division (DOJ) began an investigation into the Newark Police Department (Department) after receiving complaints of civil rights

violations by the Department, including complaints about excessive force, unwarranted stops and arrests, and discriminatory police action.

After a three-year investigation, the DOJ issued a report on July 22, 2014, detailing its finding that the Newark Police Department engaged in a pattern or practice of constitutional violations. In relevant part, the DOJ also found deficiencies in the Newark Police Department's systems "designed to prevent and detect misconduct," specifically mentioning as deficient the Department's methods for "reviewing force and investigating complaints regarding officer conduct." According to the Department's own records, IA "sustained only one excessive force allegation in the six-year period from 2007 through 2012."<sup>1</sup>

The day that the DOJ issued its report, the City and the DOJ executed "an Agreement in Principle, which contemplate[d] the negotiation of a Consent

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<sup>1</sup> By way of contrast, "a 2006 Bureau of Justice Statistics Special Report found that large municipal police departments sustained an average of 8% of citizens' complaints about police use of force." (citing Bureau of Justice, Statistics Special Report: Citizen Complaints about Police Use of Force, June 2006.)

Decree with the DOJ to resolve [its] investigation of the Newark Police Department.”<sup>2</sup>

On March 3, 2016, the DOJ filed a complaint against the City in federal court seeking declaratory or equitable relief to remedy the conduct by the Newark Police Department “that has deprived persons of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States.”

Two weeks later, the Newark Municipal Council passed the Ordinance involved in this appeal.

On April 20, 2016, the DOJ and the City entered into a Consent Decree which, among other things, stipulated to enhanced community engagement and

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<sup>2</sup> As reiterated later in the Ordinance itself, the July 2014 Agreement in Principle stated that

[t]he City is establishing and will fund a civilian oversight entity for the [Newark Police Department] to assist [the Newark Police Department] both in adhering to the Agreement and to foster positive relations between [the Newark Police Department] and the Newark Community. The City will establish a mechanism through which it will work with the community to determine the appropriate form and scope of oversight, within the parameters set forth in the Agreement. The Independent Monitor of the Agreement will evaluate and report on the City’s establishment and ongoing implementation of a civilian oversight entity.

civilian oversight.<sup>3</sup> In pertinent part, the Decree ordered the Newark Police Department to “engage constructively with the community to promote and strengthen partnerships and to achieve collaborative, ethical, and bias-free policing.” And, “[a]s part of this effort,” the City agreed to “establish a civilian oversight entity to enhance [the Newark Police Department’s] accountability and transparency and the public’s confidence”; however, the decree expressly stated that it “shall not be deemed to confer on the civilian oversight entity any powers beyond those permitted by law, including by civil service rules and collective bargaining agreements.”<sup>4</sup>

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<sup>3</sup> The Consent Decree called for review and revision of Newark Police Department policy; training; guidance on effectuating future stops, searches, and arrests; bias-free policing; use of force policies; in-car and body-worn cameras; complaint intake and internal investigation procedures; compliance reviews and integrity audits; discipline policies; data systems improvement; and transparency and oversight. By our attention in this opinion to the reference to a civilian oversight entity in the Consent Decree, we do not imply that the Consent Decree’s sole or predominant focus was the imposition of a civilian oversight entity.

<sup>4</sup> The Consent Decree order provided that

[w]ithin 365 days of the Operational Date, the 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 [the Newark

C.

The Ordinance, passed prior to but in clear contemplation of the Consent Decree, establishes, within the Office of the Mayor, a CCRB to address complaints filed by citizens against the Newark Police Department and its members. The Ordinance further authorizes the Board to recommend to the Public Safety Director the discipline to be imposed on individual officers.

In its opinion in this matter, the Appellate Division included a detailed description of the Ordinance at issue. See Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 459 N.J. Super. 458, 475-81 (App. Div. 2019). We briefly review several components important to this appeal and provide further detail later.

Section I of the Ordinance sets out the creation and structure of the CCRB. The Board is to be comprised of eleven members, all appointed by the Mayor with the advice and consent of the Municipal Council. Four of the appointees are the City's Inspector General, and three members of the Municipal Council or designees nominated by the Council. The remaining

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Police Department's] policies and practices, including, but not limited to, those regarding use of force, stop, search, and arrest. The Monitor will evaluate and report on the City's implementation and maintenance of this civilian oversight entity to determine if it is helping to achieve the goals of this Agreement.

seven are to be selected by the Mayor from individuals recommended by specifically designated community and advocacy organizations. The Ordinance also provides that the Board and its operations will be supported through municipal funds (Section II).

The Board's powers and responsibilities, delineated in Section III, can, for ease of reference, be divided into two categories: investigative powers and policy responsibilities.

With respect to its investigative powers, the Ordinance endows the Board with subpoena power and concurrent jurisdiction with the Newark Police Department to receive and investigate complaints against the Department's members.<sup>5</sup> The Board's findings of fact in its investigations are, "absent clear error," made binding on Newark's Public Safety Director, who retains final authority over discipline of the police force. The Board is also allowed to recommend the discipline to be imposed.

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<sup>5</sup> Section IV of the Ordinance provides that

[t]he processing and review of civilian complaints shall not be deferred because of any pending or parallel disciplinary proceeding or criminal investigation unless such request for deferment is made by the office of a county prosecutor or a state or federal law enforcement agency or prosecutor or by a court order.

The Ordinance confers on the Board the added power -- at the conclusion of the Newark Police Department's own investigation into an officer's behavior -- to review the findings, conclusions, and recommendations that ensue from the departmental internal investigation. In this latter respect, the Board's findings are to be submitted to the Public Safety Director, and semi-annually, the Board is to prepare and submit a report on such "Investigation Reviews" to the Public Safety Director, Mayor, and Council.

In its policymaking capacity, the Board can recommend to city officials procedures for investigating police conduct. The Board is also tasked with a consultative role in the development of a discipline matrix by the Public Safety Director and the affected bargaining units.<sup>6</sup>

Further, the Ordinance directs that Newark's Division of Police and Department of Public Safety cooperate with the CCRB (Section IV), requiring those entities

to provide such assistance as the Board may reasonably request, to cooperate fully with investigations by the Board, and to provide to the Board upon request records and other materials which are necessary for the investigation of complaints submitted pursuant to this

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<sup>6</sup> The Ordinance provides that "[t]he discipline matrix and guidelines should be developed by the Public Safety Director and affected bargaining units, in consultation with the CCRB, and must accord with any Consent Order or Judgment with the United States Department of Justice."



section, except such records or materials that cannot be disclosed by law.

However, the Ordinance further provides that

[t]he provisions of this Ordinance shall not be construed to limit or impair the authority of the Public Safety Director to discipline members of the [Newark Police Department] nor obviate the responsibility of the [Newark Police Department] to investigate citizen complaints or incidents to which [the Newark Police Department] is made known . . . . Nor shall the provisions of this section be construed to limit the rights of members of the [Newark Police Department] 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.

Finally, Section V of the Ordinance establishes rules and procedures for the CCRB, one of which provides for the confidentiality of complainant identities. However, “[i]f the complaint is substantiated and is referred to a CCRB hearing, the complainant’s identity may be released in the course of any public hearing about the alleged misconduct.” Section V reiterates that the Public Safety Director retains final authority and discretion over disciplinary determinations.

## II.

### A.

On August 5, 2016, the Fraternal Order of Police, Newark Lodge No. 12 (FOP)<sup>7</sup> filed a verified complaint in Superior Court, claiming that the Ordinance was unlawful<sup>8</sup> and seeking relief related to the Ordinance's effect on "the administration of discipline among Newark's police officers." FOP asked the court to enjoin enforcement of the Ordinance and to declare it void ab initio.

Based on the record and arguments presented on cross-motions for summary judgment, the court held the Ordinance invalid and enjoined its operation in virtually all respects.

The court determined that the Ordinance fundamentally conflicted with N.J.S.A. 40A:14-118 (the police force statute) because it inappropriately authorized the CCRB to "file a complaint against an officer and conduct the investigation," which is a power reserved to the police chief as part of his statutory responsibility for management of day-to-day operations. And,

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<sup>7</sup> FOP "is the certified, exclusive collective bargaining representative of police officers employed by the City of Newark."

<sup>8</sup> Specifically, FOP alleged that the ordinance violated N.J.S.A. 40:48-25; N.J.S.A. 40:69A-36; N.J.S.A. 40A:14-181; N.J.S.A. 40A:14-118; N.J.S.A. 40A:14-147; N.J.S.A. 11A:2-13; and Article 1, Paragraph 1 of the New Jersey Constitution.

because the City Council has no power to investigate such complaints, the court determined that the Council cannot by Ordinance “transfer th[at] power to the CCRB.”

The court observed that the Ordinance’s allowance of concurrent investigations would interfere with those conducted by the police chief’s designated IA unit and, further, that the Ordinance conflicts with the Attorney General Internal Affairs Policy & Procedures (IAPP or AG Guidelines) by allowing separate CCRB investigations that would undermine the uniformity of IA investigations. The court found that the AG Guidelines, which preempt in the conducting of such investigations, require an experienced investigator and strict confidentiality, none of which is assured under the CCRB’s process. The court questioned the neutrality of the CCRB due to the composition of its membership and noted that “the CCRB is empowered both to investigate and hear matters,” which the court viewed as “separate functions” “antithetical to each other.” Finally, the court also found no authority to support a municipality’s grant of subpoena power to a civilian review board.

Although invalidating the Ordinance’s conferral of investigatory functions on the CCRB, the court left intact the Ordinance’s grant of authority to the CCRB to conduct general oversight functions, including aiding in the development of a disciplinary matrix for use by the police force.

B.

An appeal by the City followed, in which the Appellate Division affirmed in part and reversed in part. Fraternal Order of Police, 459 N.J. Super. at 471. The Appellate Division modified the Ordinance and determined that, with those modifications, the Ordinance is consistent with N.J.S.A. 40A:14-118.

First, the court invalidated the Ordinance's required treatment of the CCRB's investigatory findings. The court explained that "the Ordinance interferes with the Chief's statutory rights by making the CCRB's findings of fact binding, absent clear error." Id. at 483. The court noted that "the Chief's day-to-day routine operations of the force include supervising the IA Department, through the chain of command, administering the disciplinary process, and imposing any resulting discipline." Id. at 491. Thus, the binding nature of the CCRB's findings, absent clear error, could not survive under the court's analysis because that required treatment impermissibly "makes the CCRB's factual findings paramount to the findings of the IA department," thereby undermining the chief's authority over the day-to-day operation of the police force "by rendering the results of the IA Department's investigation nugatory and commandeering the disciplinary process." Id. at 491-92.

Second, the Appellate Division held that, facially, the Ordinance's procedures for the CCRB do not violate due process, id. at 494, and left to another day an as-applied due process challenge, finding that to be premature, id. at 495. In particular, the court saw no facial due process violation in the requirement that the Public Safety Director explain any disagreement with a CCRB recommendation in an individual case of discipline because the CCRB does not adjudicate cases, operates only as an "investigatory and oversight body," and "has no authority to discipline officers." Id. at 496.

Third, the Appellate Division rejected FOP's argument "that preemption principles invalidate the Ordinance on its face, because N.J.S.A. 40A:14-181 and the AG Guidelines apply to law enforcement agencies and do not address a board like the CCRB." Id. at 502. Further, applying the preemption factors, the court (1) did "not read N.J.S.A. 40A:14-181 or the AG Guidelines as providing the exclusive means for the investigation of civilian complaints," (2) did not view uniformity in the conclusions reached by the separate investigations as necessary because, ultimately, discipline authority remained reposed with the Public Safety Director, and (3) did not find the "state scheme" to be "so pervasive or comprehensive" as to preclude municipal regulation that includes civilian involvement in the investigation of police misconduct. Id. at 504-06. In its preemption analysis, the court did, though,

invalidate the Ordinance’s provision authorizing disclosure of a complainant’s identity, finding that it could thwart other investigations and might discourage complainants from coming forward, disclose an informant, or encourage, for notoriety’s sake, unwarranted complaints. Id. at 507.

Finally, on the issue of subpoena power, the Appellate Division reversed the trial court. Id. at 508. The Appellate Division found support for the Council’s ability to confer subpoena authority on the CCRB as a “power . . . incidental to the City’s policy and express statutory power under N.J.S.A. 40A:14-118 to create a CCRB for the limited purpose of providing oversight in investigating and examining complaints of police misconduct.” Ibid.

We granted FOP’s petition for certification, which challenged the lawfulness of the Ordinance. 240 N.J. 7 (2019). FOP’s petition raises arguments about: (1) whether the Ordinance is consistent with N.J.S.A. 40A:14-118; (2) whether the Ordinance is governed by and consistent with N.J.S.A. 40A:14-181; (3) whether the Ordinance is governed by and consistent with the AG Guidelines; (4) whether the Ordinance lawfully authorizes the CCRB to exercise subpoena power; and (5) whether the Ordinance’s procedures for the CCRB interfere with police officers’ due process rights.

We granted leave to numerous organizations to appear as amici curiae. The AG appeared as an amicus before the Appellate Division on limited

issues, and does so again before this Court. The AG argues that the Ordinance should be held to conflict with section 118 and state law governing IA matters. The Chiefs of Police Association argues similarly and in support of reversal of the Appellate Division judgment. All other amici support the City in urging that the judgment of the Appellate Division be affirmed. Our consideration of the arguments is woven into the analysis of the issues.

### III.

Newark is a municipal government organized under the mayor-council plan of the Faulkner Act.<sup>9</sup> Mun. Council of Newark v. James, 183 N.J. 361, 364 (2005). The Faulkner Act was created to confer great power to local governments consistent with the State Constitution. McCann v. Clerk of Jersey City, 167 N.J. 311, 324, 328 (2001).

The mayor-council plan of the Faulkner Act reflects a traditional separation of executive and legislative power, “vest[ing] in the mayor the responsibility for administrative and executive operations of the municipality, while reposing the ultimate legislative and concomitant investigative responsibilities in the council.” James, 183 N.J. at 366. Here, the City exercised legislative authority when enacting an ordinance creating the CCRB.

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<sup>9</sup> N.J.S.A. 40:69A-1 to -210. The Act is also known as the Optional Municipal Charter Law.

That exercise of municipal legislative authority must find its roots in power delegated to it by the Legislature.

Municipalities in our State have the power to act legislatively where such authority has been delegated by the Legislature. Wagner v. Mayor & Mun. Council of Newark, 24 N.J. 467, 474 (1957) (stating that “[i]t is fundamental in our law that there is no inherent right of local self-government beyond the control of the State”); Fred v. Mayor & Mun. Council of Old Tappan, 10 N.J. 515, 518 (1952) (explaining that municipal power is statutory in origin).

That said, the principle of home rule is legislatively stitched into the fabric of New Jersey government. Inganamort v. Borough of Fort Lee, 62 N.J. 521, 528 (1973) (“Home rule is basic in our government.”). That principle finds expression in the legislative choice to invest “the police power of the State . . . in local government to enable local government to discharge its role as an arm or agency of the State and to meet other needs of the community.”

Ibid. N.J.S.A. 40:48-2, the police powers statute, provides that

[a]ny municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good 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 this subtitle, or by any law.

Statutes granting powers to municipal governments are entitled, by constitutional provision, to liberal construction, and they include not only expressly conferred powers but also those incidental and “of necessary or fair implication . . . and not inconsistent with or prohibited by [the] Constitution or by law.” N.J. Const. art. IV, § 7, ¶ 11 (Paragraph 11). Paragraph 11 is not, however, an independent source of municipal power. Fred, 10 N.J. at 518 (rejecting the contention that Article IV, Section VII, Paragraph 11 of the 1947 Constitution, “which had no counterpart in its predecessor constitution,” was itself a grant of general police powers to municipalities); see also Union Cty. Bd. of Chosen Freeholders v. Union Cty. Park Comm’n, 41 N.J. 333, 339 (1964) (further explaining that Paragraph 11 “was intended to obviate earlier judicial decisions which had taken the position that grants of power by the Legislature to its political subdivisions should be construed narrowly and that doubt as to the existence of any asserted power should lead to its denial”). Moreover, the constitutional provision acknowledges the omnipresent brake on the exercise of municipal authority: where municipal power to act exists, municipal action cannot run contrary to statutory or constitutional law.

A three-part test applies when determining the validity of challenged municipal action: (1) “whether the State Constitution prohibits delegation of

municipal power on a particular subject because of the need for uniformity of regulation throughout the State”; (2) “[i]f the Legislature may delegate authority in the area under scrutiny, the second question is whether the Legislature has in fact done so”; and (3) “whether any delegation of power to municipalities has been preempted by other State statutes dealing with the same subject matter.” Dome Realty, Inc. v. City of Paterson, 83 N.J. 212, 225-26 (1980); see also Inganamort, 62 N.J. at 527. Because “[a] municipality may not contradict a policy the Legislature establishes,” the question usually boils down to “whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act.” Summer v. Township of Teaneck, 53 N.J. 548, 554-55 (1969).

#### IV.

The threshold issue here is whether the City has the power to legislate, by ordinance, the creation of a citizen oversight board to have a role in the review of the handling of citizens’ police misconduct complaints. Whether that question is viewed as an issue of preemption, or a question of fundamental conflict with other statutory policies, it must be resolved before we address the details of this Board’s execution of its oversight and involvement with police misconduct complaints.

Newark’s authority to enact a civilian oversight board involves consideration of the general police power statute, with its broad “necessary and proper” delegation of authority to municipalities, and several related subjects on which the Legislature has spoken. The other key statutes are N.J.S.A. 40A:14-118, which authorizes municipalities to establish and “provide for the maintenance, regulation and control” of a police force as part of the executive function of local government and further authorizes the appointment of a chief of police with statutorily designated responsibilities, and N.J.S.A. 40A:14-181, which directs locally created law enforcement agencies to adopt procedures for the investigation of complaints of police misconduct consistent with guidelines issued by the State’s chief law enforcement officer: the Attorney General.

A.

1.

With respect to the creation and operation of a municipal police force, N.J.S.A. 40A:14-118 has multiple components. Several features are important here.

Any police force created by ordinance under this statute’s authority must be part of the “executive and enforcement function” of local government, and a specific line of authority relating to the police force is required.

Any such ordinance shall, in a manner consistent with the form of government adopted by the municipality

and with general law, 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 for the discipline of its members. . . . Any such ordinance, or rules and regulations, shall provide that the chief of police, if such position is established, shall be the head of the police force and that he shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof . . . .

[N.J.S.A. 40A:14-118.]

The statute assigns certain specific tasks to the chief of police, when such a position is created. Ibid. Among the chief’s statutory duties is the responsibility to administer and enforce rules and regulations for the discipline of the force pursuant to policies that are to be established by “the appropriate authority.” Ibid. The chief is also required to report, at least monthly, to “the appropriate authority” on the operation of the force. Ibid.

The term “appropriate authority” is defined. Its definition underscores a patent legislative intent to ensure that interactions, by other individuals or entities within the local government, with the police force occur through the designated “appropriate authority,” whomever or whatever is chosen to perform that function.

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.

Except as provided herein, the municipal governing body and individual members thereof shall act in all matters relating to the police function in the municipality as a body, or through the appropriate authority if other than the governing body.

[Ibid.]

Finally, in a closing paragraph comprised of three sentences, the statute first underscores that it does not intend to prevent the governing body from exercising its authority to conduct certain investigations relating to the police force.

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.

[Ibid. (emphasis added).]

The second sentence preserves for “the appropriate authority,” and other executive or administrative personnel, certain other functions.

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.

[Ibid. (emphasis added).]

The third sentence, irrelevant here, likewise preserves for “the appropriate authority” the power to act “in an emergency situation through special emergency directives.” Ibid.

2.

We construe section 118 to signal the creation of only one “appropriate authority.” The first two sentences of the final paragraph of section 118 relate to a separation of powers between the branches of municipal government and the legislative intent to have one “appropriate authority” designated to buffer the police force from political interference. We reach that interpretation based on the text and legislative history to the modern version of the police force statute. To the extent the City argued that its CCRB constitutes the “appropriate authority” for purposes of this paragraph of section 118, we reject that contention at the outset.

i.

The final paragraph’s first sentence about the governing body’s power simply preserves otherwise existing authority and prevents that authority from

being diminished by the other provisions of section 118. Hence, in this setting, it is essentially a reference back to the police powers statute and the authority that it confers.

The second sentence of that paragraph cannot be conflated with the first because it addresses power preserved to “the appropriate authority” and related administrative staff and personnel “charged with general administrative responsibilities within the municipality.” The Ordinance cannot aggregate to its CCRB authority reserved under the second sentence. The CCRB cannot become a second “appropriate authority” for purposes of section 118. Under Newark’s municipal code, section 2:22-3.3, the City has designated the Public Safety Director as the “appropriate authority” for section 118 purposes, with ultimate responsibility for the police force’s efficiency and day-to-day operations, including discipline, and the official to whom the police chief reports. There cannot be another entity performing the responsibilities assigned to the appropriate authority under section 118.

It is clear from the Legislature’s choice of language describing the “appropriate authority” and the term’s definitional paragraph that there is to be one, and only one, appropriate authority designated within a municipality to perform the roles that section 118 assigns to that designated person or entity.

The plain language of section 118 consistently refers to “the appropriate authority,” not multiple appropriate authorities, and the defining provision adds to the certainty that the Legislature intended that there be only one. The term’s usage does not permit a reasoned reading that it can mean one person or entity in one place and another person or entity in another. Moreover, the thrust of section 118’s plain language supports finding that it is an insulating role that “the appropriate authority” is expected to play for the police force. The appropriate authority performs that insulating role by establishing the rules and regulations that the police force must follow and the police chief must enforce; by being the entity or individual to whom the police chief reports on all day-to-day operations about the force, including the disciplining of officers; and by being the buffer through which contacts are to be made by individual members or the governing body as a whole, unless they are made “the appropriate authority.” Those roles do not bespeak a moving target. Rather, the statute suggests one line of authority through a singular entity or person to prevent interference with the running of the police force.

Any doubt about that evaporates when one considers the legislative history to the extensive text that now comprises section 118. Section 118 was substantially amended and expanded in 1981. L. 1981, c. 266. The 1981 amendments sought to balance concerns raised by local officials and police



chiefs. See Gauntt v. Mayor & Mun. Council of Bridgeton, 194 N.J. Super. 468, 484-85 (App. Div. 1984). As courts recognized, “[b]y granting chiefs of police express statutory authority, the statute sought to avoid undue interference by a governing body into the operation of the police force.” Falcone v. De Furia, 103 N.J. 219, 222 (1986); see also Assemb. Judiciary, Law, Pub. & Def. Comm. Statement to S. 1243 1 (June 22, 1981); S. Cty. & Mun. Gov’t Comm. Statement to S. 1243 1 (Nov. 24, 1980).

The committee statements and extensive additions to the former abbreviated version of section 118 support a clear legislative intent to (1) specifically delineate the powers and responsibilities of police chiefs, (2) preserve the separation of powers between the executive and legislative branches of government at the municipal level, (3) designate an “appropriate authority” as a conduit between the governing body and the police force, and (4) prevent elected representatives from exerting political influence on police operations. Those changes also support that the appropriate authority is a singular person or entity, as designated locally, entrusted by the Legislature to perform the supervisory and insulating role the statute envisions.

ii.

Moreover, the first two sentences in the concluding paragraph of section 118 assign different powers to different people, who perform different roles.

The first sentence preserves for the governing body its ability to create “committees or commissions to conduct investigations of the operation of the police force.” Different language is used in the second sentence, which preserves the ability of “the appropriate authority, or any executive or administrative officer charged with general administrative responsibilities within the municipality,” to examine “operations of the police force or the performance of any officer or member thereof.”<sup>10</sup> The persons and entities specified in the first and second sentences do not overlap, and their responsibilities are described differently.

We assume that when the Legislature drafts a statute, it avoids surplusage. Burgos v. State, 222 N.J. 175, 203 (2015). We do not regard the investigation of the operation of the police force to be the same as the second sentence’s focus on examination of the operations of the police force or the performance of an officer or member. The words chosen by the Legislature have meaning and each is entitled to receive its plain meaning. Paff v. Galloway Township, 229 N.J. 340, 353 (2017) (“We must presume that the Legislature intended the words that it chose and the plain and ordinary

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<sup>10</sup> The third sentence of the final paragraph of section 118, which again is not relevant here, further ascribes the power to take emergency action to “the appropriate authority,” thus continuing the shift in focus begun in the second sentence.

meaning ascribed to those words.”). From the different word choices and the history of this text, we glean that the expressly preserved power of the governing body to create committees or commissions is not to be confused as conferring the separate powers that are reposed in the executive bodies identified in the second sentence.

B.

The other relevant statutory consideration concerns the authority of the Attorney General to provide direction to law enforcement at the local level.

The Criminal Justice Act of 1970 (the Act), N.J.S.A. 52:17B-97 to -117, aimed to

encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State, in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State.

[N.J.S.A. 52:17B-98.]

The Act, which established the Division of Criminal Justice within the Department of Law and Public Safety and made it subject to the Attorney General’s supervision, N.J.S.A. 52:17B-99, gives the Attorney General broad law enforcement authority “relating or pertaining to the enforcement and prosecution of the criminal business of the State and of any county,” N.J.S.A.

52:17B-101, and calls for its liberal enforcement to achieve its purposes, N.J.S.A. 52:17B-98. County prosecutors, police officers, and all other law enforcement officers must cooperate with, and aid, the Attorney General in the performance of their respective duties. N.J.S.A. 52:17B-112. The Attorney General is empowered to adopt rules and regulations for the efficiency of the Department of Law and Public Safety's work and administration. N.J.S.A. 52:17B-4(d).

The Attorney General exercised that authority to issue the IAPP in 1991 to establish uniform procedures for investigating complaints of police misconduct.<sup>11</sup> According to the IAPP, every law enforcement agency must establish an IA unit, whose role and functions involve investigating complaints of police misconduct, monitoring and tracking officer behavior for incidents of misconduct, and correcting misconduct when it occurs. The IA unit is intended to be insular, consisting of trained law enforcement personnel who

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<sup>11</sup> The IAPP, first issued in 1991, was revised in 1992, 2000, 2011, 2014, and 2017. The 2014 version was in effect at the time the Ordinance creating the CCRB was adopted and when this lawsuit was filed. The 2017 alteration was relatively minor and substantively insignificant for purposes of this appeal. All references herein to the IAPP are to the 2017 version that was in effect when the Appellate Division decided its appeal and the Court granted certification in this matter. We note, however, that a substantially revised IAPP was issued by the Attorney General in late 2019 while this matter was pending before this Court. It is addressed separately, and later, in this opinion.

are directly responsible to the law enforcement executive or the designated IA supervisor. The Guidelines describe procedures that must be followed to receive, investigate, and resolve complaints of misconduct, including safeguards to protect confidential information and requisite training for persons involved in investigations. Individual law enforcement agencies have some discretion in how to fulfill the IA requirements, but certain policies are mandatory. Among the mandatory provisions are requirements that each agency establish and maintain a confidential process, including an IA records system, which must include an IA index and filing system for all documents and records. There are also specific requirements on managing and securing IA records and training requirements for IA personnel.

In 1996, the Legislature enacted legislation compelling all law enforcement agencies in the state to

adopt and implement guidelines which shall be consistent with the guidelines governing the “Internal Affairs Policy and Procedures” of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.

[N.J.S.A. 40A:14-181.]

Section 181 effectively made the AG’s IAPP required policy for all municipal law enforcement agencies in New Jersey.

C.

1.

We now turn to the validity of Newark's Ordinance authorizing a civilian oversight board. In applying the pertinent three-part test, see Dome Realty, 83 N.J. at 225-26, we find the first and second prongs are not the significant issues.

There simply is no constitutional impediment to municipal action that is claimed here, or any we perceive.

And, concerning whether there is legislatively delegated authority to permit municipalities to create an oversight board, we find that authority present in the broad police powers statute. N.J.S.A. 40:48-2's authorization for municipalities to legislate for the general welfare has been held to be its own source of municipal power and not an auxiliary power in aid of other specific grants of authority to act. Inganamort, 62 N.J. at 535-36. In an opening "Whereas" paragraph of the Ordinance, the City cites the need "to create[] protections for the citizenry," a reference to its reservoir of power under N.J.S.A. 40:48-2; no other particular source of authority is cited. Nor is more needed to the extent that the City determined that the creation of a civilian oversight board would benefit the general welfare of the citizens of Newark.

N.J.S.A. 40:48-2 is a broad grant of police powers to municipalities. Id. at 536. The Ordinance declares that the creation of a civilian oversight entity is “a critical part” in implementing reforms as part of the Consent Decree and is important for the community at large, considering the woeful track record of results from past IA investigations and the findings of the DOJ. It advances those aims by “creating protections for the citizenry . . . instilling confidence in the resolution of . . . investigation[s] and providing transparency of the process.” Those salutary reasons support use of the delegated grant of municipal police powers for a legitimate local concern.<sup>12</sup> With the City’s apparent reliance on the police powers delegation from the Legislature, it is clear that the second prong of the three-part test does not raise a concern in this case.

The real issue concerning the City’s ability to create a citizen oversight board at all, and whether it can do so in the form it has enacted, arises under the third prong of the test.

## 2.

With respect to outright preemption, the police force statute, N.J.S.A. 40A:14-118, addresses the creation and structure of a police force in this state.

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<sup>12</sup> As noted in Section IV.A.2., we construe section 118 as alluding to already existing municipal power -- it is not itself an independent source of authority.

Section 118 makes no mention whatsoever about the existence, or role, for a civilian oversight board. When it was enacted, the Legislature may not have been aware that such entities would come into prominence. But, from section 118's silence, we perceive no express or implied preemption that prevents a community from having a civilian oversight body, as a matter of local choice, to be involved in the review of the operation of the police force generally and, specifically, with respect to the police force's handling of police misconduct complaints. The issue is more fundamentally a question about statutory conflict with the intended powers of this civilian review board, but we conclude that section 118 does not preempt the municipal choice to adopt an ordinance creating a civilian oversight board.

Section 181 addresses law enforcement agencies, which as the Appellate Division noted, this CCRB is not. Fraternal Order of Police, 459 N.J. Super. at 502. However, the Legislature plainly intended that the Attorney General's standards and protocols be followed uniformly by law enforcement agencies like the Newark Police Department when performing IA functions. Nevertheless, that does not foreclose a civilian oversight board, so long as the role and duties of such a board do not conflict or interfere with the administration of the AG Guidelines. We do not perceive that section 181 or the AG Guidelines foreclose a community from adopting a civilian oversight



entity, which is, as noted, not itself a law enforcement entity, but rather an entity that interacts with a law enforcement agency.

In sum, we construe neither section 118 nor section 181 to preempt the creation of a civilian oversight board. However, both statutes figure prominently in a conflict analysis for the Ordinance and CCRB under review.

## V.

### A.

The Ordinance gives the CCRB investigatory powers and certain general oversight responsibilities. We address investigatory powers first.

#### 1.

The CCRB's investigatory authority includes the ability to accept and investigate, hear, make findings, and recommend action upon complaints by members of the public, including other police personnel, that allege misconduct involving inappropriate behavior or actions by uniformed and sworn police personnel. Its jurisdiction is concurrent with that of the Newark Police Department's ability to pursue IA investigations.<sup>13</sup>

The CCRB's findings and recommendations are presented to the Public Safety Director, who is the appropriate authority under section 118 and whose

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<sup>13</sup> There is an exception for requests for deferment by a county prosecutor or state or federal law enforcement, or by court order.

authority over discipline is specifically acknowledged in the Ordinance. The Appellate Division culled from the Ordinance the obligation of the Public Safety Director to accept the CCRB's findings of fact as binding (except for clear error), so that is no longer a part of the Ordinance as it is presented in this appeal to us. See Fraternal Order of Police, 459 N.J. Super at 491-92.

The Appellate Division also invalidated the Ordinance's provision that allowed disclosure of a complainant's identity. Id. at 507. The investigatory powers of the Board, including its ability to conduct investigations concurrently with the Newark Police Department's IA investigation, otherwise were left intact.

Newark thus designed its civilian review board to perform its own investigation of citizen complaints, whether or not there is also an IA investigation addressing the same police conduct. And the Ordinance grants the CCRB certain review authority over the results of the police department's IA process. Provisions require that the CCRB be given prior written notification detailing the Public Safety Director's reasons for imposing discipline of a lower level than that recommended by the Board when the Director intends to do so, and the Board may request that the Director appear and answer questions from the Board or provide further explanation. The Director's cooperation with the Board is required. See Section IV of the Ordinance.

2.

We find the prospect of concurrent investigations by the CCRB and the Newark Police Department's IA unit to create a conflict between the Ordinance and statutory policies. That conflict requires some further modification of the Ordinance in order to reconcile it with present law.

The statutes governing the police force and requiring implementation of the AG Guidelines, together, create an IA function that is, in the aspects discussed, rigidly regulated. Section 181 evinces a clear intent that the Attorney General's protocols for conducting IA bring uniformity to IA investigation practices. That intention dovetails with section 118, the police force statute, with its structured line of authority and statutory delegation to the chief to be responsible for the day-to-day operations of the police force. The chief's statutorily assigned duties include responsibility for administration of discipline to individual members of the force pursuant to published procedures established by the person or entity designated as the appropriate authority under section 118. Those procedures also must be consistent with the IA investigatory requirements imposed through the AG Guidelines.

The Legislature, when requiring all local law enforcement agencies to adopt the Attorney General's IAPP, had to have been cognizant of the IAPP's patent intent to professionalize IA investigatory activities and strictly preserve

the confidentiality of the IA process for reasons that the Attorney General has explained. In argument to this Court, the Attorney General emphasizes the premium placed on confidentiality during the investigatory process, finding it necessary to encourage and protect those who come forward with complaints or evidence of police misconduct or problematic behavior. FOP and the Chiefs of Police Association also strongly argue that point. Although that policy is not ours to determine, those guiding principles have been plain on the face of the IAPP since its first iteration.

The Attorney General's protocols allow for careful factual development and protective procedures designed to ensure confidentiality of information collected and thus to encourage people to come forward and cooperate, sure of that confidentiality. See Internal Affairs Policy & Procedures at 42 (providing for the confidentiality of "[t]he nature and course of internal allegations, the progress of internal affairs investigations, and the resulting materials," and setting forth four limited circumstances in which those confidential materials may be released). It is a key feature insisted upon in the AG Guidelines. And the Legislature has required law enforcement agencies, including the Newark Police Department and the chief of police charged with responsibility for this function, to implement it as the Attorney General has directed. N.J.S.A. 40A:14-181. There is no flexibility on that point.

Thus, under present law, the IA process must remain a self-contained, confidential process as designed with respect to the personnel selected and trained to perform such investigations, responsive to the chief who has ultimate responsibility for the IA operation, and separated on a reporting basis from others on the force. See Internal Affairs Policy & Procedures at 12-13 (noting, among other things, that every law enforcement agency must create a separate IA unit “directly responsible to the law enforcement executive or the designated internal affairs supervisor,” that the “[i]nternal affairs investigators should be trained not only in the elements of criminal law, court procedures, rules of evidence and use of technical equipment, but also in the disciplinary and administrative law process” and that “[l]aw enforcement executives shall not assign to the internal affairs unit any person responsible for representing members of a collective bargaining unit”). The process and the information gathered in such investigations is subject to strict confidentiality requirements, as currently mandated by the AG Guidelines, with which local law enforcement agencies are compelled by section 181 to comply. Internal Affairs Policy & Procedures at 42. To the extent that the Attorney General

maintains that mandate, no creation of a municipality can interfere with the IA function as it is required to operate.<sup>14</sup>

The prospect of a concurrent investigation by the CCRB, while an IA investigation is underway, interferes with the intended purpose of section 181's and the IAPP's requirements. The IA investigatory process is disrupted, the police chief's authority over the IA function and its proper operation diminished, and the carefully preserved structure of the IA unit responsible to the chief of police is breached by allowing a concurrent investigation by the CCRB with required departmental disclosure of IA investigatory information to the CCRB for use in its own investigation.

Despite the sound intentions to address municipal and community concerns in Newark, which concerns are empirically supported by the DOJ investigation and Consent Decree, the CCRB's operation, as originally codified in the Ordinance, must bend to the legislative infrastructure within which such entities must operate under present law. Under the IAPP, section

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<sup>14</sup> We acknowledge that, after certification was granted in this matter, in December 2019, the Attorney General issued an updated IAPP that includes various changes pertaining to confidentiality as well as other subjects. See Attorney General Law Enforcement Directive No. 2019-5. The Attorney General also has since issued other Directives on confidentiality of disciplinary records. See Attorney General Law Enforcement Directive No. 2020-5. We express no views on the amended IAPP or the other Directives; we decide this case based on the IAPP version applicable when the Appellate Division decided this matter and we took certification of the appeal.

181, and section 118, there simply cannot be a concurrent investigation of a citizen's police complaint by a CCRB while an IA complaint is under review. For that to be permissible, present statutes would have to be altered to clearly indicate how the two systems could work compatibly or to indicate that the present insulating features of the IA investigatory process no longer enjoy paramountcy.<sup>15</sup> Unless legislative change occurs, we are constrained to preclude the CCRB from employing its delegated authority to conduct a complaint-based investigation in any matter when there is an IA investigation.

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<sup>15</sup> There is an added complication with use of a record developed before the CCRB that becomes inserted into the process after the completion of an IA investigation that leads to discipline. As noted, the CCRB's findings and recommendation on quantum of discipline are to be considered by the Public Safety Director when that official is ready to impose discipline. Insertion of extra-record material must be reconciled with the hearing rights of the accused officer who has had to defend him- or herself within the IA and discipline process that exists in statute (we make no comment here on any collective bargaining rights that relate to disciplining of police personnel). When an IA investigation culminates in the initiation of formal disciplinary charges, once that discipline process commences, statutes control the process that must ensue. N.J.S.A. 40A:14-147 to -151; see Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 353-55 (2013) (discussing relevant statutes and appeal rights governing the disciplinary hearing and review process for police officers in non-Civil Service jurisdictions, such as is Newark).

The record is plainly the one developed through those processes and does not contemplate evidence from a separately conducted collateral proceeding as envisioned by this Ordinance. It is unclear how findings from a collateral hearing by the CCRB would fit into this carefully plotted IA investigatory scheme culminating in a statutory hearing process.

We accordingly hold that the CCRB's authority to conduct concurrent investigations is invalid.

3.

The problem identified with respect to concurrent investigations does not impair the ability of the CCRB to investigate citizen complaints about police misconduct that are not under IA review. The investigatory power conferred on the CCRB by ordinance is valid and poses no conflict with existing statutory law when it is used to investigate a citizen complaint filed with it and for which no IA investigation is undertaken. In such settings, the CCRB can investigate, conduct its hearing, and make findings of fact and recommendations on the pursuit of discipline to the Public Safety Director.

The Public Safety Director is ultimately in charge of the imposition of discipline; is the official designated to be "the appropriate authority" to set procedures for the police department and, specifically, for the disciplining of officers; and can direct the initiation of formal disciplinary charges against an officer. The chief of police is responsible to him, and we perceive no diminution in the chief of police's authority if the Public Safety Director directs the chief to initiate charges against a police officer after receiving the findings and recommendation of the CCRB, notwithstanding that the IA process was not commenced. We do not view the IA function as the exclusive



initiator of such investigations and recommendations about pressing charges against an officer. Once charges are issued, the statutory rights of the officer described heretofore would pertain.

B.

The CCRB has more than investigatory powers. The CCRB has been granted authority to perform various oversight functions. We agree with the Appellate Division, which upheld the Board's roles in creating a disciplinary matrix to be used by the Public Safety Director and conducting oversight reviews and reporting periodically to the Public Safety Director and to the Council.

Oversight review as to the overall performance of the IA function is a beneficial service to this community that had, in the past, lost confidence in the self-monitoring of police personnel. It is a function that we find has support in the general police powers statute. See N.J.S.A. 40:48-2. Newark argues, however, that in addition to the police power statute, this particular power of the CCRB can draw from other statutory authority.

As previously noted, the first sentence of the last paragraph of section 118 preserves for the governing body the ability to create a commission for the oversight purpose of reviewing the operation of the police force. In the context of that paragraph, that reference aligns with the CCRB's (a

commission created by the governing body) ability, consistent with its statutory police powers, to review the overall performance of the operation of the police force and make a report to the officials and entities as the Ordinance requires. See Section III of the Ordinance.

We underscore that the preserved power in that sentence of section 118 pertains to review of an overall operation of the police force or, as here, the IA unit's overall operational results, and does not include the ability to review and critique the handling of an individual IA investigation into alleged police misconduct. We do not find that first sentence to authorize an ability to perform a review of the outcome in an individual's disciplinary matter -- in the sense of a second-guessing.

The second sentence of that paragraph preserves to the municipality's executive branch -- its "appropriate authority" and others charged with general administrative duties -- the ability to handle reviews of the performance of individual officers, which would include reviewing the performance of any member of the IA unit, or the IA unit's operations, in connection with an evaluation of the need for, pursuit of, and imposition of discipline for an individual officer. The executive-versus-legislative dichotomy that the amendment to section 118 sought to maintain in order to preserve the police force from political interference is present throughout section 118, including

its final paragraph, which merely preserves existing legislative authority (in the first sentence) and executive authority (in the second).

## VI.

Finally, we address the issue of the Ordinance's delegation of subpoena power to its CCRB.

The Council's conferral through this Ordinance of subpoena power on the CCRB cannot be squared with existing statutes. There is no inherent authority for the Council to delegate its subpoena power to a non-legislative body of its creation. To the extent that the Council itself has subpoena power, as recognized in In re Shain, the subpoena power is inherent in and tied to the power to legislate. 92 N.J. 524, 539 (1983). Specifically, we recognized in Shain a City Council's subpoena power under the Faulkner Act, stating that when the Council in a mayor-council plan municipality "exercises the legislative function of the local government[,] [i]nherent in th[e] legislative power is the authority to investigate and to interrogate officials under oath, i.e., to issue subpoenas in furtherance of its proper legislative function." Ibid.

This CCRB is plainly not the Council itself. Moreover, this CCRB -- a commission, comprised of various public members, executive branch officials, and Council members or their designees -- is also plainly not a subcommittee

of the Council itself. Therefore, it cannot derive from the Council the subpoena power recognized in Shain.

Nor can an ability to confer subpoena power derive from the first sentence of section 118's last paragraph. The preserved power of inquiry that may be granted to commissions created by the governing body is not equivalent, in this setting, to the power to confer subpoena power. First of all, the Legislature knows how to give to a person or entity the power to subpoena in order to fulfill tasks. See, e.g., N.J.S.A. 40A:14-148 (hearing officers in police disciplinary hearings "shall have the power to subpoena witnesses and documentary evidence"); N.J.S.A. 40:48-25 (subcommittees comprised of members of municipal governing bodies under Faulkner Act "may issue a subpoena ad testificandum, or subpoena duces tecum"). The reference to the power to inquire is not the same language; it does not say subpoena, a word that the Legislature clearly has used in many places elsewhere.

And, for the reasons expressed, we are not dealing with a sub-delegation of the Council's own legislative power because this is not a subcommittee of the Council acting legislatively for the Council. While a municipal governing body can delegate its own subpoena power to a subcommittee of its members in furtherance of a proper legislative purpose, N.J.S.A. 40:48-25; see also City of Newark v. Benjamin, 144 N.J. Super. 58, 72 (Ch. Div. 1976), the first

sentence in section 118 stops far short of supporting that a municipality now has the power to confer subpoena power on any public-member commission it chooses to create.

In sum, to the extent this CCRB exercises its oversight function, consistent with section 118, we conclude that the referenced “power[] of inquiry” is not equivalent to “subpoena power.” As previously noted, the Legislature knows how to confer subpoena power when it chooses to do so; we do not read this reference to inquiry power to lead to the conclusion that it implicates a new authority to now confer subpoena power.

Moreover, to interpret that first sentence in section 118 as a conferral of new authority, as opposed to a preserving of existing power, would be a grand expansion of authority for municipal governing bodies accomplished in an unusual way. It would mean that any commission created by a municipal council comprised of any composition of members could be authorized to wield subpoena power. We do not find a sound basis to conclude that the Legislature intended to give municipalities the ability to widely distribute subpoena power on public-member commissions. To confer subpoena power to this municipally created civilian review board, there needs to be clearly expressed evidence of such intent by the Legislature, as it has provided elsewhere. That said, although the CCRB is not invested with subpoena

power, the Ordinance expressly requires the Newark Police Department and its members to cooperate with the CCRB, provided there is no interference with an ongoing IA investigation.

We appreciate that Newark values having a civilian body participating in the oversight of the police function. But the Legislature would have to act in order for the City to have the ability to confer subpoena power on its CCRB.

In closing, we note that the Council, of course, retains its own power to issue subpoenas to call a person before it and to obtain documents, unless they are otherwise made confidential by law. The Council may be motivated to exercise that power as a result of an oversight report from the CCRB about the performance of the IA function in Newark, viewed in its totality, as the Ordinance calls for. This opinion does not mean to suggest that Newark is powerless with respect to access to subpoena power; it is simply that such power remains reposed in the governing body itself to be used, as that body may, to compel an appearance, written testimony, or documents not shielded by law.

## VII.

To the extent FOP argues that the Ordinance's procedures violate the due process rights of officers, we find that challenge premature, as we do not yet know what the Ordinance's procedures will be. However, we note that

when the CCRB conducts an initial investigation -- and there is no IA investigation -- the statutory protections trigger if and when the Public Safety Director chooses to impose discipline. Further, as the Appellate Division noted, the CCRB is not an adjudicative body. Fraternal Order of Police, 459 N.J. Super. at 496. Thus, traditional notions of due process may not arise in the CCRB's purely investigative setting.

#### VIII.

We modify the judgment of the Appellate Division, affirming in part and reversing in part the conclusions reached. The Ordinance, as modified by this opinion, is sustained.

JUSTICES ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and TIMPONE join in JUSTICE LaVECCHIA's opinion. CHIEF JUSTICE RABNER filed a dissent.

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Fraternal Order of Police,  
Newark Lodge No. 12,

Plaintiff-Appellant,

v.

City of Newark,

Defendant-Respondent.

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CHIEF JUSTICE RABNER, dissenting

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The majority outlines a path municipalities can follow to establish civilian bodies that would have certain powers to review the conduct of local police forces. See, e.g., ante at \_\_\_\_ (slip op. at 44-45). I agree that those steps can be implemented consistent with existing law.

I respectfully differ with the majority, however, because I believe the Newark City Council chose an equally valid course when it passed an ordinance to create a civilian review board with stronger oversight authority, as modified by the Appellate Division. See Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 459 N.J. Super. 458 (App. Div. 2019). Largely for the reasons stated in Judge Fasciale’s thoughtful opinion, I would uphold the City’s ordinance.



The City Council enacted Ordinance 6PSF-B (Ordinance) in response to the United States Department of Justice's (DOJ) investigation into alleged civil rights violations by the Newark Police Department. In a July 2014 report, the DOJ found "a pattern or practice of constitutional violations in the [Department's] stop and arrest practices, its response to individuals' exercise of their rights under the First Amendment, the Department's use of force, and theft by officers." The DOJ report recognized "the many Newark officers who abide by the rule of law and commit themselves daily to the difficult, and too often thankless, job of protecting public safety." At the same time, the federal investigation found reasonable cause to conclude that officers disproportionately subjected Newark's Black residents to Fourth Amendment violations.

DOJ also identified deficiencies with the Department's internal affairs system. Out of hundreds of excessive force complaints received from 2007 to 2012, the Internal Affairs Unit sustained only one.

On March 3, 2016, DOJ filed a complaint in federal court. It was resolved with a consent decree on March 30, 2016 and revised about a month later. Meanwhile, the City enacted the Ordinance on March 17, 2016, establishing a civilian complaint review board (CCRB). I write to underscore a few points the Appellate Division ably addressed in its opinion.

First, the Ordinance -- like all municipal ordinances -- is “afforded a presumption of validity.” Grabowsky v. Township of Montclair, 221 N.J. 536, 551 (2015). In addition, under the State Constitution, courts must “liberally construe[]” laws “in . . . favor” of the authority of local government. N.J. Const. art. IV, § 7, ¶ 11; see also 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington, 221 N.J. 318, 339-40 (2015) (“An ordinance must be ‘liberally construed’ in favor of its validity.” (quoting Rumson Estates, Inc. v. Mayor & Council of Fair Haven, 177 N.J. 338, 351 (2003))).

Second, existing law expressly empowers municipalities to investigate local police forces. N.J.S.A. 40A:14-118 governs the creation of police forces and outlines the powers and duties of the chief of police and others. As the Legislature plainly declared, however,

[n]othing herein contained shall prevent the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, 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.

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

The power to investigate the operation of the police force necessarily encompasses the power to investigate its performance.

Third, implicit in that clear, strong statutory language is the power to issue subpoenas. As part of its authority to make laws, the governing body of a municipality has the inherent power to conduct investigations for legislative purposes. In re Shain, 92 N.J. 524, 530-31 (1983). That “authority may be fairly implied from [a] legislative scheme” even if it is not “expressly stated” in a statute. Id. at 532.

To gather information needed to carry out its legislative responsibilities, a municipal council, like Newark’s City Council, necessarily has the power to subpoena witnesses and other evidence. Id. at 533. A municipality’s governing body can also delegate subpoena power to “a committee of its members.” N.J.S.A. 40:48-25.

Here, the legislative scheme directly anticipates the delegation of subpoena power to oversight boards in N.J.S.A. 40A:14-118. Fraternal Order of Police, 459 N.J. Super. at 508. To repeat, the Legislature plainly declared that governing bodies may appoint committees “to conduct investigations of the operation of . . . police force[s],” and that “[n]othing [in section 118] shall prevent . . . the delegation . . . of such powers of inquiry as the governing body deems necessary or to conduct such hearing or investigation authorized by law.” N.J.S.A. 40A:14-118. In light of that broad language, it was not

necessary for the Legislature to include the term “subpoena power” in the statute to fairly imply the power was conveyed. See Shain, 92 N.J. at 532.

Armed with the above authority, the City Council reasonably concluded it was necessary to provide the CCRB with subpoena power. Indeed, without the power to compel witnesses and other evidence by subpoena, it is difficult to see how the CCRB or a similar review board could gather the information it would need to effectively “investigat[e] . . . the operation of the police force” - - as the law contemplates. See N.J.S.A. 40A:14-118; Shain, 92 N.J. at 533. City of Newark v. Benjamin, 144 N.J. Super. 58, 68 (Ch. Div.), aff’d 144 N.J. Super. 389 (App. Div. 1976), aff’d 75 N.J. 311 (1978), does not call for a different result. The case involved whether an elected civilian review board could be created by voter initiative -- not a municipal ordinance -- in a Faulkner Act city, and the ruling preceded the relevant language in section 118. Ibid.; compare L. 1971, c. 197, § 626, with L. 1981, c. 266, § 1.

The “necessary and proper” clause of N.J.S.A. 40:48-2 offers further authority for the Council’s action. The statute provides that “[a]ny municipality may make . . . and enforce . . . ordinances . . . it may deem necessary and proper for the good 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.” N.J.S.A. 40:48-2.

As the Appellate Division observed, this Court has “consistently held [N.J.S.A. 40:48-2] is itself a reservoir of police power.” Fraternal Order of Police, 459 N.J. Super. at 511 (alteration in original) (quoting Inganamort v. Borough of Fort Lee, 62 N.J. 521, 536 (1973)). The law is “an express grant of general police powers to municipalities . . . made impregnable by . . . continued legislative acquiescence . . . , by the mandate of Article IV, Section 7, Paragraph 11 of the Constitution of 1947 that acts concerning municipalities be liberally construed, and by . . . more recent judicial decisions.” Inganamort, 62 N.J. at 536 (quoting Fred v. Borough of Old Tappan, 10 N.J. 515, 520 (1952)).

In my judgment, existing law permitted the Council to delegate subpoena power to the CCRB.

Finally, N.J.S.A. 40A:14-181, which directs local law enforcement to adopt and implement guidelines for internal investigations consistent with those promulgated by the Attorney General, does not control local review boards. Section 181 expressly applies to law enforcement agencies, not civilian oversight boards. The statute does not conflict with N.J.S.A. 40A:14-118, and the two laws should be read in a way that reconciles them. See Jones v. Morey’s Pier, Inc., 230 N.J. 142, 164 (2017) (“When . . . we construe multiple statutes, we follow the principle that ‘[s]tatutes that deal with the

same matter or subject should be read in pari materia and construed together as a unitary and harmonious whole.” (alteration in original) (quoting St. Peter’s Univ. Hosp. v. Lacy, 185 N.J. 1, 14-15 (2005))).

The Attorney General, in fact, notes that nothing in its revised internal affairs guidelines bars a civilian review board from accepting complaints from the public and conducting its own investigations. Yet the guidelines in effect prevent access to a police department’s internal affairs records if a civilian review board does not satisfy the requirements imposed by the Attorney General. To be clear, section 181 does not empower the Attorney General to override the authority the Legislature granted municipalities and civilian review boards to investigate the operation of local police forces under section 118.<sup>1</sup>

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<sup>1</sup> As to confidentiality, the Ordinance bars the CCRB from releasing the identity of complainants and witnesses, as well as any “personally-identifiable information” about them, during an investigation. City of Newark, N.J. Rev. Gen. Ordinances (Newark Ordinances) 2:2-86.5, § 1-07 (2019). Although the Ordinance originally provided that, if a “complaint is substantiated . . . the complainant’s identity may be released in the course of any public hearing about the alleged misconduct,” the Appellate Division properly invalidated that section. Fraternal Order of Police, 459 N.J. Super. at 481. Elsewhere, the Ordinance requires the CCRB to keep confidential information that would otherwise reveal the identity of officers subject to investigation. Newark Ordinances 2:2-86.5, §§ 1-17(d), 1-20(a), 1-21(a). In short, the identity of complainants, witnesses, and police officers under investigation are kept confidential under the Ordinance.

For those and other reasons set forth in the Appellate Division's decision, I would uphold the City Council's Ordinance. Although the majority states it is sustaining the Ordinance as modified, see ante at \_\_\_ (slip op. at 4, 52), very little of the Appellate Division's judgment, or the real authority of the CCRB, remains intact. Under the Ordinance as modified by the Appellate Division, which I would uphold, Newark's civilian complaint review board could conduct investigations of the local police force similar to other civilian oversight boards throughout the nation. See Udi Ofer, Getting It Right: Building Effective Civilian Review Boards to Oversee Police, 46 Seton Hall L. Rev. 1033, 1041-43, 1053-61 (2016).

I respectfully dissent.

## **APPENDIX B**



NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3298-17T3

FRATERNAL ORDER OF  
POLICE, NEWARK LODGE  
NO. 12,

Plaintiff-Respondent,

v.

CITY OF NEWARK,

Defendant-Appellant.

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**APPROVED FOR PUBLICATION**

**June 18, 2019**

**APPELLATE DIVISION**

Argued May 13, 2019 – Decided June 18, 2019

Before Judges Messano, Fasciale and Rose.

On appeal from Superior Court of New Jersey,  
Chancery Division, Essex County, Docket No. C-  
000177-16.

Avion M. Benjamin argued the cause for appellant  
(Kenyetta K. Stewart, Newark Corporation Counsel,  
attorney; Avion M. Benjamin and Alana Miles, of  
counsel and on the briefs).

Matthew D. Areman argued the cause for respondent  
(Markowitz & Richman, attorneys; Matthew D.  
Areman, on the brief).

Avram D. Frey argued the cause for amici curiae  
American Civil Liberties Union of New Jersey and

Newark Communities for Accountable Policing (Gibbons, PC, attorneys; Jeanne LoCicero, Legal Director, American Civil Liberties Union, attorney; Lawrence S. Lustberg, Avram D. Frey, and Jeanne LoCicero, on the brief).

Gurbir S. Grewal, Attorney General, attorney for amicus curiae Attorney General of New Jersey (Melissa H. Raksa, Assistant Attorney General, of counsel; Joseph C. Fanaroff, Assistant Attorney General, on the brief).

The opinion of the court was delivered by

FASCIALE, J.A.D.

This appeal requires that we determine the validity of an Ordinance (the Ordinance) enacted by defendant City of Newark (the City), which created a civilian complaint review board (the CCRB) in response to an alarming "pattern or practice of constitutional violations" by the Newark Police Department (NPD). The United States Department of Justice (DOJ) uncovered the violations after a lengthy and thorough investigation of the NPD, which led to the entry of a consent decree in a federal lawsuit. The creation of the CCRB is the City's decisive legislative policy response to the DOJ's findings, which tackled the problem head on.

The City appeals from an order granting summary judgment to plaintiff Fraternal Order of Police, Newark Lodge No. 12 (FOP). FOP is the exclusive

collective negotiations representative for NPD officers. The order permanently enjoined the City from "implementing and/or enforcing" the Ordinance, "except to the extent" that the Ordinance authorized the CCRB to "serve strictly in an oversight capacity . . . ." The practical effect of the order stopped the CCRB from functioning as intended because it precluded the CCRB from investigating alleged police misconduct, prevented the CCRB from utilizing subpoena power, and thwarted implementation of the City's policy decision, which was intended to definitively promote accountability, transparency, and public confidence in the NPD.

We must address numerous legal questions, especially whether the City validly set policy. We acknowledge that N.J.S.A. 40A:14-118 expressly authorizes the City to create a board – such as the CCRB – to investigate and examine allegations of police misconduct. But the same statute charges the Chief of Police (the Chief) with responsibility for efficient and routine day-to-day operations of the police force. Therefore, one of the primary legal questions on this appeal is whether the Ordinance has infringed upon the Chief's statutory mandate.

Understanding that the Ordinance also cannot alter the NPD's obligation to follow the Attorney General Guidelines (AG Guidelines) when undertaking

its own internal affairs (IA) investigations, we hold that the Ordinance is valid on its face with two exceptions. First, the Ordinance infringes upon the Chief's statutory rights by making the CCRB's findings of fact binding, absent clear error, and second, the Ordinance improperly permits disclosure of complainant and police officer identities. Otherwise, we conclude that the CCRB can function as intended under the Ordinance, including providing an oversight role by investigating alleged police misconduct, conducting hearings, participating in the development of a disciplinary matrix, making recommendations, and issuing subpoenas.

We therefore affirm in part and reverse in part.

## I.

In May 2011, the DOJ, in conjunction with the Special Litigation Section of the Civil Rights Division and the United States Attorney's Office for the District of New Jersey, opened an investigation of the NPD. It did so after receiving "serious allegations of civil rights violations" by NPD officers. The investigation spanned a period of three years.

In July 2014, upon the conclusion of its investigation, the DOJ released a forty-nine page report that communicated its findings and recommendations to City officials and the NPD (the DOJ report). The DOJ acknowledged the "skills

and dedication of the many [NPD] officers who abide by the rule of law and commit themselves daily to the difficult, and too often thankless, job of protecting public safety." Indeed, the DOJ report expressly states that the DOJ's findings "are not meant to detract from these officers' efforts." We also do not intend to undermine the important work that police officers perform.

Nevertheless, the DOJ report reflects that its investigation

showed 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 [NPD's] use of force, and theft by officers. The investigation also revealed deficiencies in the NPD's systems that are designed to prevent and detect misconduct, including its systems for reviewing force and investigating complaints regarding officer misconduct. The investigation also identified concerns that do not appear to amount to patterns of constitutional misconduct, but which nonetheless are significant and warrant consideration by the NPD. These concerns relate to the NPD's practices in dealing with potentially suicidal detainees, the NPD's sexual assault investigations, and the impact of the NPD's policing on the [lesbian, gay, bisexual, and transgender] LGBT community.

The DOJ found recurrent problems with the IA function of the NPD,<sup>1</sup> such as the failure to collect evidence from complainants, to "probe officers' accounts or assess officer credibility," and to give witness statements "sufficient weight." The DOJ identified instances of needless and unnecessary use of Miranda<sup>2</sup> warnings when interviewing complainants and witnesses with the effect of intimidating and discouraging their participation. And it determined that the disciplinary system lacked "transparent [and] objective criteria," resulting in arbitrary decisions. The DOJ report concluded that the NPD failed to investigate "officers with high numbers of credible complaints," and that these officers "continued to work on the force . . . without any discipline or other corrective action[.]" The DOJ concluded that these patterns and practices undercut the community's trust and confidence in the NPD.

Like the DOJ, the New Jersey Attorney General (AG) has similarly recognized that a failure in the IA function leads to a "negative impact on the administration of criminal justice and the delivery of police services," which

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<sup>1</sup> The NPD currently refers to its IA department as the Office of Professional Standards (OPS). For the sake of consistency, and to avoid confusion by adding another acronym, we refer to it as the IA department.

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

inevitably erodes "the respect and support of the community" and possibly results in civil lawsuits. AG Guidelines on Internal Affairs Policy & Procedures, at p. 5.

As to its finding that the constitutional violations resulted in a significant lack of accountability, the DOJ report stated:

The NPD has neither a functioning early warning system nor an effective [IA] structure. Those inadequacies undermine the Department's ability to identify and address officer misconduct. The NPD's data collection and analysis, and its system for regular review of officer use of force, are similarly deficient.

One indication of the ineffectiveness of the NPD's [IA] system is that the [IA] Unit . . . sustained only one civilian complaint of excessive force out of hundreds received from 2007 through 2012. While there is no "right" rate at which force complaints should be sustained, only one finding of unreasonable force out of hundreds of complaints over a six-year period is symptomatic of deeply dysfunctional accountability systems. The NPD also has failed to adequately collect or analyze data about officers' use of force, stops, or arrests. Nor has the NPD taken adequate steps to implement an early warning system that would track and identify officers' problematic behavior. As a result of these systematic deficiencies, the NPD does not discern or respond to problematic trends in officer conduct that could constitute or lead to misconduct.

[(Emphasis added).]

The DOJ determined that the IA system "tacitly permit[ted] [police] officers to engage in such conduct," and crucially, that the NPD knew about the problems but failed to address them. The DOJ report itself reflects that the City agreed in principle to "establish a civilian oversight entity for the NPD" and to "revise its [IA] practices to ensure effective complaint intake, objective investigations of misconduct, and fair and consistent discipline."<sup>3</sup>

On March 3, 2016, the United States of America filed a complaint against the City in the United States District Court for the District of New Jersey, alleging that the City was liable for the acts or omissions of the NPD. The complaint referenced the DOJ report and its investigative findings and conclusions. By filing the complaint, the United States attempted to remedy the "pattern or practice" of the NPD that "has deprived persons of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States." The United States sought to enjoin the NPD from further alleged

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<sup>3</sup> Under the agreement, in April 2015, the Mayor acted swiftly and issued an executive order establishing a CCRB. Two months later, the then-Police Director issued a proposed disciplinary matrix, with the goal of providing a uniform manner of addressing progressive and corrective discipline within the NPD. The CCRB, as contemplated by the executive order, never convened, and the matrix was not adopted in the manner prescribed by the executive order. The executive order and its related proposed disciplinary matrix are not the subject of the present litigation.



misconduct, and requested that the City "adopt and implement policies and procedures to remedy the pattern or practice of unconstitutional and unlawful conduct described [in the complaint]." This litigation was resolved a few weeks later, on March 30, 2016, with a consent decree, which was subsequently revised on April 29, 2016.

On March 17, 2016, fourteen days after the federal complaint was filed, the City enacted the Ordinance, establishing the CCRB. In creating the CCRB, the City joined multiple other cities nationwide with similar boards.<sup>4</sup> The Ordinance is the embodiment of the City's legislative policy decision to enable transparent investigation and examination into allegations of police misconduct. The Ordinance details the CCRB's structure, power, and duties, which we will outline.

As to its structure, the CCRB shall consist of eleven members of the public, appointed by the Mayor, with the advice and consent of the Municipal

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<sup>4</sup> This includes New York City, Chicago, Philadelphia, Houston, Washington D.C., Dallas, Baltimore, Miami, Las Vegas, Detroit, Memphis, Milwaukee, San Francisco, Honolulu, Atlanta, Prince George's County, Indianapolis, Cleveland, St. Louis, Cincinnati, Albuquerque, and Portland. See Udi Ofer, Getting It Right: Building Effective Civilian Review Boards to Oversee Police, 46 Seton Hall L. Rev. 1033, 1053-61 (2016).

Council. Newark, NJ, Code (Code) 2:2-86.1(a)(2)(a).<sup>5</sup> One member shall be the City's Inspector General, who will "serve as the administrative head of the Board," Code 2:2-86.1(a)(2)(c); three members shall be elected members of the Municipal Council, or their designees; and the remaining seven members shall be selected from individuals recommended by seven organizations identified in the Ordinance. Code 2:2-86.1(a)(2)(a).<sup>6</sup>"In selecting representatives to serve on the CCRB, nominators are encouraged to consider potential members' professional experience in law, civil rights or law enforcement." Code 2:2-86.1(a)(2)(a). But "[n]o member of the [CCRB], excluding the Inspector General, shall be former employees of the NPD." Code 2:2-86.1(a)(2)(c). Training for CCRB members "shall be predominately obtained from such independent, third party bodies or institutions that have experience with regard to [IA] and civilian review investigations and audits." Code 2:2-86.5, § 1-23.

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<sup>5</sup> Newark's Code codified the Ordinance.

<sup>6</sup> They are the (1) American Civil Liberties Union (ACLU) – New Jersey; (2) National Association for the Advancement of Colored People – New Jersey; (3) People's Organization for Progress; (4) La Casa de Don Pedro; (5) Ironbound Community Corporation; (6) Newark Anti Violence Coalition; and (7) the clergy, meaning any person who provides moral, spiritual, or philosophical guidance as a profession. Code 2:2-86.1(a)(2)(a). By a separate ordinance adopted July 1, 2016, the City replaced La Casa de Don Pedro with a representative from the LGBT community.

As to the CCRB's powers and duties, the Ordinance authorizes the CCRB to "consider and make recommendations to the Public Safety Director,<sup>[7]</sup> Mayor, Municipal Council, and the public [pertaining] to policies and procedures concerning the general investigation of complaints by the Division of Police as well as its [IA] procedures." Code 2:2-86.3(d). It authorizes the CCRB to "investigate and make recommendations regarding practices and/or patterns of behavior that are problematic with regard to" police interactions with the public. Code 2:2-86.3(d). Along these lines, the CCRB must request certain information from the NPD on a quarterly basis. Code 2:2-86.5, § 1-21(b).

The Ordinance also authorizes the CCRB to review the findings, conclusions, and recommendations arising from the NPD's internal investigations of individual complaints of police misconduct, as follows:

At the conclusion of the [NPD]'s investigation of a complaint or behavior, the [CCRB] shall have the power to conduct a review of the findings, conclusion and recommendations of the Division of Police (Investigation Review). The [CCRB] shall report its findings of the Investigation Review to the Public Safety Director. A semi-annual report of the Investigation Reviews shall be submitted to the Mayor, Public Safety Director and the Municipal Council. The [CCRB] may utilize all the powers set forth in this Section 2:2-86 to carry out the Investigation Reviews.

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<sup>7</sup> Pursuant to a different 2016 ordinance, the City established a Department of Public Safety, in which the Division of Police is a sub-division. Code 2:22.

[Code 2:2-86.3(b) and Code 2:2-86.5, § 1-02(d).]

The City expressly declared that the Ordinance was intended to allow the CCRB to make recommendations to the Public Safety Director. The City did not create the CCRB to impose discipline on police officers. Specifically, the City, via the Ordinance, empowered the CCRB to consider and make recommendations as to policies and procedures concerning

the general investigation of complaints by the Division of Police as well as its [IA] procedures, and with regard to evidence of practices or patterns of behavior or practice that is problematic with regard to the interaction of the Division of Police with the public at large, as well as any failures of communication with regard thereto.

[Code 2:2-86.5, § 1-02(c).]

The Ordinance authorizes the CCRB to conduct its own investigations of complaints filed by members of the public (including NPD members) against any member of the NPD. The CCRB can do so not to adjudicate complaints or impose discipline – as it lacks such power under the Ordinance – but rather to investigate alleged police misconduct and make recommendations. The Ordinance therefore gives the CCRB concurrent jurisdiction with the NPD to investigate complaints or behavior. Code 2:2-86.3(c). More specifically, the ordinance states:

The [CCRB] shall have the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public (including, but not limited to[,] complaints made by other police officers or personnel) against uniformed and sworn personnel of the NPD that allege misconduct involving inappropriate behavior or actions, including but not limited to[,] excessive use of force, abuse of authority, unlawful arrest, unlawful stop, unlawful searches, discourtesy or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, age, sexual orientation, gender identity or expression, and disability, theft, and any other categories protected under law. Any member of the public is intended to have the broadest possible meaning and interpretation.

[Code 2:2-86.3(a).]

The CCRB shall notify the NPD of any complaints it receives and indicate whether it will (1) "contemporaneously initiate a parallel investigation of the [c]omplaint or behavior with the Division of Police; and/or" (2) "not investigate the [c]omplaint or behavior but will conduct an Investigation Review upon the Division of Police's conclusion of its investigation . . . ." Code 2:2-86.5, § 1-06. The Ordinance prevents the CCRB from "constrain[ing] or chang[ing] . . . the obligations of the Division of Police to conduct appropriate and timely investigations of NPD uniform and sworn members of [the] NPD and to be compliant and consistent with the requirements of N.J.S.A. 40A:14-147." Code 2:2-86.5, § 1-16(d).

To make its own investigation meaningful, the CCRB enjoys subpoena power under the Ordinance. "Upon a majority vote of members of the [CCRB], the [CCRB] may issue subpoenas ad testificandum and duces tecum, which may be served to the extent permitted by law." Code 2:2-86.3(f) and 2:2-86.5, § 1-10(e) (emphasis added). Under the Ordinance, the CCRB may: (1) make written or oral requests for information or documents; (2) interview the complainant, witnesses, and the subject officer to the extent consistent with the rights afforded to officers by law, the NPD, and in collective negotiations agreements (CNAs); and (3) make field visits to the site of the alleged misconduct. Code 2:2-86.5 §§ 1-10, 1-11.

As to interviews of police officers and other individuals, the Ordinance importantly refers to officers' constitutional protections and their rights set forth in CNAs.

(a) It is the intent of these Rules not to alter the rights afforded to police officers by the NPD in standing orders or other rules and procedures or in collective negotiations contracts with respect to interviews so as to diminish such rights, if any, including but not limited to[,] any existing right to notice of an interview, the right to counsel, and the right not to be compelled to incriminate oneself.

(b) A member of the Division of Police who is the subject of a complaint shall be given two business days' notice prior to the date of an interview, to obtain and

consult with representatives. A member of the Division of Police who is a witness in an investigation of a complaint shall be given a period of time, up to two business days, to confer with [his or her] representatives.

(c) All persons interviewed may be accompanied by up to two (2) individuals to act as their representative, inclusive of their chosen counsel. Such counsel or representative may advise the person interviewed as circumstances may warrant, but may not otherwise participate in the proceeding.

(d) Prior to the commencement of the interviewing of a police officer, the following statement shall be read to such officer:

You are being questioned as part of an official investigation of the [CCRB]. You will be asked questions specifically directed and narrowly related to the performance of your duties. You are entitled to all the rights and privileges guaranteed by the laws of the State of New Jersey, the Constitution of this State and the Constitution of the United States, including the right not to be compelled to incriminate yourself and the right to have legal counsel or such other representative present at each and every stage of this investigation, however that person may not unduly interfere or disrupt the proceedings.

(e) Interviews shall be scheduled at a reasonable hour, and reasonable requests for interview scheduling or rescheduling shall be accommodated. If possible, an interview with a police officer shall be scheduled when such officer is on duty and during daytime hours. Interviews may be conducted at the [CCRB's] offices or other locations designated by the [CCRB].

(f) The interviewer shall inform the interviewee of the name and position of the person in charge of the investigation, name and position of the interviewer, the identity of all persons present at the interview, whether the interviewee is a subject or a witness in the investigation, the nature of the complaint and information concerning all allegations, and the identity of witnesses and complainants, except that addresses need not be disclosed and confidential sources need not be identified unless they are witnesses to the alleged incident.

(g) The interviewer shall not use off-the-record questions, offensive language or threats, or promise of reward for answering questions.

(h) The interviewer shall regulate the duration of question periods with breaks for such purpose as meals, personal necessity and telephone calls. The interviewer shall record all recesses.

(i) Interviews shall be recorded by the CCRB. No other recordings are permitted.

(j) If an interviewee needs an interpreter, he or she shall advise the interviewer of such need as soon as possible after being notified of the date and time of the interview. A qualified interpreter will be obtained from an official registry of interpreters or another reliable source.

(k) Reasonable accommodations shall be made for persons with disabilities who are participating in an interview. Persons requiring such accommodations shall advise the [CCRB] of such need as soon as possible after being notified of the date and time of the interview.



[Code 2:2-86.5 § 1-11 (emphasis added).]

The Ordinance requires the CCRB to report its review of every complaint to the Public Safety Director, as well as "all relevant forms, memoranda and background information to assist the Public Safety Director in making [his or her] final disciplinary determination." Code 2:2-86.5 § 1-17(a).

The Ordinance contemplates that the CCRB will make findings of fact and propose disciplinary recommendations to the Public Safety Director. For example:

The [CCRB] shall use an established discipline matrix and guidelines to recommend discipline for outcomes resulting from investigations and complaints filed with the [CCRB] and/or the NPD. Said discipline matrix and guidelines shall act as safeguards to ensure the consistent application of discipline and should include aggravating and mitigating factors. The discipline matrix and guidelines should be developed by the Public Safety Director and affected bargaining units, in conjunction with the CCRB, and must accord with any Consent Order or Judgment with the United States [DOJ].

[Code 2:2-86.3(j).]

But the Ordinance violates the law, as we will later explain, by requiring the Public Safety Director to accept the CCRB's findings of fact. This part of the Ordinance improperly provides:

The [CCRB] shall provide its findings of fact to the Public Safety Director and, absent clear error, the Public Safety Director shall accept those findings of fact. The [CCRB] shall also make disciplinary recommendations, and the Public Safety Director shall make all disciplinary decisions based on the CCRB's findings of fact, absent clear error, and consistent with the matrix and guidelines.

[Code 2:2-86.3(k).]

According to the Ordinance: "Clear error exists when the CCRB's findings of fact are based upon obvious and indisputable errors and cannot be supported by any reasonable interpretation of the evidence." Code 2:2-86.5 § 1-17(b). The practical effect of this requirement, as we will explain later, is that it interferes with the Chief's statutory responsibility for the routine day-to-day operations of the force.

Notwithstanding the binding nature of the CCRB's findings – which we invalidate – the Public Safety Director nevertheless retains the authority and discretion to make final disciplinary determinations. Code 2:2-86.4(d) and 2:2-86.5 § 1-16(a). This is so because the Ordinance specifically limits the CCRB's authority.

The provisions of this section shall not be construed to limit or impair the authority of the Public Safety Director to discipline members of the NPD nor obviate the responsibility of the NPD to investigate citizen complaints or incidents to which NPD is made known,

involving uniformed and sworn members of the NPD, and to promptly inform the CCRB of all such complaints or incidents.<sup>[8]</sup> 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 provisions of law or otherwise.

[Code 2:2-86.4(d).]

The Ordinance further states that it should not be construed to interfere with other external investigations of NPD members:

e. The provisions of this Ordinance shall not be construed to prevent or hinder the investigation or prosecution of a member of the NPD for violations of law by any court of competent jurisdiction, a grand jury, [c]ounty or [s]tate [p]rosecutor or any other authorized officer, agency or body.

f. The processing and review of civilian complaints shall not be deferred because of any pending or parallel disciplinary proceeding or criminal investigation unless such request for deferment is made by the office of a [c]ounty [p]rosecutor or a [s]tate or [f]ederal law enforcement agency or prosecutor or by a court order.

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<sup>8</sup> We emphasize that the Ordinance cannot alter the NPD's obligation to comply with the AG Guidelines as part of the NPD's IA investigations. But the AG Guidelines do not prevent the NPD from disclosing to a municipal oversight body, such as the CCRB, "citizen complaints or incidents to which NPD is made known, involving uniformed and sworn members of the NPD," especially because the CCRB is also required to maintain confidentiality. Furthermore, this Ordinance disclosure requirement is consistent with the oversight authority granted to municipalities under N.J.S.A. 40A:14-118.

[Code 2:2-86.4(e)–(f).]

The Ordinance also addresses complainant confidentiality and correctly guarantees confidentiality during the investigatory process, but – improperly – not at public hearings.

During the investigatory process, neither the identity of, nor personally-identifiable information about, complainants or witnesses shall be released beyond the CCRB staff, [CCRB] members, and NPD staff engaged in the specific investigation of the complainant's allegation. If the complaint is substantiated and is referred to a CCRB hearing, the complainant's identity may be released in the course of any public hearing about the alleged misconduct.

[Code 2:2-86.5, § 1-07 (emphasis added).]

We invalidate this part of the Ordinance. A complainant's identity should always remain confidential, for reasons that we express later in our opinion. Moreover, although this section of the Ordinance only addresses the confidentiality of complainants and witnesses, other parts of the Ordinance require the CCRB to maintain the subject officers' confidentiality in its public reporting, see Code 2:2-86.5 §§ 1-17(d), 1-20(a), 1-21(a), consistent with the

AG Guidelines at p. 44.<sup>9</sup> We emphasize that a police officer's identity should remain confidential as well.

The CCRB also must publish certain information on its website, on a quarterly basis, "with personally identifiable information redacted." Code 2:2-86.5, § 1-21(a). And the CCRB must publish an annual report on its website, with statistical information, identifying "trends, patterns, areas of concern, or areas of excellence," in the NPD's practices. Code 2:2-86.5, § 1-21(c) (emphasis added). The Ordinance also sets the procedures for the CCRB to report case dispositions to complainants. Code 2:2-86.5, § 1-22.

The April 29, 2016 consent decree that terminated the federal litigation against the City reflected the minimum duties and responsibilities of the CCRB. Section V, Paragraph A of the consent decree provides in pertinent part that the CCRB "shall, at a minimum," perform

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.

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<sup>9</sup> The Ordinance is also subordinate to other State law, for example, the Open Public Records Act (OPRA), which provides for the confidentiality of personnel records in the possession of a public agency. N.J.S.A. 47:1A-10.

The consent decree appointed a former Attorney General of the State of New Jersey to act as an independent monitor and to ensure compliance with the consent decree.

In August 2016, FOP filed an order to show cause and a verified complaint. FOP alleged ultra vires creation of subpoena power by the Ordinance, in violation of N.J.S.A. 40:48-25 and the Faulkner Act, N.J.S.A. 40:69A-36 (Count One). It contended that there existed an inconsistency between the Ordinance and the AG Guidelines and discipline of police officers by the IA division, in violation of the Law Enforcement Officers Protection Act, N.J.S.A. 40A:14-181 (Count Two). It alleged that the Ordinance deprived officers of due process, in violation of N.J.S.A. 40A:14-147, N.J.S.A. 11A:2-13, and N.J. Const. art. I, ¶ 1 (Count Three). Finally, FOP claimed that the Ordinance violated N.J.S.A. 40A:14-118, by infringing on the Chief's rights (Count Four).

The judge entertained cross-motions for summary judgment and invalidated the Ordinance with two exceptions: (1) the CCRB could perform an oversight function, and (2) the CCRB could consult with the Public Safety Director and NPD in the creation of the discipline matrix. In his oral opinion, the judge "expressly prohibited" the CCRB "from engaging in investigations,

hearings, adjudications, or the issuance of subpoenas relating to police misconduct and/or discipline[.]"

## II.

On appeal, the City argues that the Ordinance does not violate N.J.S.A. 40A:14-118; the judge erroneously concluded (*sua sponte*) that the Ordinance violates due process rights; N.J.S.A. 40A:14-181 and the AG Guidelines do not preempt the Ordinance; and the judge erred by concluding that the CCRB's subpoena power was invalid.

The ACLU joins the contentions made by the City. The ACLU emphasizes that neither N.J.S.A. 40A:14-181 nor the AG Guidelines preempt municipal regulation in the field of civilian complaints of police misconduct. Additionally, the ACLU maintains that the City correctly implemented its own police power – relying on its home rule authority – and properly established legislative policy consistent with N.J.S.A. 40A:14-118.

FOP maintains that the Ordinance contravenes N.J.S.A. 40A:14-118 because it transfers the power to administer and discipline police officers from the Police Chief to the CCRB; disregards police officers' due process rights; violates N.J.S.A. 40A:14-181 and the AG Guidelines; and improperly empowers the CCRB with subpoena power.

The AG, who accepted our invitation to appear as amicus, primarily contends that the Ordinance violates N.J.S.A. 40A:14-118 by giving the CCRB's findings dispositive weight unless clearly erroneous. The AG argues the Ordinance "impermissibly assigns to the CCRB functions that the [statute] assigns to the [Chief]," maintaining that the CCRB's purported authority to "conduct investigations, find facts, and make recommendations for the discipline of officers and members of the police force falls within the ambit of the [C]hief's authority under the statute."

### III.

We begin by addressing the City's argument that the Ordinance is consistent with N.J.S.A. 40A:14-118. We agree, with one exception: the Ordinance interferes with the Chief's statutory rights by making the CCRB's findings of fact binding, absent clear error. To analyze this argument, we must interpret the statute, giving the Ordinance a presumption of validity. Indeed, our standard of review is well settled.

"In matters of statutory interpretation, our review is de novo." Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 294 (2017). "The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492



(2005). In reading the text of the statute, courts should "ascribe to the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole[.]" Ibid. (citations omitted). "[I]f there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'" Id. at 492-93 (quoting Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004)).

Municipal ordinances are "afforded a presumption of validity[.]" Grabowsky v. Twp. of Montclair, 221 N.J. 536, 551 (2015). Accord Hawthorne PBA Local 200 v. Borough of Hawthorne, 400 N.J. Super. 51, 60 (App. Div. 2008). Moreover, our State constitution and case law require us to liberally construe the law in favor of municipal authority and an ordinance's validity. N.J. Const. art. IV, § 7, ¶ 11; 388 Route 22 Readington Realty Holdings, LLC v. Twp. of Readington, 221 N.J. 318, 339-40 (2015). Thus, statutes, like the one here, that delegate to municipalities the authority to adopt ordinances on a particular subject, should be read expansively. Holmdel Builders Ass'n v. Twp. of Holmdel, 121 N.J. 550, 566 (1990); In re Egg Harbor Assocs., 94 N.J. 358, 366-67 (1983).

We first analyze the power N.J.S.A. 40A:14-118 gives to the Chief and the City. After that, we address the City's establishment of local policy and its authority to do so. And then, we specifically respond to FOP's contention that the CCRB infringes upon the Chief's day-to-day operations of the force.

A.

Broadly speaking, N.J.S.A. 40A:14-118 authorizes municipalities to create a police department and appoint a police chief as the head of that department. Pursuant to the statute, the police chief is responsible for the department's day-to-day operations, and reports to the "appropriate authority" within the municipal government, who is responsible for promulgating rules and regulations for the control of the police force. The statute also authorizes municipalities to investigate and examine the operations of their police forces, and individual members thereof.

Thus, N.J.S.A. 40A:14-118 recognizes two things: "[T]he principle of non-interference of elected officers individually in the operation of the police force"; and "the power of the governing body to conduct official investigations of the police force, and the power of executive and administrative officers in their official capacity to examine the operations of the police force and the performance of any officer therein." S. Cty. & Mun. Gov't Comm. Statement to

S.1243 (Nov. 24, 1980). Accord Assembly Judiciary, Law, Public Safety & Defense Comm. Statement to Assembly Comm. Substitute for S.1243 (June 22, 1981).

Consistent with this statute, the City enacted an ordinance providing for a Department of Public Safety, headed by the Director of Public Safety, containing the Division of Police, headed by the Chief of Police. The Chief reports to the Mayor through the Public Safety Director, who, as the "appropriate authority," is responsible for adopting rules and regulations for the NPD, including the imposition of discipline of police officers. Code 2:22. See PBA Local 160 v. Twp. of N. Brunswick, 318 N.J. Super. 544, 552 (App. Div. 1999) (stating that under N.J.S.A. 40A:14-118, "[t]he appropriate authority adopts rules and regulations for the department, and the discipline of the members; additionally, the appropriate authority establishes policies for the daily operations of the department. The appropriate authority is a civilian position.").

As we stated in Gauntt v. City of Bridgeton, 194 N.J. Super. 468, 486 (App. Div. 1984),

[i]n the context of N.J.S.A. 40A:14-118 which in part spells out the relationship of the municipal governing body, including its appropriate executives, and the chief of police, we deem the authority to fix policy as one comprehending the formulation of fundamental principles to serve as broad guides to the chief of police

in making his decisions with respect to discharging his responsibility for the efficiency and routine day to day operation of the police department.

[(Emphasis added).]

Thus, the Code provides that the Public Safety Director is the "Chief Executive Officer of the Police Division," Code 2:22-2.2(i), and is responsible for "[m]ak[ing], administer[ing] and enforc[ing] rules and regulations for the control, disposition and discipline of the Department of Public Safety, and of its officers and employees in all of its Divisions and Offices." Code 2:22-2.2(j).

The Code also establishes a Division of Police, Code 2:22-3, and sets forth the duties of the Police Chief. Code 2:22-3.3. Under the Code,

[t]he Police Chief shall be the head of the Police Force and shall be directly responsible to the Mayor through the Public Safety Director designated by the Mayor as the Appropriate Authority for the Police Force's efficiency and day to day operations and shall carry out the powers and duties established under N.J.S.A. 40A:14-118 . . . .

[Code 2:22-3.3(c).]

N.J.S.A. 40A:14-118 expressly grants certain rights to a chief of police, and certain rights to a governing body. As to the rights afforded to a chief of police, the plain text of the statute provides:

Any such ordinance, or rules and regulations, shall provide that the chief of police, if such position is

established, shall be the head of the police force and that he shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof, and that he shall, pursuant to policies established by the appropriate authority:

a. Administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel[.]

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

As this statute is applied in Newark, the Director of Public Safety exercises a great deal of control over the disciplinary process within the NPD.

For example, the Code provides that the Director of Public Safety shall:

k. Establish procedures for the hearing and determination of charges of violation of departmental rules and regulations by any member of the Police Division provided that a member may be fined, reprimanded, removed, suspended or dismissed from the Division only on written charges made or preferred against him or her, after such charges have been examined, heard and investigated by a Disciplinary Trial Board selected from among the members of the Police Division as provided for herein, upon such reasonable notice to the member charged, and according to such practice, procedure and manner as may be prescribed by rules and regulations of the Department.

. . . .

m. Be responsible for appointing members to serve on the Disciplinary Trial Boards . . . .

[Code 2:22-2.2(k), (m).]

The Director of Public Safety assigns NPD officers to the IA Department. Also, members of the IA Department investigate complaints of alleged officer misconduct and provide completed reports through the chain of command to the Public Safety Director. Thereafter, should a complaint be sustained, the Public Safety Director is responsible for directing that charges be prepared, signed, and served upon the subject officer or employee.

Meanwhile, pursuant to N.J.S.A. 40A:14-118 and the Code, the Police Chief is responsible for day-to-day operations of the NPD, with members of the IA Department responsible to the Police Chief, through their chain of command. The IA Department's completed reports go through the chain of command, and thus to the Police Chief, and to the Director of Public Safety. And, should the Director of Public Safety direct that an officer be charged, the Police Chief then becomes responsible for implementing the disciplinary process and administering discipline, pursuant to established rules and regulations.

As to the rights afforded to a municipal governing body, the plain text of the statute authorizes the creation of a board such as the CCRB, for the purpose

of investigating and examining, at any time, the operations of the police force, stating:

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.

[Ibid. (emphasis added).]

The statute does not expressly define or limit the meaning of "examine," or for that matter, "investigate." Merriam-Webster defines "examine" as "to inspect closely," "to test the condition of," "to inquire into carefully," or "to interrogate closely." And it defines "investigate" as "to observe or study by close examination and systematic inquiry" and "to conduct an official inquiry." Merriam-Webster's Collegiate Dictionary 434, 639 (11th ed. 2012). Consistent with our standard of review, we apply these ordinary definitions when interpreting the text of N.J.S.A. 40A:14-118.

Notably, "examining" and "investigating" appear in the paragraph of the statute that expressly contemplates investigations of police misconduct by municipal government bodies. Also importantly, "the courts and the Legislature have long recognized that because police officers are different from other public employees, the scope of discretion accorded to the public entities that administer police departments is necessarily broad." City of Jersey City v. Jersey City PBA, 154 N.J. 555, 572 (1998).

B.

By adopting the Ordinance and creating the CCRB, the City proactively addressed the variety of problems uncovered by the DOJ. It made a policy decision to encourage transparency, protect its citizenry, and root out unfair treatment by the NPD. The City took control of the situation – characterized by the judge as "broken" – by addressing the specific needs of its community.

The City adopted the Ordinance as an exercise of its police power, invoking the doctrine of home rule expressed in the New Jersey State Constitution, Article IV, § VII, ¶ 11:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such 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, and not inconsistent with or prohibited by this Constitution or by law.

"Home rule is basic in our government" and "embodies the principle that the police power of the State may be invested in local government to enable local government to discharge its role as an arm or agency of the State and to meet other needs of the community." Inganamort v. Borough of Ft. Lee, 62 N.J. 521, 528 (1973). Home rule permits each municipality to act in a way it believes will best meet the local need. W. Morris Reg'l Bd. of Educ. v. Sills, 58 N.J. 464, 477 (1971).

"Whether the State alone should act or should leave the initiative and the solution to local government, rests in legislative discretion." Inganamort, 62 N.J. at 528. The presumption of the validity of local legislative action is constrained by the obvious understanding that "[a] statute has supremacy over an ordinance," In re Ordinance 04-75, 192 N.J. 446, 469 (2007), and "a local municipality is but a creature of the State, capable of exercising only those powers granted to it by the Legislature . . . ." Moyant v. Paramus, 30 N.J. 528, 535 (1959). See also Dome Realty, Inc. v. Paterson, 83 N.J. 212, 225 (1980) ("[M]unicipalities, being created by the State, have no powers save those delegated to them by the Legislature and the State Constitution.").

N.J.S.A. 40:48-2, which is akin to the necessary and proper clause in the United States Constitution,<sup>10</sup> gives a municipality broad general police power, stating:

Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good 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 this subtitle, or by any law.

[(Emphasis added).]

Moreover, the City derives further governmental power under the Faulkner Act, which the Legislature enacted to present New Jersey's municipalities "with various optional methods of organizing their local governments." Keuerleber v. Twp. of Pemberton, 260 N.J. Super. 541, 544 (App. Div. 1992). In Keuerleber, we pointed out that the Faulkner Act was "intended to confer upon the municipalities the greatest possible powers of local self-government and home rule consistent with the Constitution of this State." Ibid. (emphasis added).

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<sup>10</sup> U.S. Const., art. I, § 8, cl. 18.

Any specific enumeration of municipal powers contained in this act or in any other general law shall not be construed in any way to limit the general description of power 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. All grants of municipal power to municipalities governed by an optional plan under this act, whether in the form of specific enumeration or general terms, shall be liberally construed, as required by the Constitution of this State, in favor of the municipality.

[N.J.S.A. 40:69A-30 (emphasis added).]

Our Supreme Court provided further guidance – especially in the context of N.J.S.A. 40A:14-118 – on what constitutes accepted policy properly entrusted to municipal government. This guidance is particularly relevant here. In Falcone v. De Furia, 103 N.J. 219 (1986), the Court analyzed the validity of an ordinance that provided for appointment of detectives to the police force with approval by the governing body.

The Court considered the authority accorded the police chief under N.J.S.A. 40A:14-118, and addressed whether the designation of a detective is more like an appointment/promotion than an assignment of a subordinate within the police force. Id. at 224. The former is permanent and not subject to change at the discretion of the chief of police. Ibid. The latter pertains to a chief of police's statutory responsibility to conduct the routine day-to-day operations of

the police force. Ibid. The Falcone Court held that the designation of detectives was a policy decision because "detectives [were] entrusted with . . . more sensitive responsibility" and because "the appointment of detectives [was] permanent, and not subject to changes at the discretion of the chief [of police.]" Ibid.<sup>11</sup>

Therefore, applying Falcone and Gauntt, a governing body decision constitutes a matter of policy properly entrusted to a municipal government when it concerns "fundamental principles" that are intended to serve as "broad guides to the chief of police," and where the determination concerns a "sensitive responsibility" and is not subject to change by the discretion of the chief of police. Id. at 224-25. Here, the City addressed "fundamental principles" pertaining to constitutional violations and related problems uncovered by the DOJ by developing a system for transparent investigations into police misconduct. It did so while simultaneously employing the City's express right, under N.J.S.A. 40A:14-118, to investigate and examine the police force and its members. And the City's local determination to create a board, such as the

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<sup>11</sup> Recall that in Newark, the Director of Public Safety appoints officers to the IA department.

CCRB, concerns the City's "sensitive responsibility" to ensure law-enforcement accountability, which is not subject to change by the discretion of the Chief.

C.

Notwithstanding the express statutory authority to investigate and examine the operations of the police force or any officer/member, and even though the City responsibly set local policy enabling transparency and police accountability, FOP correctly maintains that the CCRB interferes with the Chief's day-to-day routine operations of the force in one limited way. As previously discussed, and as counsel conceded at oral argument before us, the Chief's day-to-day routine operations of the force include supervising the IA Department, through the chain of command, administering the disciplinary process, and imposing any resulting discipline. That part of the Ordinance requiring the Director of Public Safety to accept as binding the CCRB's findings of fact, absent clear error violates N.J.S.A. 40A:14-118 to the extent it makes the CCRB's factual findings paramount to the findings of the IA department. In this respect, the Ordinance impermissibly undermines the Chief's statutory authority to run the NPD's day-to-day operations by rendering the results of the IA Department's investigation nugatory and commandeering the disciplinary process.

The Ordinance expressly provides that it "shall not be construed to limit or impair the authority of the Public Safety Director to discipline members of the NPD . . . ." Code 2:2-86.4(d). And the CCRB rules provide that as to the recommendations of the CCRB, "[t]he Public Safety Director shall retain in all respects the authority and discretion to make final disciplinary determinations." Code 2:2-86.5, § 1-16(a). The CCRB can only make recommendations to the Public Safety Director as to the appropriate discipline. It cannot impose discipline. By imposing binding findings on the Public Safety Director – and by extension, the Chief – this part of the Ordinance does more than establish policies, rules, and regulations. We conclude, though, that the CCRB can still meet its objectives even without imposing such a requirement.

The statute expressly authorizes municipalities to set rules and regulations for their police departments. It is essentially undisputed that participating in the creation of a disciplinary matrix does not interfere with the Chief's routine day-to-day operations of the force. Indeed, N.J.S.A. 40A:14-118 contemplates that a governing body may "provide for the maintenance, regulation and control" of a police force, including "the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and for the discipline of its members." But by "expressly prohibit[ing]" the CCRB "from

engaging in investigations, hearings, . . . or the issuance of subpoenas relating to police misconduct and/or discipline," as the judge ordered, the CCRB cannot examine or investigate alleged police misconduct as contemplated by N.J.S.A. 40A:14-118, or the policy set by the City.

FOP maintains that the CCRB renders the IA process meaningless and divests the Chief of his powers. But the Ordinance plainly states that the Public Safety Director "shall retain in all respects the authority and discretion to make final disciplinary determinations." Code 2:2-86.5, § 1-16(a). As such, the City is correct in classifying the CCRB as "solely a [B]oard of fact finding, investigatory review and public transparency, designed to provide civilian oversight [in]to the [NPD], and to make recommendations to the Public Safety Director as to what discipline the Public Safety Director should impose within his authority, and at his discretion." The CCRB has no power to impose "minor or major discipline" upon NPD officers. It can only make recommendations to the Public Safety Director after reaching its own findings and by using a disciplinary matrix developed by the Public Safety Director, bargaining units,

and the CCRB. Thus, absent the binding nature of its findings, the CCRB will not interfere with the Chief's oversight role of investigations by IA.<sup>12</sup>

In concluding that the Ordinance violates N.J.S.A. 40A:14-118, the judge relied on Gauntt, 194 N.J. Super. 468, overruled in part by Falcone, 103 N.J. 219. Gauntt is a different case entirely. In Gauntt, the Police Director violated N.J.S.A. 40A:14-118(c) (reserving to the Chief the power to "[p]rescribe the duties and assignments of all subordinates and other personnel"). There is no such violation or contention here. And in Gauntt, we considered a different ordinance than the Ordinance at issue here.

In Gauntt, we concluded that the Police Director interfered with the responsibilities and duties of the chief of police and therefore violated Section (c) of the statute. 194 N.J. Super. at 487. He did this by requiring an IA officer to report to him rather than the chief of police, ibid.; assigning an officer to investigate a purported theft of money in the clerk's office, ibid.; assigning a lieutenant and detective to a neighborhood crime watch, id. at 487-88;

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<sup>12</sup> Another part of the Ordinance provides that the Public Safety Director may need to explain his or her reasons for not following the disciplinary recommendations of the CCRB. Code 2:2-86.5, § 1-17(c). We conclude that aspect of the Ordinance is facially valid, and, as we will later explain, is subject to as applied challenges. Notwithstanding that aspect of the Ordinance, we emphasize that the CCRB's findings of fact and recommendations are not binding.



overruling the chief of police's decision to appoint an individual as head of the detective division, id. at 488; removing detectives from homicide investigation school and ordering the chief of police to assign an officer to attend a breathalyzer course, ibid.; ordering a police department secretary to post a sign-up list to work on a specific police shift, id. at 489; and temporarily appointing a lieutenant to the position as acting chief of police, id. at 490-91.

As its plain language confirms, the Legislature amended the statute to simply "redefine the relationship between a municipal governing body and the chief of police." [Falcone, 103 N.J. at 221]. As amended, N.J.S.A. 40A:14-118 limited the authority of municipalities to regulate the [IA] of police departments, designated properly-appointed chiefs of police as the heads of police forces, and granted such chiefs the authority to "[p]rescribe the duties and assignments of all subordinates and other personnel." N.J.S.A. 40A:14-118(c). The amended statute thus "sought to avoid undue interference by a governing body into the operation of the police force." Falcone, 103 N.J. at [222].

[Paff v. Ocean Cty. Prosecutor's Office, 235 N.J. 1, 21 (2018) (third alteration in original).]

Here, the Ordinance does not prescribe the duties and assignments of subordinates and other personnel.

We recognize that the current version of N.J.S.A. 40A:14-118 gives chiefs of police "express statutory authority . . . to avoid undue interference by a

governing body into the operation of the police force." Falcone, 103 N.J. at 222. But the Ordinance was not intended to, nor does it, divest the Chief of his statutory authority to oversee investigations by IA. Thus, other than making the CCRB's findings binding, the Ordinance does not divest the Chief of his responsibility under the statute.

#### IV.

We do not share the judge's general view that the entire Ordinance violates due process on its face. Of course, both the federal and state constitutions protect against the deprivation of life, liberty, or property without due process of law. U.S. Const. amend. XIV; N.J. Const. art. 1, ¶ 1; Doe v. Poritz, 142 N.J. 1, 99 (1995). Fundamentally, procedural due process entails notice and an opportunity to be heard. Doe, 142 N.J. at 106. "Due process is not a fixed concept, however, but a flexible one that depends on the particular circumstances." Ibid. Accord In re Promulgation of Guardianship Serv. Regulations, 103 N.J. 619, 632 (1986).

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. Along those lines, Code 2:2-86.5, § 1-08 requires the CCRB to develop "procedures" for investigating complaints to best facilitate

"accurate, orderly and thorough fact-finding." Code 2:2-86.3(e) contemplates that the CCRB may propose amendments to those "procedures," subject to public comment. Code 2:2-86.4(d) provides safeguards for "members of the NPD with respect to disciplinary action" by expressly stating that their rights shall not be limited "to the right to notice and a hearing, which may be established by any provisions of law or otherwise." And Code 2:2-86.5, § 1-23 mandates that CCRB board members must be appropriately trained. A full due process analysis is premature because multiple sections of the Ordinance anticipate the need to establish procedural due process protections. An as applied due process challenge, if warranted, may be raised on a more fully developed record.

We disagree with the judge's general conclusion that the "potential for political mischief with [the CCRB] is evident." The judge reached that determination noting that prospective CCRB members would be members of organizations that advocated changing the structure of an existing ineffective method of disciplining police. But a decisionmaker is not disqualified "simply because he [or she] has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" Hortonville

Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976) (quoting United States v. Morgan, 313 U.S. 409, 421 (1941)). As such, "policymakers with decision making power" are afforded a "presumption of honesty and integrity." Id. at 497.

Disqualification is not "automatically required merely because a decisionmaker has announced an opinion on a disputed issue." In re Carberry, 114 N.J. 574, 585 (1989). "[A]ctual bias or a likelihood of bias must appear if an otherwise valid administrative sanction is to be overturned because of a denial of due process." In re Seidman, 37 F.3d 911, 925 (3d. Cir. 1994). "[A]ctual bias is grounds for disqualification when 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. On its face, we see no evidence of such bias on the part of prospective CCRB members, or an inability of the CCRB to be neutral or detached.

It is important to remember that the CCRB does not adjudicate cases. It operates as an investigatory and oversight body. It has no authority to discipline officers. Based upon the investigations performed by staff members, the CCRB produces a report, consisting of findings of fact and recommendations for disciplinary action, which it provides to the Director of Public Safety. However,

the CCRB does not take disciplinary action against any officer, nor does it make any disciplinary rulings. It also does not interfere with the NPD's internal investigatory and disciplinary procedures, or the court's role in reviewing cases under the civil service law. The CCRB does not function as an adversarial board.

After receiving the investigation report, it is the Director of Public Safety, and not the CCRB, who determines the appropriate disciplinary action, if any. If disciplinary charges are appropriate, officers will be subject to the internal disciplinary proceedings of the NPD. Thereafter, they may pursue appeals through any available administrative and judicial processes, and they may pursue any rights they might have under their CNAs. On its face, the Ordinance does not interfere with any due process rights that officers may have in these other proceedings.

Based upon an IA investigation report, or a CCRB investigation report, or both, the Director of Public Safety may decide to file disciplinary charges against an officer. In making that decision, the Public Safety Director is not bound by the CCRB's findings, as the Ordinance provides. As a matter of due process and fundamental fairness, Doe, 142 N.J. at 108-09, the Public Safety

Director should consider all of the facts presented, and must be permitted to consider the entirety of the evidence.

On this record, there is no evidence demonstrating that the CCRB could not perform its oversight function and simultaneously investigate matters contemporaneously with and independently of ongoing investigations conducted by IA. And of course, any such concurrent investigation is subject to being stopped by a prosecutor or court. Code 2:2-86.4(e)–(f). The United States Supreme Court explained that,

[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. Without a showing to the contrary, state administrators "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."

[Withrow v. Larkin, 421 U.S. 35, 55 (1975) (quoting Morgan, 313 U.S. at 421).]

"If an interested party has a right to cross-examine witnesses and present proof, the mere fact that an administrative agency has conducted an investigation and formulated a policy position does not necessarily mean that the mind of the agency head is closed." Carberry, 114 N.J. at 586. "The combination of investigative, charging, and adjudicative functions in the same administrative

tribunal does not, without more, constitute a violation of due process." Ende v. Cohen, 296 N.J. Super. 350, 362 (App. Div. 1997).

Although "[i]t has often been argued that casting the same individuals within an agency in these dual roles violates due process," the "general rule is that proof of actual bias is necessary to overturn administrative actions on this basis." In re Opinion No. 583, 107 N.J. 230, 236 (1987). There is no such proof here. "The wisdom of creating an agency with a responsibility for both initiating and adjudicating a proceeding is a legislative function, and not a judicial one." In re Bd. of Educ. of Trenton, 176 N.J. Super. 553, 565 (App. Div. 1980). "[T]he mere fact that the administrative agency has investigated the matter in question does not render it or its members incompetent, consistent with due process, to adjudicate the case as presented at the evidentiary hearing." Id. at 565-66 (alteration in original).

Finally, at this point, we perceive no facial concerns with one additional provision of the Ordinance. The Ordinance requires the Public Safety Director to 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. Code

2:2-86.5, § 1-17(c). On its face, such a requirement does not violate due process, N.J.S.A. 40A:14-118, or Newark's Code.

Requiring the Public Safety Director to explain his or her reasons for rejecting the CCRB's findings or recommendations serves a legitimate public interest because the Public Safety Director's responses will assist the CCRB in performing its oversight functions, including as required under the consent decree. This provision of the Ordinance serves the legitimate public interests of transparency and improving the critical relationship between the NPD and the Newark community. And it is consistent with that part of N.J.S.A. 40A:14-118 allowing for investigations by boards like the CCRB, it promotes police accountability in ways beyond those contemplated by the IA function, and it complements the Public Safety Director's general obligation to report to the Mayor. Indeed having the Public Safety Director – under the circumstances described in the Ordinance – explain his or her reasons to the CCRB cannot interfere with the Chief's day-to-day operations of the police force because it is the Public Safety Director – not the Chief – who may have to appear before the CCRB. Nevertheless, as the CCRB gets up and running, as applied challenges to this part of the Ordinance may be made on a more fully developed record if warranted.



## V.

We now move to the subject of preemption. A local government, like the City, may not act contrary to State law. FOP maintains that the City acted contrary to State law by enacting an Ordinance that purportedly conflicts with N.J.S.A. 40A:14-181 and the AG Guidelines. Therefore, FOP argues that the doctrine of preemption requires that we invalidate the Ordinance.

N.J.S.A. 40A:14-181 and the AG Guidelines do not expressly address the Ordinance's grant of oversight authority to the CCRB. Indeed, the statute is directed towards law enforcement agencies (which the CCRB is not), and the AG Guidelines are designed to assist law enforcement agencies, enhance their integrity, improve delivery of police services, and ensure proper consideration of police misconduct.

N.J.S.A. 40A:14-181 states in part that,

Every law enforcement agency, . . . shall adopt and implement guidelines which shall be consistent with the guidelines governing the "[IA] Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.

[(Emphasis added).]

The text of this statute does not expressly state that an executive or legislative agency is barred from concurrently investigating police misconduct – as part of a CCRB with broad oversight authority to statutorily investigate and examine complaints of police misconduct – when a law enforcement agency has adopted and implemented guidelines consistent with those promulgated by the AG.

To be sure, the AG has issued guidelines pursuant to this statute, and as chief law enforcement officer of the State, N.J.S.A. 52:17B-98, these guidelines are binding upon local law enforcement agencies. O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 384 (App. Div. 2009); In re Carroll, 339 N.J. Super. 429, 439, 442-43 (App. Div. 2001).<sup>13</sup> The AG Guidelines pertain to law enforcement agencies. The AG Guidelines recognize that proper administration of the IA function is "a critical issue for the criminal justice system in New Jersey today," (AG Guidelines, at p. 3), with the IA function viewed by the courts "as an important means of protecting the constitutional rights and civil liberties of the state's citizens." (AG Guidelines, at p. 3). The Guidelines state:

Agencies that make a vigorous commitment to the [IA] process signal their desire to comply with the highest

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<sup>13</sup> The most recent AG Guidelines on IA Policy & Procedures are dated November 2017. See [https://www.state.nj.us/lps/dcj/agguide/internalaffairs2000v1\\_2.pdf](https://www.state.nj.us/lps/dcj/agguide/internalaffairs2000v1_2.pdf) (last visited May 22, 2019). In its summary judgment papers, FOP referred to the 2014 version of the AG Guidelines. We apply the most recent guidelines, as did the judge.

standards of professionalism in law enforcement. They also ensure that their officers will be accountable for their actions to both the agency and the community. Agencies that fail to make such a commitment run the risk of failing to uncover policies, practices and procedures that may undermine legitimate efforts to provide the highest quality law enforcement services.

Indifference to the [IA] function will have a negative impact on the administration of criminal justice and the delivery of police services to New Jersey's citizens. Agencies that fail to make the [IA] function a priority can lose the respect and support of the community. The integrity of individual law enforcement agencies, and the reputation of the State's criminal justice system, can also suffer if agencies fail to identify and correct officer misconduct. In addition, law enforcement agencies that fail to implement a meaningful and objective [IA] process may be found liable in civil lawsuits for their failure to effectively address officer misconduct.

[(AG Guidelines, at p. 5; see also AG Guidelines at pp. 31, 46) (emphasis added).]

As we have said, the purpose of the AG Guidelines "is to assist the State's law enforcement agencies with investigating and resolving complaints of police misconduct that originate with private citizens or are generated by the supervisors, officers or employees of a law enforcement agency." (AG Guidelines at p. 3) (emphasis added). And the stated goal of the AG Guidelines is "to enhance the integrity of the State's law enforcement agencies, improve the delivery of police services and assure the citizens of New Jersey that complaints

of police misconduct are properly addressed." (AG Guidelines at p. 3) (emphasis added).

The AG Guidelines contain the following eleven mandates, which every law enforcement agency must implement:

1. Each agency must establish by written policy an [IA] function.
2. Each agency must accept reports of officer misconduct from any person, including anonymous sources, at any time.
3. Where a preliminary investigation indicates the possibility of a criminal act on the part of the subject officer, the county prosecutor must be notified immediately. No further action should be taken, including the filing of charges against the officer, until the county prosecutor so directs.
4. The agency must notify the county prosecutor immediately of any use of force by an officer that results in death or serious bodily injury.
5. Each agency must thoroughly and objectively investigate all allegations against its officers.
6. Each agency must notify its officers of complaints and their outcomes.<sup>14</sup>
7. Each agency must notify complainants of the outcomes of their complaints.

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<sup>14</sup> The Ordinance does not explicitly contain this requirement. However, since the Ordinance requires the CCRB to notify the NPD of any complaints it receives, the NPD's IA Department will provide such notice to officers.

8. Each agency must establish and maintain an [IA] records system which, at a minimum, will consist of an [IA] index system and a filing system for all documents and records. In addition, each agency shall establish a protocol for monitoring and tracking the conduct of all officers.

9. Each agency must submit quarterly reports to the county prosecutor summarizing the allegations received and the investigations concluded for that period. Each county prosecutor shall establish a schedule for the submission of the reports and specify the content of the reports.

10. Each agency must annually release reports to the public summarizing the allegations received and the investigations concluded for that period. These reports shall not contain the identities of officers or complainants. In addition, each agency shall periodically release a brief synopsis of all complaints where a fine or suspension of [ten] days or more was assessed to an agency member. The synopsis shall not contain the identities of the officers or complainants.

11. Each agency shall ensure that officers assigned to the [IA] function complete training as mandated by the Division of Criminal Justice.

[(AG Guidelines at pp. 4-5) (emphasis added).]

The AG Guidelines next describe the fundamentals of the disciplinary process for law enforcement agencies, including a system of discipline, and a schedule of possible penalties when discipline is imposed. (AG Guidelines at

pp. 6-11). Thus, the Ordinance cannot impede the NPD's obligation – as part of its IA investigations – to follow the AG Guidelines.

We reject the idea that preemption principles invalidate the Ordinance on its face, because N.J.S.A. 40A:14-181 and the AG Guidelines apply to law enforcement agencies and do not address a board like the CCRB, which has the important and vital oversight role of providing transparency into investigations of police misconduct. We nevertheless perform a preemption analysis. Although we 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, as with our due process analysis, as applied challenges may be raised – if warranted – once the CCRB begins functioning as intended under the Ordinance. At this point, we add the following remarks on preemption.

We review de novo the legal question of whether State law preempts the Ordinance. "[A] court may declare an ordinance invalid if it . . . is preempted by superior legal authority." Rumson Estates, Inc. v. Mayor of Fair Haven, 177 N.J. 338, 351 (2003) (citing United Bldg. & Constr. Trades Council v. Mayor of Camden, 88 N.J. 317, 343 (1982)). "Preemption is a judicially created principle based on the proposition that a municipality, which is an agent of the State,

cannot act contrary to the State." Redd v. Bowman, 223 N.J. 87, 108 (2015) (citing Overlook Terrace Mgmt. v. Rent Control Bd. of W.N.Y., 71 N.J. 451, 461 (1976)).

"[A]n ordinance will fall if it permits what a statute expressly forbids or forbids what a statute expressly authorizes." Summer v. Twp. of Teaneck, 53 N.J. 548, 554 (1969). In analyzing the question of preemption, "[t]he ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act." Id. at 555. "It is not enough that the Legislature has legislated upon the subject[.]" Id. at 554. Instead, for preemption purposes, the Legislature's intent to occupy the field "must appear clearly." Ibid. (emphasis added).

In Redd, our Supreme Court reiterated the five governing factors that a court must consider to determine whether state law preempts a municipal ordinance:

- (1) Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?
- (2) Was the state law intended, expressly or impliedly, to be exclusive in the field?

(3) Does the subject matter reflect a need for uniformity?

(4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?

(5) Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature?

[223 N.J. at 109 (quoting Overlook, 71 N.J. at 461-62).]

Applying these five factors, we reject FOP's contention that the statute, or for that matter, the AG Guidelines, preempt the Ordinance. Our conclusion does not undermine the importance of the AG Guidelines, or their applicability to law enforcement agencies.

(1)

We cannot say with confidence that the Legislature clearly intended to immobilize municipalities from promoting police accountability in ways beyond those contemplated by the IA function. Neither N.J.S.A. 40A:14-181 nor the AG Guidelines preclude municipalities from implementing a CCRB with oversight power to investigate and examine civilian complaints of police misconduct. Therefore, in that sense, the Ordinance does not permit what the Legislature has generally forbidden, or forbid what the Legislature has authorized.



Furthermore, reading the AG Guidelines to preclude civilian municipal investigations of police departments ignores not only the City's right to set policy, but also the City's express rights contained in N.J.S.A. 40A:14-118. As we previously stated, N.J.S.A. 40A:14-118 expressly permits:

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[; and] the appropriate authority, or any executive or administrative officer charged with the general administrative responsibilities within the municipality, [to] examin[e] at any time the operations of the police force or the performance of any officer or member thereof.

[(Emphasis added).]

We make every effort to read N.J.S.A. 40A:14-118 and the Guidelines, adopted pursuant to N.J.S.A. 40A:14-181, as compatible. See In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 359 (2010) (stating that when reviewing two separate statutes addressing the same subject matter, courts must read the statutes in pari materia and attempt to reconcile them). Here, the Ordinance does not replace an IA investigation with an investigation performed by the CCRB. Rather, the Ordinance provides for the possibility of concurrent investigations, and, as we have determined in this

opinion, the upshot of the investigation performed by the CCRB cannot bind the Public Safety Director when it comes to law enforcement disciplinary determinations.

(2)

Under the second factor, we conclude that there is no evidence that State law intended, either expressly or impliedly, to be exclusive in the field. That is, we do not read N.J.S.A. 40A:14-181 or the AG Guidelines as providing the exclusive means for the investigation of civilian complaints of police misconduct. The AG Guidelines do not preclude municipalities from creating separate entities to investigate complaints (solely in an oversight function). Once again, any such reading of N.J.S.A. 40A:14-181 or the AG Guidelines would violate N.J.S.A. 40A:14-118, which expressly empowers investigation and examination of police forces by boards like the CCRB, and contravenes the City's fundamental right to set local policy.

(3)

Under the third factor, there is no need for uniformity in the conclusions reached by separate IA and CCRB investigations. Regardless of whether the conclusions and recommendations made by the IA department and the CCRB conflict, it is the Public Safety Director who determines – without limitation –

whether any disciplinary action should be taken. We have already invalidated that part of the Ordinance that provided that the CCRB's findings would be binding. Thus, the Public Safety Director still determines disciplinary action, and does so by considering the entirety of the evidence. In this sense, the CCRB's investigation is consistent with State law and vitally promotes transparency and law enforcement accountability of the NPD.

(4)

Under the fourth factor, the state scheme is not so pervasive or comprehensive that it precludes the coexistence of municipal regulation. N.J.S.A. 40A:14-181 and the AG Guidelines do not preclude civilian municipal investigations into the police department or individual members of the police department. That is primarily so because such a reading ignores N.J.S.A. 40A:14-118, which explicitly permits such civilian investigations.

N.J.S.A. 40A:14-181 requires law enforcement agencies to adopt guidelines that are consistent with the AG Guidelines, any tenure or civil service law, and existing contractual agreements. The oversight role of the CCRB does not interfere in any way with a law enforcement agency's obligation under N.J.S.A. 40A:14-181 or the AG Guidelines. Thus, there exists room for important municipal regulation.

(5)

Under the fifth factor, the Ordinance importantly does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature. The AG Guidelines state that "[t]he goals of the policy are to enhance the integrity of the State's law enforcement agencies, improve the delivery of police services and assure the citizens of New Jersey that complaints of police misconduct are properly addressed." (AG Guidelines, at p. 3) (emphasis added). The goal of the Ordinance is to further the same objectives, particularly in light of the NPD's past failures, as set forth in the DOJ's report. In our view, the CCRB furthers, rather than impedes, the Legislature's objectives.

Moreover, the City's powers should not be constrained in an area in which the Legislature has expressly permitted municipalities to act. N.J. Const. art. IV, § 7, ¶ 11; N.J.S.A. 40:48-2, N.J.S.A. 40:42-4, N.J.S.A. 40:69A-30. In establishing an independent body to perform oversight of the NPD – in furtherance of quality policing and a trusting relationship between the community and the police – the City squarely acted within the authority granted to it by the Legislature.

Furthermore, the Ordinance does not permit CCRB investigations to interfere with or taint criminal prosecutions of police officers. Both the Ordinance and the AG Guidelines require coordination with the prosecutor's office, and deferral to the prosecutor's office, where potentially criminal conduct is at issue. (Compare AG Guidelines at pp. 20-22, 24, 32-38, with Code 2:2-86.4(e)–(f)). The only difference is that the Ordinance requires deferral of case processing only if a request for deferral is made by the prosecutor, federal law enforcement agency, or by court order.

The AG Guidelines and the Ordinance require training of investigatory staff. (Compare AG Guidelines, at p. 13, with Code 2:2-86.3(h), and 2:2-86.5, § 1-23). Also, the Ordinance requires the recusal of any Board members who have a conflict of interest. Code 2:2-86.5, § 1-24. To be sure, IA officers may have greater tools at their disposal for the investigation of complaints, based upon their access to the officer's workplace and their existence within the chain of command of the police department. (AG Guidelines, at pp. 25-31). However, that does not mean that CCRB investigations stand as an obstacle to accomplishing and executing the full objectives of the AG Guidelines. To the contrary, the fact that IA officers are police officers is a double-edged sword. Their experience creates the possibility of both better-informed analysis of the

evidence, as well as potentially biased analysis of the evidence. Civilian review provides a different perspective in furtherance of the same legislative objective.

The AG Guidelines provide that in publishing reports on IA investigations, law enforcement agencies "shall not" publish the names of complainants and subject officers. (AG Guidelines at p. 44). As to confidentiality of officers, like the AG Guidelines mandate for IA investigations, the Code requires that the identity of a police officer must remain confidential in any of the CCRB's public reporting. Code 2:2-86.5 §§ 1-17(d), 1-20(a), 1-21(a). By contrast, the Ordinance provides that if a complaint is substantiated and referred for a CCRB hearing, "the complainant's identity may be released in the course of any public hearing about the alleged misconduct." Code 2:2-86.5, § 1-07.

Disclosure of a complainant's identity 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. It could also discourage complainants from coming forward, or encourage unwarranted complaints from people seeking notoriety. For this reason alone, we elect to invalidate that part of the Ordinance allowing disclosure of a complainant's identity. But we uphold the remainder of the Ordinance sans the binding nature

of the CCRB's findings. See Brunetti v. Borough of New Milford, 68 N.J. 576, 603 (1975) (stating that the invalidity of the provisions of an ordinance does not affect the enforceability of the remainder of the ordinance because they are "clearly severable"). Such a conclusion is consistent with the severability paragraph of the Ordinance, which provides that if any part of the ordinance is declared unconstitutional or illegal, the remaining provisions shall not be affected and shall continue in full force and effect. See Code 1:1-10. Any other purported discrepancies between the AG Guidelines and the Ordinance 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.

## VI.

Finally, the City has widespread authority to issue and delegate subpoena power to the CCRB.<sup>15</sup> This power is incidental to the City's policy and express statutory power under N.J.S.A. 40A:14-118 to create a CCRB for the limited purpose of providing oversight in investigating and examining complaints of police misconduct. Without such power to issue subpoenas, its effectiveness will be undermined.

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<sup>15</sup> Indeed, in its amicus brief, the AG did not specifically raise an objection to the CCRB's subpoena power.

Code 2:2-86.3(f) authorizes the CCRB to issue subpoenas. It provides:

The [CCRB] may require the production of . . . records and other materials as are necessary for the investigation of complaints submitted to the [CCRB], pursuant to this section [of the Ordinance] through the issuance of subpoenas. Upon a majority vote of the members of the [CCRB], the [CCRB] may issue subpoenas ad testificandum and duces tecum, which may be served, to the extent permitted by law.

By enacting the Ordinance, the City tailored the CCRB's subpoena power to the CCRB's task: investigating civilian complaints alleging police misconduct. The City specifically delegated this power to remedy the problems associated with the DOJ investigation. Indeed, the purpose of the Ordinance supplies sufficient guidance for the City's delegation.

Both the United States Supreme Court and the Supreme Court of New Jersey have recognized that a legislative body has the inherent authority to issue subpoenas to fulfill its legislative and investigative authority. See McGrain v. Daugherty, 273 U.S. 135 (1927); In re Shain, 92 N.J. 524 (1983). The Ordinance by itself does not grant the power to subpoena. The power to subpoena comes from constitutional and legislative authority. Shain, 92 N.J. at 532. "[S]uch authority may be fairly implied from the legislative scheme without being expressly stated within the four corners of a statute." Ibid. In reaching that conclusion, our Court relied on the rationale expressed in McGrain:



A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

. . . .

[S]tate courts quite generally have held that the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose.

[Id. at 532-33 (quoting McGrain, 273 U.S. at 175, 165) (alterations in original) (emphasis added).]

Thus, "[a] reasonable incident of the Council's power to investigate under N.J.S.A. 40:69A-37<sup>[16]</sup> is the power to compel testimony, i.e., to issue subpoenas." Id. at 533. Our Court elaborated:

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<sup>16</sup> This statute is entitled "Investigative, removal powers" and states:

The council, in addition to such other powers and duties as may be conferred upon it by this charter or otherwise by general law, may:

Unless an investigating committee has power to compel [documents and] testimony, it has no feasible method to obtain all the information it needs to perform its legislative function. Without the power to interrogate knowledgeable officials under oath, its investigation may become a nullity.

[Ibid. (emphasis added) (citations omitted).]

For investigations to be conducted by either the executive or legislative branches of municipal government, these entities must have subpoena power. Id. at 532.

Thus, implicit in the Legislature's creation of investigatory authority through policy and N.J.S.A. 40A:14-118 is the creation of the subpoena power. Ibid. As for the delegation of subpoena power to the CCRB, N.J.S.A. 40A:14-118 expressly anticipates such delegation. It anticipates a municipal governing body's creation of "committees" or "commissions" to perform investigations, and/or the executive's appointment of an administrative officer to perform investigations. Cf. Jansco v. Waldron, 70 N.J. 320, 326-27 (1976) (stating that

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(a) Require any municipal officer, in its discretion, to prepare and submit sworn statements regarding his official duties in the performance thereof, and otherwise to investigate the conduct of any department, office or agency of the municipal government;

(b) Remove, by at least two-thirds vote of the whole number of the council, any municipal officer, other than the mayor or a member of council, for cause, upon notice and an opportunity to be heard.

the pre-1981 version of N.J.S.A. 40A:14-118 anticipated sub-delegation of power to adopt disciplinary rules and regulations for police departments). Where such delegation occurs within the legislative branch, State law expressly anticipates the delegation of subpoena power. Specifically, N.J.S.A. 40:48-25 states:

When the governing body of a municipality shall have appointed a committee of its members upon any subject or matter within its jurisdiction, the committee may issue a subpoena ad testificandum, or subpoena duces tecum, to any person within this state, to appear before it to give testimony or information required.

[(Emphasis added).]

Thus, in Shain, 92 N.J. at 530-39, the Court held that a municipal council in a Faulkner Act municipality, like here, had the authority to delegate its subpoena power to a special investigatory committee that consisted entirely of council members. In so holding, the Court noted the power of legislatures to perform investigations, id. at 530-34, and stated that "[n]o specific statutory grant is necessary to vest a legislative body with subpoena power," because "[t]he power to compel testimony is inherent in the legislative power to investigate." Id. at 532.

Moreover, the New Jersey State Constitution Article IV, § VII, ¶ 11, and the necessary and proper clause of N.J.S.A. 40:48-2, provide further support for

our conclusion that the CCRB enjoys subpoena power as it fulfills its function under the Ordinance. The New Jersey Supreme Court has "consistently held [N.J.S.A. 40:48-2] is itself a reservoir of police power." Inganamort, 62 N.J. at 536.

[N.J.S.A. 40:48-2 is] an express grant of general police powers to municipalities [and] has been made impregnable by the continued legislative acquiescence therein, by the mandate of Article IV, Section VII, paragraph 11 of the Constitution of 1947 that acts concerning municipalities be liberally construed, and by the adherence thereto of the more recent judicial decisions . . . .

Plainly, therefore, [N.J.S.A. 40:48-2] must be considered as an express grant of broad general police powers to municipalities.

[Ibid. (citations omitted).]

Relying on its express and implied powers, the City is authorized to delegate to the CCRB authority to issue subpoenas in accordance with the terms outlined in the Ordinance.<sup>17</sup>

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<sup>17</sup> Under federal law, the United States Supreme Court has held that the parallel "Necessary and Proper Clause" of U.S. Const. art. I, § 8 permits Congress to delegate subpoena power. See Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 214 (1946), which incidentally was decided two decades after McGrain, the case that our Court relied on in Shain.

Finally, FOP's reliance on City of Newark v. Benjamin, 144 N.J. Super. 58 (Ch. Div. 1976), is misplaced. Benjamin pertains to an attempt to create a CCRB by voter initiative with elected members, which essentially created another elected body, in violation of the Faulkner Act. Id. at 63. Here, the City established the CCRB by Ordinance with appointed members, not voter initiative. Indeed, the Benjamin court drew that distinction by stating, "what is involved here is not whether the Newark council had the power to enact an ordinance for civilian review of police conduct, but whether it can be done by initiative in a Faulkner Act city." Id. at 68.

In Benjamin, the court recognized that "the subpoena power of a municipal investigative body is set forth in N.J.S.A. 40:48-25." Id. at 72. The court did not consider whether municipal executive and legislative bodies were authorized to issue subpoenas, or delegate the authority to issue subpoenas, under N.J.S.A. 40A:14-118 because the relevant language of N.J.S.A. 40A:14-118 was not adopted until after Benjamin was decided. Here, the City seized its power and acted decisively by creating the CCRB.

In summary, the CCRB's findings are not binding and the identity of complainants and police officers must remain confidential. The Ordinance is valid on its face and cannot alter the NPD's obligation to follow the AG

Guidelines when undertaking its own IA investigations. Consequently, the CCRB can function as intended under the Ordinance, including providing an oversight role by investigating alleged police misconduct, conducting hearings, participating in the development of a disciplinary matrix, making recommendations, and issuing subpoenas. Consistent with this opinion, as applied challenges may be made if warranted.

Affirmed in part; reversed in part.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION

## **APPENDIX C**

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIV: GEN. EQUITY PART  
ESSEX COUNTY  
DOCKET NO.: C-177-16  
A.D. #: A-003298-17-T3

FRATERNAL ORDER OF POLICE)	)	
NEWARK LODGE NO. 12,	)	
	)	
Plaintiff,	)	
	)	TRANSCRIPT
vs.	)	OF
	)	MOTION
CITY OF NEWARK, et al.,	)	
	)	
Defendant.	)	

Place: Wilentz Justice Complex  
212 Washington Street  
Newark, NJ 07102

Date: March 14, 2018

BEFORE:

HONORABLE DONALD A. KESSLER, J.S.C.

TRANSCRIPT ORDERED BY:

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APPEARANCES:

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Recording Opr: Not provided



I N D E XPAGE

Colloquy re: Housekeeping

MOTIONS:PAGEARGUMENTS:

BY: Mr. Areman.....4, 15  
BY: Ms. Benjamin.....18  
BY: Mr. Lustberg.....27, 57  
BY: Mr. Frey.....37

THE COURT:

Decision.....60

1 rather than taking the extra step that I usually would  
2 do of writing it all out and sending you an opinion, I  
3 just thought this couldn't wait and I didn't want to  
4 consume the better part of another month making you  
5 wait for a decision.

6 So with that in mind I will deliver my  
7 opinion after we take a ten-minute break.

8 (Recess taken from 10:28 to 10:42)

9 THE COURT: Please be seated. We're back on  
10 the record in the matter of Newark FOP Lodge No. 12  
11 versus City of Newark. Before the Court begins  
12 delivering it's opinion, I wanted to make one comment.  
13 After spending a lot of time reviewing the briefs in  
14 this matter, and looking at the underlying submissions,  
15 it really struck me that the Attorney General's Office  
16 should have really been offered the opportunity to  
17 comment on whatever this Court does or at least provide  
18 their input. I'm just going to say this for a reason.

19 I am sure that this case is not going to end  
20 today regardless of what I do. Both parties will --  
21 may in fact each appeal based on what I do today. I  
22 don't know if they will, but they could.

23 But regardless of what I do today if this  
24 case goes further, I truly believe because the  
25 guidelines are such an important part of this case, and

1 those guidelines are statutorily required to be  
2 developed by the Attorney General, that the Attorney  
3 General's Office should be at least notified of an  
4 opportunity to participate, invited to participate. So  
5 I think that's important. I don't want to say, had I  
6 really appreciated what the arguments were going to be  
7 when I first took on this case, I would've brought them  
8 in myself at the beginning. But certainly also, struck  
9 me that Mr. Harvey as the monitor would have something  
10 to say about it too.

11 But I'm less concerned about what Mr. Harvey  
12 has to say about it, than what the Attorney General has  
13 to say about it. And then just as a brief aside Mr.  
14 Areman for the future, please use New Jersey citations  
15 instead of Atlantic citations, that's what's you're  
16 supposed to use in New Jersey Courts.

17 MR. AREMAN: Fair enough, Your Honor.

18 THE COURT: So I just ask you to -- you  
19 know, it made the combing through the briefs a little  
20 more difficult for the court.

21 Okay. So the Fraternal -- excuse me -- the  
22 City of Newark is a municipal corporation and political  
23 subdivision of New Jersey. The Fraternal Order of  
24 Police Lodge No. 12 is the certified collective  
25 bargaining representative of the police officers

1 employed by the City of Newark.

2 The Fraternal Order of Police has instituted  
3 this lawsuit seeking declaratory relief challenging  
4 Ordinance 6PSF-B which establishes a civilian complaint  
5 review board in the Office of the Mayor. The ordinance  
6 provides the board will be comprised of three members  
7 designated by the City Council, the Inspector General,  
8 a member of the clergy, and I believe it was misstated  
9 before that it would be five community organizations.

10 The express purpose of the ordinance is to  
11 remedy the deep and longstanding problems in the Newark  
12 Police Department which were identified during a  
13 Department of Justice investigation into the Newark  
14 Police Department. And to the credit of the City, they  
15 did not -- it did not sweep the investigation under the  
16 rug. They embraced it and tried to take action which  
17 in the judgment of the elected officials they thought  
18 was necessary and required to protect all the citizens  
19 in Newark.

20 And as the Court has said and cannot say  
21 enough, the goals of the CCRB are laudable. The  
22 preamble of the ordinance states that the creation of  
23 the CCRB is a critical part of the implementation of  
24 reforms and created protections for the citizenry as  
25 well as instilling confidence in the resolution of the

1 investigation and providing transparency of the  
2 process.

3 On July 22, 2014, the United States  
4 Department of Justice Civil Rights Division issued a  
5 findings report regarding the results of a three-year  
6 investigation it conducted the beginning of May 2011  
7 after receiving serious allegations of civil rights  
8 violations by the Newark Police Department, including  
9 that the Newark Police Department subjects residents to  
10 excessive force, unwarranted stops, and arrests and  
11 discriminatory police action.

12 The DOJ investigation found a pattern of  
13 Constitutional violations by the Newark Police  
14 Department, in addition to deficiencies in the Newark  
15 Police Department systems that are designed to prevent  
16 and detect misconduct, including it's systems for  
17 reviewing force and investigating complaints regarding  
18 officer conduct.

19 The investigation further found that the  
20 Newark Police Department system for investigating  
21 civilian complaints appears to have been structured to  
22 curtail disciplinary action and stifle the  
23 investigations into the credibility of the City's  
24 police officers. The Department of Justice identified  
25 a number of specific areas where problems were

1 persistent, including the failure of the police  
2 departments internal affairs unit to probe officer's  
3 accounts, or to assess officer's credibility and give  
4 statements from complainants and witnesses sufficient  
5 weight.

6           Additionally, the Department of Justice found  
7 that investigating citizen's complaints against the  
8 policing, internal affairs unit improperly relied on  
9 complainant's criminal histories, while discounting  
10 officer's disciplinary histories. The Department of  
11 Justice also found a pattern of intimidating,  
12 discouraging witnesses participation in the complaint  
13 process which created a disciplinary system that lacked  
14 transparent objective criteria.

15           The ultimate conclusion of the Department of  
16 Justice was that officers with a high number of  
17 credible complaints that have not been adequately  
18 investigated by the Newark Police Department, thus  
19 resulting in no corrective action or discipline where  
20 such actions was necessary.

21           The Department of Justice also found a  
22 pattern of recalcitrants relying on expert testimony,  
23 presented in the suit, the -- they reached these  
24 conclusions, specifically the expert reported that the  
25 internal affairs division pays little or no attention

1 to complaints from citizens, especially those regarding  
2 use of force.

3 The DOJ found only one civilian complaint of  
4 excessive force had been sustained by the Newark Police  
5 Department Internal Affairs Division in six years, with  
6 only two complaints of theft having been sustained in  
7 three years, and the low rate of sustaining complaints  
8 was true of all civilian complaints. The DOJ concluded  
9 that the Newark Police Department system for  
10 investigating civilian complaints appears to have been  
11 structured as I indicated earlier to curtail civilian  
12 complaints, and stifle investigations into the  
13 credibility of officers.

14 The Department of Justice identified specific  
15 recurrent problems, including the Internal Affairs  
16 unit's failure to collect evidence from complainants,  
17 failure to probe officer's accounts of facts, and so  
18 forth. Prior to the investigation and up to the  
19 present time, the Newark Police Department has had it's  
20 own internal review process that is triggered when a  
21 member of the public files a complaint against an  
22 officer. Once the complaint is filed it is  
23 investigated by the Division's internal affairs unit.  
24 Internal affairs investigations were and continue to be  
25 conducted in compliance with the New Jersey Attorney

1 General's Guidelines for investigating complaints of  
2 police misconduct.

3 Prior to the enactment of the ordinance in  
4 issue and while the Department of Justice investigation  
5 was ongoing, the Mayor of Newark attempted to be  
6 proactive about this situation. Newark Mayor Ras  
7 Baraka signed an executive order on April 30, 2015.  
8 The order established a new system for handling  
9 complaints against police officers. The order provided  
10 that public complaints against members of the Newark  
11 Police Department shall hence forth be investigated and  
12 disciplines, if any shall be recommended to the police  
13 director by a civilian complaint review board. The  
14 order called for the CCRB to -- if I use that acronym I  
15 mean the Civilian Complaint Review Board, just for the  
16 purpose of my opinion -- to meet out discipline based  
17 on a disciplinary matrix that was to be developed by  
18 the police director with the input of the effected  
19 bargaining units. As I think Ms. Benjamin indicated,  
20 there's also an SOA which is not a party to this case  
21 that governs superior officers, is the bargaining agent  
22 for superior officers.

23 Prior to the initiation of the executive  
24 order, the Mayor received input from various community  
25 organizations. And there is a letter dated January 9,



1 2015 where input was received from the ACLU, Garden  
2 State Equality Ironbound Community Corporation, the  
3 NAACP, and the People's Organization for Processing,  
4 1199 SCIU, which is represents United Healthcare  
5 workers. And in that letter while the proposed CCRB  
6 was being considered by the Mayor, those groups asked  
7 the Mayor to impose a -- rules which would be more than  
8 oversight and would look at disciplining officers. And  
9 in that letter, and I'll just read some parts of it  
10 that are pertinent to the Court.

11 On the first page of the letter it says the  
12 proposed and I'm quoting from it, "the proposed CCRB  
13 must be considered in light of the recent findings by  
14 the United States Department of Justice of widespread  
15 civil rights and civil liberties violations by the  
16 Newark Police Department. As you know the Justice  
17 Department's investigation into Newark Police following  
18 years of community demands for federal oversight, and  
19 the ACLU and New Jersey's formal request for a federal  
20 civil rights investigation of Newark Police practices."  
21 Then on page two it goes on to state, in the last two  
22 paragraphs, "the proposed executive order to create a  
23 CCRB does not grant disciplinary authority to the CCRB,  
24 rather provides the CCRB with a comparative non-binding  
25 recommendation of discipline to the Newark Police

1 Department. The police director may accept, reject, or  
2 modify the recommendations presented by the CCRB. If  
3 the police director decides to discipline an officer at  
4 a lower level than the CCRB recommends or to not  
5 discipline at all, the police director is asked to  
6 notify the CCRB in writing including a detailed  
7 explanation of the reasons for deviation."

8 Then the next paragraph states, "by  
9 retaining" and this is on page two, and I'm quoting,  
10 "by retaining exclusive disciplinary authority with the  
11 police director this proposal fails to address the  
12 primary weakness with the current police oversight  
13 system in Newark. Under the proposed regime the police  
14 director will not -- will be able to ignore the  
15 recommendations of the CCRB, that your appointed police  
16 director will take his or her responsibilities for  
17 discipline and accountability seriously. The structure  
18 created here will be available to all future mayors and  
19 police directors who may not view accountability in the  
20 same light as you do and may exploit weaknesses in the  
21 system."

22 In the next paragraph on page three the  
23 letters says, "in order to fundamentally reform the  
24 system of police oversight and in order to prevent  
25 future violations that the scale identified by the

1 Department of Justice and complained about by community  
2 members for many years it is vital that Newark create a  
3 CCRB with the power to ensure discipline occurs in  
4 appropriate cases, the police director must not retain  
5 unfeathered discretion over whether police officers who  
6 have been found to have engaged in misconduct."

7 Later in the page is another paragraph which  
8 states, "we understand the City of Newark is concerned  
9 that creating a CCRB with independent disciplinary  
10 authority may conflict with other areas of the law.  
11 The ACLU NJ has worked closely with Gibbons PC to study  
12 this concern. And we have concluded that there are  
13 indeed ways that comport with existing law for the  
14 CCRB's fact finding to result in discipline that is  
15 effectively binding upon the police department by  
16 imposing sanctions based upon a lawfully established  
17 disciplinary matrix created by the CCRB in consultation  
18 with police officials and other stakeholders. This  
19 approach must be crafted carefully and we are very much  
20 interested in assisting the City in crafting a proposal  
21 that will not only successfully withstand the legal  
22 challenge but will also be entirely consistent with the  
23 City's obligations."

24 In a letter dated February 2, 2015, then  
25 acting prosecutor Carolyn Murray voiced her concerned

1 about the proposed executive order, which strikes --  
2 which bears a striking similarity to the current  
3 ordinance. Her letter states in part, "while well  
4 intentioned unfortunately the most recent version of  
5 the proposed executive order is not enforceable because  
6 it violates the laws of the State of New Jersey."

7 "The function of the civilian review board as  
8 proposed by the executive order exceeds a purely  
9 investigative role, and it's administration of the  
10 internal affairs process effectively conflicts with  
11 the New Jersey Attorney General Guidelines for internal  
12 affairs and procedures which is State law enacted under  
13 N.J.S.A. 48:14-181... we believe that any subpoena  
14 served under the authority of this executive order  
15 which violates the law would not be legally  
16 enforceable... consideration should be given to the  
17 terms of employment contracts and agreement with  
18 various unions who represent the Newark Police  
19 Department... N.J.S.A. 40A:14-181, also mandates that  
20 any guidelines should be consistent with the Civil  
21 Service Laws and not supercede any existing contractual  
22 agreements."

23 The Court acknowledges that it is not bound  
24 by Prosecutor Murray's statements. But the Court at  
25 least wanted to present those statements as part of the

1 history of this matter. And as we know from oral  
2 argument, I don't have to quote the letter directly,  
3 initially the counsel took the position that under the  
4 City of Newark versus Benjamin there was not a subpoena  
5 power. But I think I've already addressed during oral  
6 argument and I continue to maintain the position that  
7 was -- or I shouldn't say the position, I maintain the  
8 view that the position taken by the City at that time  
9 is not binding. The City has every right to change  
10 it's perspective as it continues to study what to do.  
11 And it is not binding.

12 On June 24, 2015, after the enactment of the  
13 executive order, the police director at that time,  
14 Eugene Venable issued a disciplinary matrix and  
15 guidelines. Those draft guidelines were not finalized  
16 because among other reasons, the union had not been  
17 consulted.

18 On January 7th, 2016, the City enacted  
19 Ordinance 15-2387 which consolidated the Newark Police  
20 and Fire Departments into a single public safety  
21 department. This ordinance installed the public safety  
22 director to head the public safety department, and  
23 designated the public safety director the "appropriate  
24 authority" which is a significant term -- I'm sorry  
25 it's "appropriate authority" which is a significant

1 individual in the context of this statutory framework.  
2 The ordinance is -- directly acknowledges that the  
3 police safety director is appointed with the  
4 "appropriate authority" pursuant to N.J.S.A. 40A:14-  
5 118. This ordinance also created the police chief's  
6 position within the meaning of N.J.S.A. 40A:14-118, who  
7 is according to the ordinance authorized to carry out  
8 his or her duties in accordance with applicable law and  
9 the Attorney General Guidelines and Directives.

10 Thus even after the DOJ investigation the  
11 police chief retained the authority by ordinance to  
12 carry out the duties, his duties according to the  
13 Attorney General's Guidelines, including the guidelines  
14 regarding the internal affairs investigative powers.  
15 On March 3, 2016 after the enactment of this ordinance,  
16 the United States filed a complaint against the City of  
17 Newark arising out of the pattern or practices of the  
18 Newark Police Department. On March 30th, 2016 a  
19 consent decree was filed by the Department of Justice  
20 in the City of Newark resolving the complaint in lieu  
21 of litigation. It's apparent to this Court that filing  
22 of the complaint and the consent decree was coordinated  
23 in a sense, and wisely so.

24 And that decree that was later amended on  
25 April 29th, 2016. On March 16, 2016 in anticipation of

1 and prior to the enactment of the consent decree, and  
2 it's just obvious if you read the ordinance that this  
3 was all done in a thoughtful way. At the same time,  
4 the Newark Municipal Council enacted the ordinance and  
5 issues 6PSF-B and in many respects that ordinance was  
6 substantially in accord with Mayor Baraka's early  
7 consent order -- I'm sorry -- earlier executive order.  
8 I misspoke. Like the earlier executive order,  
9 Ordinance 6PSF-B created a system for investigating and  
10 resolving complaints against police officers.  
11 Principally by placing a civilian complaint review  
12 board to oversee the police department and to  
13 investigate and hold hearings with regard to misconduct  
14 of individual officers.

15           Among other things, the CCRB's duties  
16 included investigating allegations of inappropriate  
17 behavior, filed by any member of the public against a  
18 police officer, Article 3, Section I of the ordinance.  
19 And when I go through the article and the section, for  
20 the purpose of my opinion right now, just so I don't  
21 have to repeat it every time, I'm referring to the  
22 ordinance itself. The CCRB was empowered to make  
23 factual resolutions regarding the allegations that are  
24 final and binding for the City's disciplinary  
25 perspective, subject to the review of the police

1 director that we discussed earlier today. And that's  
2 contained in Article 3, Section 11, and Article 5,  
3 Section 1-17B and C.

4 The CCRB was empowered to make  
5 recommendations based on various factual resolutions.  
6 Article 3, Section 11. It also was empowered to assist  
7 in the development of a disciplinary matrix and  
8 guidelines, specifying a level in nature of discipline  
9 to be applied in response to particular behavior which  
10 is to be developed collaboratively with the CCRB, the  
11 police safety director, and effective bargaining units.

12 In case I neglect to say this later, I want  
13 to point out that in -- certainly, I said this during  
14 oral argument the CCRB participation in development of  
15 this disciplinary matrix is certainly an important goal  
16 of this body. And under argument that is made to this  
17 Court, this Court finds that it has such powers of  
18 recommendation. I will try to cover that later.

19 The CCRB also has the authority to review  
20 investigations of officers by the internal affairs unit  
21 of the police department. Article 3, Section 2 and  
22 Article 5, Section 1-12B. The ordinance also has the  
23 following pertinent positions. The CCRB's findings of  
24 fact and determinations of discipline are forwarded to  
25 the public safety director Article 3, Section 11. The



1 public safety director must accept the CCRB's findings  
2 of fact as true unless there are -- unless the public  
3 safety director finds that the findings are based on  
4 obvious and indisputable errors. This is -- actually I  
5 should quote this line, "based on obvious and  
6 indisputable errors and cannot be supported by any  
7 reasonable interpretation of the evidence".

8 The ordinance -- that's Article 5, Section 1-  
9 17B. The ordinance goes on to say that if the police  
10 safety director is contemplating not following the  
11 CCRB's findings, presumably because they are  
12 indisputably erroneous, the police director must  
13 provide the CCRB with written notice and explanation,  
14 and appear before the CCRB for questioning prior to  
15 taking any action. Article 5, Section 1-17C and D.

16 If after providing written notice and  
17 explanation, submitting to questioning, the police  
18 director -- if the police director continues to deviate  
19 from the findings or recommendations, his written  
20 explanation -- or the police director's written  
21 explanation of errors will be published on the CCRB's  
22 public website. Article 5, Sections 1C and D.

23 The CCRB authorized to issue subpoena for  
24 evidence including testimony and documents, Article 3,  
25 Section 6 and Article 5, Section 1-10(D), no findings

1 or recommendations of the CCRB shall be based solely on  
2 unsworn complaints or statements. The ordinance  
3 specifically provides in part, "nor shall the  
4 provisions of this section be construed to limit the  
5 rights of members of the Newark Police Department with  
6 respect to disciplinary actions, including but not  
7 limited to the right to notice and a hearing, which may  
8 be established by any provisions of law or otherwise."

9 The CCRB is prohibited from deferring a  
10 complaint regardless of any parallel disciplinary  
11 proceedings or criminal investigation unless a county,  
12 state, or federal prosecutor, or state law or federal  
13 law enforcement agency requests the CCRB to defer it's  
14 investigation, or a court order requiring the CCRB to  
15 defer its investigation. Article 4, Section F.

16 The Newark Police Department is required to  
17 provide the CCRB with any records, and other materials  
18 upon the CCRB's request, including personnel records,  
19 and records of ongoing law enforcement investigations  
20 and operations. Article 4, Section A. The public  
21 safety director and police chief are required to ensure  
22 that the officers, employees of the police department  
23 appear before and respond to inquiries by the CCRB and  
24 it's civilian investigators. Article 4, Section B.

25 The CCRB is required to make it's

1 investigations, findings, and determinations public on  
2 it's website and in the regular public meetings,  
3 subject to redaction as amply described during the oral  
4 argument to this Court.

5 On April 29, 2016, the City of Newark, the US  
6 Attorney, and the Civil Rights Division of the  
7 Department of Justice, filed a revised consent order  
8 which was later approved by the federal court. And it  
9 contained a provision regarding what's called "Civilian  
10 oversight" and that provision had amended and modified  
11 a civilian oversight provision in the earlier consent  
12 order and replaced it with the -- what it said was  
13 within 365 days of the operational date, the City shall  
14 implement and maintain a civilian oversight entity.  
15 The duties and responsibilities of that entity shall,  
16 at a minimum, include the substantive and independent  
17 review of internal investigations and the procedures  
18 for the resolutions of complaints, monitoring trends in  
19 complaints, findings of misconduct, and NPD's policies  
20 and practices, including but not limited to those  
21 regarding use of force, stop, search, and arrest. The  
22 monitor will evaluate and report on the City's  
23 implementation and maintenance of this civilian  
24 oversight entity and determine if it is helping to  
25 achieve the goals of this agreement.

1           This decree shall not be deemed to confer on  
2 these civilian oversight entity any powers beyond those  
3 permitted by law, including civil service rules, and  
4 collective bargaining agreements. The consent order  
5 therefore clearly envisions the CCRB as an oversight  
6 body and did not charge that body with any  
7 responsibility to investigate or hear disciplinary  
8 matters. And it's been argued to this Court that the  
9 minimum standards which are articulated as such in the  
10 consent order would permit the CCRB to take on other  
11 lawful functions.

12           And the Court well understands their argument  
13 that the powers that have been conferred to the CCRB  
14 are a lawful function. On July 7, 2016 the Newark  
15 Municipal Council enacted an amendment to Ordinance  
16 6PSF-B to slightly modify the membership of the CCRB.  
17 In its current form under the ordinance, the CCRB is an  
18 agency where the office of Mayor composed of 11 members  
19 who were appointed by the Mayor, five members named  
20 non-profit corporations, American Civil Liberties  
21 Union; National Association for the Advancement of  
22 Colored People, New Jersey; People's Organization for  
23 Progress; Ironbound Community Corporation, and the  
24 Newark Anti-Violence Corporation.

25           The ordinance also indicates that one

1 representative from the LGBTQ committee will serve on  
2 the board, together with one representative of the  
3 clergy and three elected members of the Municipal  
4 Council, or their designees and the Newark Inspector  
5 General who investigates wrongdoing in Newark  
6 Government. And that's in Section 1 of the ordinance.

7 The ordinance grants the Mayor the authority  
8 to remove any organization of it's representation from  
9 the CCRB at will with or without cause. A section  
10 which is in Article 1 of the Section 1 of the  
11 ordinance. None of the members of the CCRB may be  
12 current or former employees of the Newark Police  
13 Department, or the Division of Police, except the  
14 Inspector General. Article 1, Section 2(C).

15 On or about August 8, 2016, the Fraternal  
16 Order of Police Newark Lodge No. 12 filed an order to  
17 show cause and verified complaint seeking declaratory  
18 relief relating to the ordinance in issue. The City  
19 initially did not answer the complaint. And on  
20 November 2, 2016, the return date of the order to show  
21 cause, Judge Moore, who was then sitting in this matter  
22 entered interlocutory restraints. The Court would note  
23 that those interlocutory restraints were entered  
24 without any opposition. A default was entered against  
25 the City of Newark in this case.

1           This Court found that the failure to answer  
2 the complaint was through no fault of the City. That  
3 they -- there was an employee in the City who did not  
4 properly follow-up, much to the disappointment of the  
5 City which they made very clear to this Court. This  
6 Court vacated the default and felt that there needed to  
7 be an opportunity for this very important matter to be  
8 fully developed and submitted for consideration before  
9 this Court. The Court also permitted Gibbons, PC  
10 through Mr. Lustberg and Mr. Frey who had been  
11 representing, acting on behalf of the Amici in this  
12 case, on behalf of the ACLU NJ and the -- and NAACP. I  
13 think that that -- the parties engaged in limited  
14 discovery prior to briefing this -- the issues before  
15 this Court.

16           And all parties agree that there are -- is  
17 not a disputed issue of fact in this case that would  
18 warrant a fact-finding hearing by this Court and that  
19 this Court could decide this matter based on the record  
20 presented to it. So with that in mind, the Court will  
21 now review it's view of the relevant legal principles.

22           N.J.S.A. -- I would like to first start with  
23 N.J.S.A. 40A:14-118, which was the last issue briefed  
24 for this Court. But I think in order to build a  
25 logical order to what the Court is going to do I wanted

1 to take the arguments made to this Court in the first  
2 order that I had just thought it would help me build up  
3 how I would look at this case.

4 So N.J.S.A. 40A:14-118, provides for the  
5 establishment of a municipal police force. The statute  
6 states in part that the governing body of a  
7 municipality may provide for a "appropriate authority"  
8 to promulgate rules and regulations for the governance  
9 of a police officer. And in this regard, the statute  
10 states "the governing body of any municipality by  
11 ordinance may create and establish an executive or  
12 enforcement function of municipal government a police  
13 force, whether as a department, or a division bureau or  
14 other agency thereof and provide for the maintenance,  
15 regulation, and control thereof.

16 Any such ordinance shall in a manner  
17 consistent with the form of government adopted by the  
18 municipality and with general law provide for a line of  
19 authority relating to police function and for the  
20 adoption and promulgation by the -- (phone rings)  
21 please if anybody has a phone on I'm going to -- whose  
22 got a phone?

23 UNIDENTIFIED FEMALE: It's not in here,  
24 Judge.

25 THE COURT: Then I apologize. If you don't

1 mind, I'm just going to wait a minute because I find it  
2 to be distracting. And I don't know if counsel does,  
3 but I don't want to interfere with anyone's full  
4 attention. It actually sounds like a fax machine.

5 So okay. I'll just start reading this  
6 sentence which is the second sentence in the statute.  
7 Any such ordinance shall in a manner consistent with  
8 the form of government adopted by the municipality and  
9 with general law provide for a line of authority  
10 relating to police function and for the adoption and  
11 promulgation by the appropriate authority of rules and  
12 regulations for government of a police force and for  
13 discipline of it's members.

14 The statute requires that if a police chief  
15 is appointed he shall be directly responsible for the  
16 efficient administration of the day-to-day operations  
17 of the apartment -- department. Thus the ordinance is  
18 drafted requires that the police chief administer the  
19 department, and that the appointing authority said the  
20 policy under which the police department will operate.

21 And in this regard, the ordinance goes on to  
22 provide any such ordinance -- I'm sorry the statute,  
23 any such ordinance or rules and regulations and quoting  
24 from the statute, "any such ordinance or rules and  
25 regulations shall provide the police chief, if such



1 position is established shall be the head of the police  
2 force and he shall be directly responsible to the  
3 appropriate authority for the efficiency and routine  
4 day-to-day operations thereof and shall create -- I'm  
5 sorry -- and that he shall pursuant to the policies  
6 established by the appropriate authority (a) administer  
7 and enforce rules and regulations... for disposition  
8 and discipline of the force."

9 I'll start again. So the statute requires in  
10 summary that if the police chief is appointed he shall  
11 be directly responsible for the efficient  
12 administration of the day-to-day operations in the  
13 department which among other things would include under  
14 the statute (a) he would have the authority to  
15 administer and enforce rules and regulations... for the  
16 disposition and discipline of the force against  
17 officers and personnel. (c) prescribe the duties and  
18 assignments of all subordinates and other personnel;  
19 and (d) delegate his authority as he may deem necessary  
20 for the efficient operation of the force to be  
21 exercised under his discretion and supervision.

22 So while the police chief is the day-to-day  
23 operations, the "appropriate authority" creates policy  
24 by developing rules and regulations governing the  
25 department, the statute defines appropriate authority

1 as follows. As used in the section "appropriate  
2 authority" I'm reading directly from the statute,  
3 "means the Mayor, manager, or other appropriate  
4 executive or administrative officer such as a full time  
5 director of public safety or governing body, or any  
6 designated committee or member thereof or any municipal  
7 board or commission established by ordinance for such  
8 purpose as shall be provided by ordinance in a manner  
9 consistent with the degree of separation of executive  
10 and administrative powers and legislative powers  
11 provided for in the charter form of government, either  
12 adopted by the municipality or under which the  
13 governing body operates."

14 The ordinance further envisions that entities  
15 such as the CCRB may be pointed by the governing body  
16 to examine the operations of the department. And I  
17 would as I did during oral argument, focus on the word  
18 examine which I believe has meaning. So what this part  
19 of the statute says is "nothing herein contained shall  
20 prevent the appointment by the governing body of  
21 committees or commissions to conduct investigations of  
22 the operations of police force and the delegations of  
23 such committees or commissions of such power of  
24 inquiry, as the governing body deems necessary to  
25 conduct such hearings or investigations authorized by

1 law.

2 Nothing herein contained shall prevent the  
3 appropriate body or any executive or administrative  
4 officer charged with the general administrative  
5 responsibilities within the municipality from examining  
6 at any time the operations of the police force or the  
7 performance of any officer or member thereof."

8 In this Court's view the examination of  
9 operations of the force or of the conduct of any  
10 particular officer is meant as an oversight function to  
11 examine and remedy systemic problems in the police  
12 force. The day-to-day operations are the  
13 responsibility of the police chief. The over -- the  
14 day-to-day responsibilities of the police chief include  
15 the power to appoint individuals within the internal  
16 affairs department to investigate complaints against  
17 police officers and to file complaints against officers  
18 arising from misconduct. "Under present law the chief  
19 of police has a responsibility to file police  
20 disciplinary charges since N.J.S.A. 40A:14-118A gives  
21 the chief of police the authority to 'administer and  
22 enforce rules and regulations... for the disposition  
23 and discipline of the force.'" The Mayor and Council  
24 of the City of Bridgeton 194 N.J.Super. 468, 491 (APP.  
25 DIV. 1984) (cert denied 99 N.J. 148 (1984)).

1 Judge Trautwein of the Appellate Division  
2 further explained that in administering the day-to-day  
3 operations of the force, the police chief was empowered  
4 to delegate -- to designate personnel who will conduct  
5 investigations of police misconduct. In coming to this  
6 conclusion, Judge Trautwein reviewed the legislative  
7 history of N.J.S.A. 40:14-118.

8 The Court pointed out that the legislative  
9 history of a statute may be resorted to for  
10 "confirmation of literally apparent meaning" citing  
11 Service Armament Co v. Hyland, 70 N.J. 550, 560 (1976).  
12 Judge Trautwein noted that the legislative history of  
13 N.J.S.A. 40A:14-118 reflects the attention of the  
14 statute is to empower the police chief to run the day-  
15 to-day operations and for the appropriate authority to  
16 develop the rules and regulations as to how those  
17 operations should be implemented.

18 Judge Trautwein noted that the expressed  
19 words of the statute reflect the intent of the  
20 "appropriate authority" is empowered to prescribe the  
21 rules -- I'm sorry -- prescribe the duties and powers  
22 of the police chief and his obligations thereunder to  
23 execute the rules and regulations of the police  
24 department. Gauntt 194 N.J.Super at 482. In Gauntt  
25 Judge Trautwein expressed that there may be some

1       ambiguity in the meaning of Section 118 of the Statute.  
2       However, he indicated that the legislative history of  
3       N.J.S.A. 40A:14-118 clarifies the statute's meaning.  
4       Before the 1981 enactment of the statute, municipal  
5       governing bodies had brought authority to regulate the  
6       internal affairs function of police departments  
7       including authority to prescribe the duties and  
8       functions of police officers. The powers of a police  
9       chief originated from the municipal ordinances and  
10      regulations. To this end the Court cited Smith versus  
11      Township of Hazlet, 63 N.J. 523, 526-27 (1973).

12               A proposed amendment to N.J.S.A. 40A:14-118  
13      first submitted in April of 1979, is bill number 1317  
14      would have added a paragraph to the legislation to  
15      provide that a municipal ordinance establishing a  
16      police department "shall have except where specifically  
17      provided to the contrary by law, provide that the chief  
18      of police shall be the chief executive head of the  
19      police department, and shall be responsible to the  
20      governing body for the efficiency thereof. And that he  
21      shall (1) administer and enforce rules and regulations  
22      for the disposition and discipline of the department  
23      and it's officers and employees; and (2) have exercised  
24      and discharge the functions powers of the department."

25               The senate and municipal government

1 committee's statement containing bill number 1317 dated  
2 April 23, 1979 indicates the bill's amendment was to  
3 reflect the following concerns of the New Jersey  
4 Association of police chiefs, (A) municipal officials  
5 not be permitted to bypass the police chief by  
6 assigning duties directly to his subordinates. So the  
7 police chief could not be bypassed by someone else  
8 assigning duties to his subordinates. (B) the  
9 ordinance reflected -- the statute amendment was also  
10 issued because the nature of the chief's duties and  
11 responsibilities be clarified to provide a uniform  
12 concept of that position, rather than having the nature  
13 of the position dependent upon the provisions of local  
14 ordinance. And (C) and this is most material to the  
15 Court, municipal elected officials not be permitted to  
16 interfere in the day-to-day operations of the force.  
17 Gauntt 194 N.J.Super. at 484. In Quaglietta v. Haldon,  
18 182 N.J.Super. 136, 140 (LAW DIV. 1984), the Court also  
19 observed that N.J.S.A. 14-118 was enacted to "prevent  
20 interference by officials individually in the  
21 operations of the police force."

22 The statute therefore, reflects that the  
23 police chief has the authority to run the day-to-day  
24 operations and without interference from elected  
25 officials, and that the appropriate authority would

1 develop policy through rules and regulations. Senate  
2 bill 1317 was not passed by the legislature in 1979,  
3 however an amended version of the bill passed in 1981  
4 as Senate Bill 1243 is now the present law.

5 That bill contained the changes in 1979  
6 related to the police chief. The statement of Senate  
7 Bill 1243, the comment of the statute reflect that one  
8 of the bases for the bill was "the principle of non-  
9 interference of elected officials individually, in the  
10 operation of the police force." Bill number 1243 also  
11 contained the additional provision that the chief's  
12 responsibilities included "administering the work of  
13 the force through division in such unison,  
14 administration as he finds necessary or desirable.

15 The Senate Bill 1243 was adopted on June 22,  
16 1981 with an effective date of August 24, 1981. In  
17 Gauntt plaintiff is the chief of police of the City of  
18 Bridgeton filed a complaint against its City, mayor,  
19 and council and the directors -- director of  
20 Bridgeton's Department of Police and Fire Don Maurer.  
21 As defined in the statute, Maurer is an appropriate  
22 authority. The complaint alleged that Maurer, the  
23 director of the police and fire department, and the  
24 Mayor of Bridgeton had on numerous occasions  
25 transferred police personnel and interfered with the

1 plaintiff's power to assign police personnel to  
2 specific hours and duties.

3 He further complained that Maurer and the  
4 Mayor were exercising powers in performing duties which  
5 would only be exercised by the Chief of Police pursuant  
6 to the statute and could not be exercised by them as  
7 the "appropriate authority". Plaintiff sought an  
8 injunction as the police chief, sought an injunction  
9 barring Maurer from exercising any of the functions  
10 granted to the chief of police under N.J.S.A. 40A:14-  
11 118.

12 During his testimony at trial the police  
13 chief set forth various examples of alleged  
14 interference by Maurer in the performance of the  
15 plaintiff's powers and duties as police chief. In one  
16 instance Maurer's offices advised the police chief that  
17 the investigation into an officer where the officer was  
18 campaigning on duty and Maurer's office issued the  
19 following directive to the chief of police, as per the  
20 investigation of Officer Cane's campaigning while on  
21 duty and in uniform, it appears that Officer Cane  
22 violated certain rules and regulations of the duty  
23 manual and possibly even civil service regulations.  
24 Please review the duty manual and file appropriate  
25 authorities -- I'm sorry -- please review the duty



1 manual and file appropriate charges. That's Gauntt 194  
2 N.J.Super. at 477.

3 In regard to the defendant's directive to the  
4 police chief to file disciplinary charges, the Court  
5 ruled that Maurer was of the opinion that plaintiff had  
6 ignored his duties by refusing to file a disciplinary  
7 charge against a subordinate. Maurer could have  
8 instituted disciplinary proceedings against the chief  
9 of police.

10 Under present law, the chief of police has  
11 the responsibility to file disciplinary charges since  
12 N.J.S.A. 40A:118A gives the chief authority to  
13 "administer and enforce rules and regulations...for the  
14 discipline -- for the disposition and discipline of the  
15 force and it's officers and personnel." Id. at 491.

16 The Court also pointed out that the day-to-  
17 day operations include the assignment of subordinate  
18 officers including the officers who conduct internal  
19 affairs investigations. The Court noted that Maurer as  
20 the police and fire director, and as the appropriate  
21 authority could not oversee the police department's  
22 internal affairs officer. Gauntt 194 N.J.Super. at  
23 487.

24 Thus in another instance, complained of by  
25 the police chief, the court noted that the event

1 occurred prior to the passage of N.J.S.A. 40A:14-118,  
2 that concerned Maurer's directing the police chief to  
3 change the organizational chart of the police  
4 department, which had been prepared by the police  
5 chief. The organization ordered to remove the internal  
6 affairs officer from the criminal investigation of the  
7 division and inserted the requirement that the officer  
8 with their -- would thereafter report directly to  
9 Maurer. The directive was made on or about July 16,  
10 1979.

11 The Court held that at the time of his  
12 directive Maurer had only qualified authority to  
13 determine the internal organization of the department,  
14 Ordinance number 71-10 and then controlling provided  
15 that such authority to effect the internal structure  
16 was "under direction". And therefore, may not have  
17 constituted interference with the police chief's  
18 authority and responsibilities.

19 The Court concluded, however that after  
20 August 21, 1981 the passage of N.J.S.A. 14-118 Maurer's  
21 continuing to order the internal affairs officer to  
22 report directly to him rather than to the chief was a  
23 proper. 194 N.J.Super. at 487.

24 On a separate occasion Maurer appointed  
25 Detective Tuner, one of the detectives in the

1 department to investigate money missing from a safe  
2 located in the clerk's violation office. The defendant  
3 informed plaintiff that he had assigned a detective to  
4 "complete the investigation". The police chief had no  
5 prior knowledge of the investigation into the missing  
6 monies, nor the assignment of Detective Turner to  
7 investigate.

8 With regard to the assigning Turner, the  
9 court in Gauntt at page 475 cited, "Maurer's continuing  
10 to order the internal affairs officer to report  
11 directly to him rather than the chief was improper.  
12 Maurer acknowledged that he signs complaints involving  
13 police disciplinary matters directly to Detective  
14 Turner. There were times where investigations have  
15 begun without the police chief's knowledge... Since  
16 Detective Turner is a member of the police force,  
17 N.J.S.A. 40A:14-118C mandate that his duties and  
18 assignments be prescribed by plaintiff rather than  
19 Detective Maurer." Maurer was as I indicated, was one  
20 of the individuals authorized to act as an appropriate  
21 authority under the statute.

22 The Gauntt case reflects that the appointing  
23 authority cannot interfere with the day-to-day  
24 operations of the department by directing  
25 investigations of department officers and filing

1 disciplinary complaints. The ordinance in issue  
2 plainly intrudes on the Newark Police Chief's authority  
3 to oversee day-to-day operations of internal affairs  
4 function. The CCRB is in power to file a complaint  
5 against an officer and conduct the investigations,  
6 power that the police chief can only implement in his  
7 responsibilities to manage day-to-day operations.  
8 Clearly if the appointing authority such as the mayor  
9 and council have no such power, they cannot transfer  
10 this power to the CCRB in violation of the statute.

11 The Gauntt case clearly reflects that the  
12 police chief, not an outside body such as the CCRB has  
13 the power to file complaints and investigate civilian  
14 complaints. Giving the power to file charges against  
15 police officers and to investigate such charges  
16 violates the provisions of N.J.S.A. 14-118, which were  
17 developed to avoid political interference with the day-  
18 to-day operations.

19 The pointing authority, the mayor and the  
20 council which are political bodies cannot transfer  
21 power that they do not possess to another entity under  
22 the statute. It should be emphasized that the Gauntt  
23 recognizes there are times when a police chief does not  
24 correctly discharge his duties. However, the remedy is  
25 to discharge the police chief, not to take over his

1 duties such as internal investigations, and filing  
2 complaints which is part of the police chief's day-to-  
3 day operation and responsibilities.

4 I would next like to turn to the due process  
5 issues that I see in this case. And I see the due  
6 process issues a little bit differently than both  
7 counsel. Under the New Jersey Constitution, the public  
8 employee has a property interest in continued  
9 employment for police officers. The employment  
10 contract requires a just cause standard be met for  
11 termination. Nicoletta v. North Jersey District Water  
12 Supply Commission, 77 N.J. 145, 154 (1978).

13 Two New Jersey statutes provide for due  
14 process protections for police officers. N.J.S.A. 11:A  
15 -- I'm sorry N.J.S.A. 11A:2-3 which appears to be part  
16 of the Civil Service Law, provides "except as otherwise  
17 provided herein before any disciplinary action in  
18 Section A123 of N.J.S.A. 11A:2-6 is taken against a  
19 permanent employee in the career services, or person  
20 serving a working test period, the employee shall be  
21 notified in writing and shall have the opportunity to  
22 have a hearing before the appointing authority or its  
23 designated representative, the hearing shall be within  
24 30 days of notice of disciplinary action unless waived  
25 by the employee. Both parties may consent to adjourn

1 it to a later date.

2 Similarly, police officers are afforded  
3 statutory due process by N.J.S.A. 40A:14-147 for  
4 discipline. The statute mandates that no member or  
5 officer of the police department, and this is a quote,  
6 "no permanent member or officer of the police  
7 department can be removed from his office, employment  
8 or position for any political reasons, or for any cause  
9 other than incapacity, misconduct, or disobedience of  
10 rules and regulations established for the government,  
11 police department; nor shall any -- nor shall such  
12 member or officer be suspended, removed, fined, or  
13 reduced in rank from an office, or position they're in  
14 except for just cause as herein provided, and then only  
15 upon a written complaint setting forth the charge or  
16 charges against such member."

17 There are time periods in this statute that  
18 require that the complaint be served within no less  
19 than 10, no more than 30 days from the finding of  
20 charges. It also indicates that once the complaint is  
21 filed against the police officer, that complaint has to  
22 be resolved within 45 days.

23 The Fraternal Order of Police Lodge No. 1  
24 Camden versus City of Camden Police Department 368 N.J.  
25 56 (LAW DIV. 2003) illustrates the relationship between

1 the statutory due process, protections afforded to  
2 police officers and investigations that could result in  
3 discipline. In Camden the chief of police issued a  
4 directive to internal affairs discipline on March 28th,  
5 2003 subsection F of that directive provided the  
6 employees facing minor disciplinary actions would not  
7 be entitled to a hearing.

8 On April 25, 2003, a preliminary notice of  
9 disciplinary action was filed against an officer of the  
10 Camden Police Department who was charged with the  
11 violation of the Camden Police Department disciplinary  
12 code in failing to conduct proper and thorough and  
13 complete investigations. The officer requested a  
14 departmental hearing. Additionally, he requested  
15 advanced notice of the hearing so that he could have  
16 council present on the basis of the directive issues by  
17 the chief.

18 The officer was not afforded a departmental  
19 hearing, and he was summarily disciplined after  
20 reviewing the relevant statutes. The Court in Camden  
21 found that the officer was entitled to a hearing under  
22 N.J.S.A. 40A:14-147. Thus the requirements of a  
23 hearing applies whether there is major or minor  
24 discipline.

25 In Nicoletta the North Jersey District of

1 Water Supply Commission, 77 N.J. 145 (1978), the Court  
2 addressed the due process rights of police termination  
3 cases, and I would like to quote a statement in which I  
4 think provides an apt summary of due process rights for  
5 the purpose of this case at pages 164 to 165 of that  
6 case, which states, "In examining the components of a  
7 fair hearing, under due process norms, in the case such  
8 as the present one, we adopt the philosophy in the  
9 manner of it's implementation stated by the United  
10 States Supreme Court in Marcy versus Brewer, 408 U.S.  
11 471, (1972).

12           Thereafter, the Supreme Court adopted the  
13 following principles articulated by the U.S. Supreme  
14 Court in Marcy and quoted those principles on page 165  
15 of its opinion which are as follows: "Once it is  
16 determined that due process applies the question  
17 remains what process is due." It has been said so  
18 often by this Court and others as not to require a  
19 citation of authority, due process is flexible and it  
20 calls for such procedural protection as the articular  
21 situation demands.

22           "Consider of what due process my require  
23 under any given set of circumstances must begin with a  
24 determination of the precise nature of the governmental  
25 function involved as well as the private interest that



1 has been effected by the governmental action."

2 Cafeteria and Restaurant Workers versus McElroy, 367

3 U.S. 886 (1961).

4           It's flexibility is in its scope once it has  
5 been determined that some process is due. It is a  
6 recognition that all situations calling for procedural  
7 safeguards call for the same kind of procedure. Then  
8 they have three stars and then it goes on to say what  
9 is needed is an informal hearing structured to destroy  
10 the finding \*\*\* will be based on verified facts in the  
11 exercise of discretion will be informed by accurate  
12 knowledge of the behavior.

13           We now turn to the nature of process that is  
14 due bearing in mind the interest of the parties will be  
15 furthered by an effective but informal hearing. 408  
16 U.S. 484-85.

17           Our task is limited to deciding the minimum  
18 requirements of due process. They include (a) written  
19 notice of the claim violations; (b) disclosure of  
20 evidence; (c) opportunity to be heard in person and to  
21 present witnesses and documentary evidence; (d) the  
22 right to confront, cross examine adverse witnesses  
23 unless hearing officer specifically finds good cause  
24 for not allowing confrontation; (e) I want to focus on  
25 this, a "neutral and detached hearing body" members of

1 which may not be judicial officers and lawyers; and (f)  
2 a written statement by the fact-finder as to the  
3 evidence relied on. 488 U.S. 488-89. That was a quote  
4 in Nicoletta.

5 The Court is concerned that the process under  
6 the CCRB violates due process in various ways. First  
7 the Court has concerns as to whether there -- the CCRB  
8 can be a neutral and detached hearing body. Turning to  
9 N.J.S.A. 40A:14-147, the statute says that no member of  
10 the force can be removed from it's employment "for  
11 political reasons".

12 What gives the Court pause and I certainly  
13 want to be clear that I'm not trying to impugn the  
14 integrity of any of the organizations involved in this  
15 case whose participation is heartfelt and laudable.  
16 But the Court cannot ignore that several members of the  
17 CCRB are the ones that advocated change to the  
18 structure of police discipline because it was not  
19 effective. And the potential and I'm not say this will  
20 be reality but I have to look at potential. The  
21 potential that discipline could be taken for political  
22 reasons is an inherent risk of this ordinance, the  
23 nature of it being public, the nature of the selection  
24 of any of the members by the mayor. And I'm not in the  
25 slightest way suggesting that Mayor Baraka has anything

1 other than the highest integrity.

2 But it's possible that down the road there  
3 could be a mayor who does not have such high integrity.  
4 The potential for political mischief with this body is  
5 evident. And the -- there is a question in this mind  
6 as to organizations which advocated this change should  
7 be members of this body and you know, the Court would  
8 note that I read a letter earlier about changing,  
9 implementing this ordinance which was advocated by the  
10 ACLU, the NAACP, the People's Organization for  
11 Progress, the Ironbound Community Corporation, and by  
12 LGBTQ Organization.

13 There is a huge risk with the ordinance as  
14 crafted that there could be a neutral and detached  
15 decision-maker. And from a due process perspective  
16 that is a challenge that cannot be fixed, at least  
17 under the ordinance as crafted, despite it's very good  
18 intentions.

19 But the Court's concern does not end there.  
20 The ordinance indicates that the CCRB is empowered both  
21 to investigate and to hear matters. And investigating  
22 and hearing matters are completely separate functions  
23 which in this Court's view are antithetical to each  
24 other. So if -- and paragraph 3i says the board shall  
25 have the power to receive, investigate, hear, make

1 findings, and recommended action upon complaints by  
2 members of the public against the sworn personnel of  
3 the Newark Police Department. Likewise, the section 1-  
4 02 under -- which is under Roman Numeral 5 (V) of the  
5 ordinance regarding the rules of the civilian complaint  
6 board likewise provides such (indiscernible)  
7 investigatory hearing and fact finding  
8 responsibilities.

9           The -- a fair and impartial hearing on  
10 whether it's by the judiciary by an arbitrator, by a  
11 municipal court, clearly reflects that the  
12 investigation hole is akin to something that a  
13 partisan, an attorney, a prosecutor would take. And  
14 the adjudicative function is more of a judicial  
15 function. And those functions are at odds with each  
16 other. And although it is not directly on point, I  
17 think it's -- the court would reference IN RE: D'Elia  
18 216 N.J. 2014 in which a municipal court judge was  
19 disciplined where he questioned litigants when a  
20 prosecutor wasn't present. And therefore acted both as  
21 the prosecutor, and the hearing officer. And in  
22 essence the State Supreme Court found that such conduct  
23 in the Court's view was a "flagrant and obvious error".

24           Now I recognize that the facts of D'Elia are  
25 much different than this case. But I think what the

1 D'Elia court teaches us is something that I think is  
2 standard operating procedure for any fundamental due  
3 process circumstance. The same body cannot be  
4 investigating and making factual hearings. Certainly,  
5 there have been -- I don't know if it's Ethics Rules or  
6 there are cases on this, but the Court is well aware of  
7 the fact that the judiciary you know, cannot deciding a  
8 case, can't go out and investigate a case while they're  
9 deciding it. Those role are antithetical to a fair  
10 hearing.

11 So although, as I said all of this is well-  
12 intentioned, it can't survive due process scrutiny.  
13 The -- the problems don't end there. There is inherent  
14 in any due process, there has to be fundamental  
15 fairness. And the Court finds that unintentionally,  
16 because I don't -- I tried to say this during oral  
17 argument and I really mean it. The motives in this  
18 case could not be purer. But the effect,  
19 unfortunately, does not match up with the motives.

20 Here there can be parallel hearings going on  
21 at the same time. Thus, in paragraph three -- I'm  
22 sorry in Section 3, paragraph 3 it indicates that "the  
23 jurisdiction of the board shall be concurrent with that  
24 of the NPD to investigate complaints and behavior."  
25 And Paragraph 1-06 of Article 5 regarding the rules of

1 the civilian complaint board, provide that -- provides  
2 among other things that "that the board will  
3 contemporaneously initiate a parallel investigation of  
4 the complaint or behavior with the Division of Police."

5 So in essentially -- essentially what this  
6 ordinance provides is that a police officer can be  
7 subject to investigations at the same time involving  
8 the same conduct. And in theory, could be subject to  
9 two hearings on the same charges. And either the  
10 investigations or more significantly, the hearings  
11 could result in inconsistent results. How -- and  
12 because of that, as an operational matter the Court  
13 believes that the rules of fundamental fairness are  
14 violated, although not intentionally. And from -- as I  
15 went over with the one case and as I indicated also  
16 from the legislative history Section 19 of the Statute,  
17 the plain authority and the authorities are not  
18 supposed to interfere with the day-to-day operations.  
19 And those day-to-day operations include the internal  
20 affairs function.

21 And I recognize that there is a significant  
22 problem that needs to be remedied, but this is not the  
23 way to do it. There are ways to do it. And I think  
24 the ordinance correctly looks at some of those ways by  
25 developing disciplinary matrix. They also have certain

1 oversight powers which will allow them to intercede.

2 They do not have the right in this Court's  
3 view from a due process point of view to make the  
4 police officer at issue subject to separate hearings on  
5 the very same conduct before two different bodies.  
6 And as I said I'm very concerned about the potential  
7 for inconsistent results.

8 There is also a further concern that the  
9 ordinance as written could interfere with -- interfere  
10 is a bad word -- but the -- the ordinance provides  
11 under certain circumstances an extra layer of review,  
12 which I think intrudes on the Court's functions on the  
13 civil service law.

14 And what I am concerned about is paragraph --  
15 paragraph on page 4 of the ordinance, which relates to  
16 -- it's in subsection four on that page, for some  
17 reason it appears the pages of the ordinance I was  
18 given were out of order, so that's why I'm looking at  
19 that particular page.

20 In any event, what it says is findings and  
21 recommendations of the board and the basis therefore  
22 including those that may relate to suggested policy and  
23 procedures, not specific to any particular  
24 investigation or complaint shall be submitted to the  
25 public safety director. And then it goes on to say and

1 this is the important sentence to me, "no finding or  
2 recommendation shall be based solely upon an unsworn  
3 complaint or statement, nor shall any -- nor shall  
4 prior unsubstantiated or unfounded or withdrawn  
5 complaints be the basis for any such finding or  
6 recommendation with regard to a particular complaint,  
7 but such findings or recommendations shall be grounded  
8 in a residuum of some competent support or evidence."

9 So apparently, the way that I read this, is  
10 that the CCRB can review the findings of the -- of --  
11 in a particular hearing that might find something  
12 unfounded. And if there is a challenge to the findings  
13 in a hearing, that challenge has to be determined by a  
14 *de novo* review in the Superior Court. That principle  
15 is stated on the Fraternal Order of Police Lodge No. 1  
16 versus Camden, City of Camden 368 N.J.Super. at 64.

17 So essentially what may be occurred here is there may  
18 be an extra layer of review, which is not allowed under  
19 civil service law and intrudes upon the due process  
20 guarantees under the civil service law.

21 The Court is also concerned about the  
22 constraints placed upon the public safety director that  
23 you know once -- and this is in Article 4C on page  
24 five, where it states in any case substantiated by the  
25 board in which the public safety director finds clear



1 error. So we talked before that the public safety  
2 director has to find clear error, which is a very  
3 exacting standard, or intends to impose -- maybe I  
4 should go back to that for a minute, just because it is  
5 an important concept.

6 Article 9 on page 6, which for some reason  
7 the copy that I have comes before page 5. It says the  
8 board shall -- I'm sorry it's Article 11. I'm sorry.  
9 It's right there Subsection 11. The Board shall  
10 provide it's findings of fact to the public safety  
11 director and absent clear error, the public safety  
12 director shall accept those findings of fact. The  
13 board shall also make disciplinary recommendations and  
14 the public safety director shall make disciplinary  
15 decisions based on the CCRB's findings of fact absent  
16 clear evidence in consist with the matrix guidelines.

17 And then it goes on to say, this is in  
18 paragraph four, Section 4C on page five, in any case  
19 substantiated by the board in which the public safety  
20 director finds clear error in the findings of fact, or  
21 intends to impose discipline, that is of a lower level  
22 recommended by the board, or by the Newark Police --  
23 NPDs police trial board, the public safety director  
24 shall notify the CCRB in writing prior to the  
25 imposition of such discipline detailing the specific

1 reasons for the decisions not to accept the CCRBs  
2 findings of fact, or to impose the discipline  
3 recommended by the CCRB or the police trial board. The  
4 board may then request that the public safety director  
5 appear in person before the board for further  
6 explanation or to address questions from the board.  
7 The public safety director shall cooperate with such  
8 requests to appear before the board.

9 I appreciate the fact that -- that these  
10 provisions were crafted in a narrow to give  
11 transparency to the process. But unfortunately, they  
12 may not have their intended effect. And I have to look  
13 on what I review ordinances, or legislation to see if  
14 there are any unintended consequences from a due  
15 process perspective. And that's all I'm looking at is  
16 it's from a due process perspective. And from a due  
17 process perspective there is a potential that the  
18 actions of the police director would be publicized and  
19 that the hearing process would be politicized and this  
20 process is unfortunately prone to political abuse. And  
21 as I said, I don't mean to impugn the integrity of  
22 anybody who has done this, because one thing that is  
23 crystal clear to me is that everyone is trying to  
24 improve a broken system, that's profoundly broken.

25 Unfortunately for the reasons that I just

1 outlined the Court finds that the statute -- I'm sorry  
2 that the ordinance as written and that the  
3 investigation and hearing process in the ordinance is  
4 in violation of due process.

5 I would like to next turn to -- and I just  
6 want to ask I'm going to continue but if anyone wants a  
7 little bit of a break I'll certainly give it to you.  
8 But I have a fair amount more to do. But if not I'll  
9 continue. Okay.

10 Internal affairs investigations by law  
11 enforcement agencies fall under the supervision of the  
12 Attorney General who is New Jersey's Chief Law  
13 Enforcement Officer. The Guidelines were adopted  
14 pursuant to the authority granted to the Attorney  
15 General set forth in N.J.S.A. 40A:14-81 which states  
16 "every law enforcement agency...shall adopt and  
17 implement guidelines which shall be consistent with the  
18 guidelines governing the 'internal affairs policies and  
19 procedures' of the police management manual promulgated  
20 by the police bureau of the Division of Criminal  
21 Justice and the Department of Law and Public Safety and  
22 shall be consistent with any tenure or civil service  
23 laws, but shall not supercede existing contractual  
24 agreements."

25 The statute "statute requires every law

1 enforcement agency to adopt and implement guidelines  
2 consistent with that Attorney General's Internal  
3 Affairs policies and procedures." McElwee v. Borough  
4 of Fieldsboro, 400 N.J.Super. 338, 395 (APP. DIV.  
5 2008). The Attorney General's internal affairs  
6 policies and procedures were first published in 1991  
7 and they're available online. It states the policies  
8 were promulgated in 1992, 2011, 2014 and recently in  
9 November of 2017. Just so counsel knows what I'm doing  
10 here, I did go online and for that I think I have the  
11 authority to do so, just to get the latest version of  
12 the guidelines, because I'm making a decision in 2018.  
13 I don't think that there are material changes in the  
14 guidelines, but I do want to be clear to all counsel  
15 that I've tried to look at the most recent versions,  
16 just so everyone knows I don't have any deep, dark  
17 secrets. I worked at this at home and forgot to bring  
18 the pleadings home with me, so I looked it up online  
19 and that's when I discovered that there was a later  
20 amendment. I wasn't fishing around for this. I just  
21 wanted to get this opinion finished.

22 In any event, referencing N.J.S.A. 48:14-181  
23 the guidelines discuss the importance of the internal  
24 affairs function in law enforcement agencies to  
25 investigate complaints and different types of

1 Constitutional rights in civil liberties of the state's  
2 citizens. Further, "strict adherence" to the policy  
3 and procedures by "subordinate law enforcement  
4 agencies" is demanded and so that's what contained in  
5 the guidelines. And if you look at the -- I mean I'm  
6 sorry in the statute.

7 So as I indicated strict adherence to its  
8 policies and procedure is a mandate. The guidelines  
9 themselves underscore the mandatory compliance expected  
10 by municipal authorities on page 3 all of this comes  
11 from the November 2017 version. But when I checked I  
12 didn't see very many -- any substantive changes to what  
13 I'm reading.

14 "It is" -- this is on page three of the  
15 guidelines, "It is important for every county in  
16 municipal law enforcement agencies to recognize that as  
17 they conduct internal affairs investigations, they do  
18 so under the general supervision of the Attorney  
19 General. The Criminal Justice Act of 1970 designates  
20 the Attorney General as the State's Chief Law  
21 Enforcement Officer. N.J.S.A. 52:17B-98, as the  
22 Attorney General is responsible for the supervision of  
23 the State's law enforcement agencies to provide the  
24 efficient administration of the criminal justice  
25 system. Subordinate law enforcement agencies including

1 county and municipal police forces have a duty to  
2 cooperate with the Attorney General to improve the  
3 administration of the criminal justice system,  
4 including the efficient delivery of police services,  
5 the county and municipal law enforcement agencies,  
6 cooperation, and internal affairs matters begins with  
7 strict adherence to the Attorney General's policy  
8 requirements." And that section, I read, came off of  
9 page four.

10 Continuing on page four, the guidelines state  
11 that "county and municipal law enforcement agencies  
12 must recognize that they conduct internal affairs  
13 investigations, particularly those that involve  
14 allegations of criminal conduct under the direct  
15 supervision of county prosecutors. County and  
16 municipal law enforcement agencies must inform the  
17 appropriate county prosecutor when allegations of  
18 police misconduct involve potential criminal conduct.  
19 In addition, county and municipal law enforcement  
20 agencies must confer with and follow the instructions  
21 given by the County prosecutor in all critical points  
22 in the investigative process."

23 This is particularly true when the agency is  
24 in the process of gathering evidence including the  
25 taking of statements concerning allegations of criminal

1       conduct. I would note that that also creates what I  
2       just read a conflict between what the CCRB is trying to  
3       accomplish and what the guidelines are trying to  
4       accomplish. And the guidelines, although it may not be  
5       intended, the CCRB's investigation may taint a criminal  
6       prosecution. It goes on to say on page four, "the  
7       revised policy contains several mandates, that at the  
8       Attorney General's direction every law enforcement  
9       agency must implement.

10               However the manner in which these agencies  
11       must implement these mandates is a decision that is  
12       left to the individual law enforcement agencies  
13       discretion. For instance, every agency must establish  
14       an internal affairs function. But the manner in which  
15       the mandate is satisfied is a decision left to the  
16       discretion of the individual agencies, individual  
17       agencies shall decide based on the characteristics of  
18       their jurisdiction, the workload of their agency,  
19       whether the internal affairs function is a full or  
20       part-time unit, and how many officers are assigned to  
21       work in that unit."

22               This particular provision is consistent with  
23       the -- what is contained within Section 118 of the  
24       Statute that we discussed earlier, that the day-to-day  
25       operations are run by the department; the policy is set

1 by the appointing authority. And as the very  
2 foundation of the statute indicates, there is not  
3 supposed to be political interference with police  
4 operations. The CCRB has drafted -- and as I'm saying  
5 that, I'm not saying that what the current Mayor is  
6 trying to do, or what the current counsel is trying to  
7 do, but the way it is written it is open to conflicting  
8 directly with the guidelines and impairing the ability  
9 of law enforcement to fulfill it's obligations.

10 I would like to mention a concept which I  
11 will circle back to a little later. The way I read the  
12 guidelines, the guidelines require a certain level of  
13 expertise in the implementation of the internal affairs  
14 option. Thus, on page five of the November 2017, in  
15 addition to the guidelines, it says each agency shall  
16 ensure that officers assigned to the internal affairs  
17 functioning complete training as mandated by the  
18 Division of Criminal Justice. I just think that bears  
19 repeating. It requires training as mandated by the  
20 Division of Criminal Justice.

21 So there is a level of expertise that is  
22 needed by experienced law enforcement officers to  
23 properly execute this function. And the CCRB which  
24 would have no police members, say the Inspector General  
25 if he were a current or former police officer, has any



1 police experience. And therefore, it conflicts again  
2 with the functions of the internal affairs under the  
3 guidelines. And continuing on page five, it says the  
4 above represents critical performance standings that  
5 every county and municipal enforcement agency must  
6 implement. Agencies that make a vigorous commitment to  
7 internal affairs process signal their desire to comply  
8 with the highest standards of professionalism in law  
9 enforcement.

10 And as an oversight body the CCRB can oversee  
11 the operations of the police department to make sure  
12 that they comply with those highest standards of  
13 professionalism. But that isn't oversight, not  
14 operational function. And it goes onto say further on  
15 page five, after citing a number of reasons, some of  
16 which I've already laid out, that it is for these  
17 reasons that the Attorney General has issued this  
18 policy and directed the State's law enforcement  
19 agencies to implement the critical mandates set forth  
20 by the policy. Again, I would highlight that these are  
21 critical mandates.

22 But you know, N.J.S.A. 40A:14-181 requires  
23 that every law enforcement agency in the State adopt  
24 and implement guidelines that are consistent with the  
25 guidelines promulgated by the Attorney General through

1 the police bureau and the Division of Criminal Justice.  
2 O'Rourke versus City of Lambertville 4 N.J.Super. 8  
3 (APP. DIV. 2008) (cert denied 198 N.J. 311). In -- in  
4 O'Rourke the Appellate Division explained the  
5 importance of a municipality complying with the  
6 Attorney General's guidelines. In O'Rourke the City  
7 Council terminated plaintiff Michael O'Rourke a  
8 Lambertville Police Officer. O'Rourke sued defendants,  
9 the City, it's Mayor, members of the city council.  
10 Bruce Cocuzza the director of the police department at  
11 the time that the case was heard Lambertville had 10  
12 full time police officers and six civilian employees  
13 working for the police department. The police director  
14 Bruce Cocuzza was also a civilian employee. Cocuzza  
15 investigated O'Rourke for among other reasons,  
16 conducting unauthorized and improper employee  
17 background investigations, contrary to Cocuzza's order  
18 as police director. Prior to deciding to perform the  
19 investigation himself, Cocuzza attempted to assign the  
20 investigation to Jeffrey Jones, who was the officer  
21 assigned to the police departments internal affairs  
22 unit.

23 Jones was uncomfortable with conducting the  
24 investigation because he knew O'Rourke for 17 or 18  
25 years and suggested that the prosecutor's office

1 conduct the internal affairs investigation. Cocuzza  
2 decided the alleged misconduct -- that he would  
3 investigate the alleged misconduct himself, even though  
4 some of the misconduct involved violation of his  
5 directives as police director.

6 The City Council held a hearing after  
7 Cocuzza's made the investigation and made  
8 recommendations and found O'Rourke guilty of  
9 insubordination and failure to comply with the superior  
10 order, neglect of duty, failure to notify the police  
11 department internal affairs unit of criminal activity,  
12 and conduct unbecoming a police officer.

13 The trial court reinstated O'Rourke with back  
14 pay holding that by not referring the investigation to  
15 the internal affairs unit, the director violated the  
16 department's internal affairs procedure, the New Jersey  
17 Attorney General Guidelines, and N.J.S.A. 40A:14-181.  
18 It ruled that the City's failure to adhere to the  
19 guidelines deprived the officer of due process. On  
20 appeal the Appellate Court did not agree that the  
21 officer was deprived of due process, however, Judge  
22 Yannotti of the Appellate Division agreed that the  
23 investigation was not properly conducted under the  
24 City's rules, which were promulgated in accordance with  
25 the Attorney General Guidelines.

1                   Accordingly Judge Yannotti ruled that when a  
2 municipality adopted rules governing disciplinary  
3 actions for members of the police force, pursuant to  
4 N.J.S.A. 40A:14-181, to implement the guidelines  
5 promulgated by the Attorney General, the municipality  
6 was required to comply with those rules and the City's  
7 failure to do so invalidated the decision to remove the  
8 order -- officer, I'm sorry.

9                   In connection with the trial and the appeal,  
10 O'Rourke claimed among other things that Cocuzza  
11 exceeded his authority by conducting the investigation  
12 into the charges in so doing violated the department's  
13 internal affairs procedures, the Attorney General  
14 Guidelines and the statute. He also -- the there is a  
15 portion of the decision which addresses the issue of  
16 due process. But I would like to focus on is part of  
17 the decision that in which the Court found that the  
18 investigation was not conducted in the conformity with  
19 the Attorney General guidelines and the rules and  
20 regulations it adopted as a result.

21                   So on pages -- O'Rourke is at 405 N.J.Super.  
22 at 18 to 19 the Court makes the following ruling, and  
23 this is all a quote:

24                   "In our judgment Cocuzza's failure to comply  
25 with the City's rules does not rise to the plaintiff's

1 constitutional right to due process. Nevertheless, we  
2 are convinced that Cocuzza's failure to comply with the  
3 City's rules warrants affirming of the trial court's  
4 order reinstating plaintiff to his position in the  
5 City's Police Department. The rules at issue here were  
6 adopted pursuant to N.J.S.A. 40A:14-181. The statute,  
7 'which requires every law enforcement agency' in the  
8 State to 'adopt and implement guidelines' that are  
9 'consistent with the guidelines' that have been  
10 promulgated by the Attorney General from the Police  
11 Bureau and Division of Criminal Justice. The Attorney  
12 General's Guidelines state that every law enforcement  
13 agency must establish an internal affairs unit, 'to  
14 establish a mechanism for the receipt, investigation,  
15 resolution of complaints of officer misconduct'. The  
16 internal affairs unit 'will consist of those personnel  
17 department assigned to internal affairs by the agencies  
18 law enforcement executive'. The guidelines detail the  
19 procedures that must be followed in the investigation  
20 of complaints concerning law enforcement officers  
21 including 'serious infractions'.

22           Serious complaints that are involved in this  
23 case must be referred 'to the internal affairs unit', and  
24 investigated by an internal affairs investigator."

25           The guidelines additionally state that the

1 internal affairs investigator "must strive to conduct a  
2 thorough and objective investigation without violating  
3 the rights of the subject officer, or any other law  
4 enforcement officer." According to the guidelines the  
5 investigator must submit "an objective investigation  
6 report. The report must recount all of the facts of  
7 the case and a summary of the case along with  
8 conclusions for each allegation for further action."

9 Then on pages in O'Rourke, 405 Super. at  
10 pages 20 to 21, the Court goes on to say, in this  
11 matter it is undisputed that Cocuzza failed to adhere  
12 to the City's rules when he investigated his own  
13 allegations that the plaintiff engaged in 'serious'  
14 conduct. As noted Cocuzza undertook the investigation  
15 himself even though he was not a member of the  
16 department assigned to the internal affairs unit.

17 Clearly Cocuzza was not authorized to  
18 investigate the matter. According to the City's rules  
19 allegations of serious misconduct must be investigated  
20 by a member of the department who has been assigned to  
21 the internal affairs unit. The results of the  
22 investigation are ultimately presented to the police  
23 director. But under the City's rules the  
24 responsibility of the investigation rests with the  
25 internal affairs unit, not the director.

1           Moreover the City's rules require that the  
2 investigation be undertaken in a fair and objective  
3 manner, because the principle allegations here was that  
4 plaintiff acted in defiance of one of Cocuzza's  
5 directives and because Cocuzza was himself the focus of  
6 one of plaintiff's alleged background checks, Cocuzza  
7 could not be expected to perform the kind of objective  
8 investigation required by the Attorney General's rules  
9 and the City's rules.

10           As the Court has previously -- let me just  
11 state this in O'Rourke there are two instances of  
12 failure to comply with the guidelines. Municipalities  
13 have discretions to promulgate rules and regulations  
14 that are consistent with its needs. However, such  
15 rules need to comply with the guidelines.

16           As I indicated earlier, there are -- there is  
17 a significant risk that there may not be a fair and  
18 objective investigation by the CCRB despite it's good  
19 intentions. And that at least in so far as I read  
20 O'Rourke, O'Rourke indicates that the appointing  
21 authority can't do the investigation. The  
22 investigation has to be performed by the police chief,  
23 again, consistent with the provisions of N.J.S.A.  
24 40A:14-118 that I previously discussed.

25           I think that Amici argues that O'Rourke can

1 be distinguished from present circumstances because  
2 O'Rourke was decided on the basis of the violation of  
3 City employees. However, it is clear from the opinion  
4 that the rules are ones that are mandated by the  
5 guidelines. Thus, at the very end of the decision the  
6 Court states in summary and this is 405 N.J.Super. at  
7 page 23 in summary we are convinced that when a law  
8 enforcement agency adopts rules pursuant to N.J.S.A.  
9 40A:14-181 to implement the Attorney General's  
10 Guidelines, the agency has an obligation to comply with  
11 those rules. But it failed to do so. And because of  
12 these -- because the deficiencies tainted the  
13 disciplinary process, the City's decision to remove  
14 plaintiff from the position cannot stand.

15 The Guidelines require that misconduct be  
16 investigated by the internal affairs unit, and that a  
17 failure to do so is improper. The CCRB conflicts with  
18 the guidelines in such conflict with State policy  
19 cannot exist in the context of the current ordinance.  
20 And I would like to turn to the preemption argument  
21 which a municipality may not contradict a policy the  
22 legislature establishes. Auto Right Supply Co v. Mayor  
23 and Township Committeemen of Woodbridge, 25 N.J. 188,  
24 (1957).

25 Hence an ordinance will fail if it permits



1 what a statute expressly forbids, or forbids what a  
2 statute expressly authorizes. Even absent such evident  
3 conflict, a municipality may be unable to exercise the  
4 power it would otherwise have if the legislature has  
5 preempted the field. This follows from the basic  
6 principle that local government may not act contrary to  
7 State Law, but in an attempt to occupy the field as  
8 (indiscernible) Kennedy v. City of Newark 29 N.J. 178,  
9 187 (1959). And the previous passage was taken from  
10 Summer v. Teaneck 53 N.J. 548, 554 (1968).

11 In Redd, R-E-D-D versus Bowman, 223 N.J. 87,  
12 (2015) our Supreme Court provides guidance as to how  
13 Courts should analyze preemption issues. And I believe  
14 on page -- and I'm going to quote the following  
15 passage, the passage from Redd versus Bowman at pages  
16 108 to 109.

17 "A court may declare an ordinance invalid if  
18 it is preempted by a superior legal authority. Rumson  
19 States Inc. versus Mayor of Fairhaven, 177 N.J. 338,  
20 351 (2003) (citing United Building and Construction  
21 Trades v. Mayor of Camden 88 N.J. 317, 343 (1982),  
22 'Preemption is a judicially created principle based on  
23 the proposition that a municipality which is an agent  
24 of the State cannot act contrary to the State.'"  
25 (Citing Overlook, I don't have the rest of the cite, 71

1 N.J.Super. 461, which in turn cited Summer versus  
2 Teaneck, 53 N.J. 548, 554 (1969).

3 In a preemption analysis the initial question  
4 is whether the field or subject matter in the ordinance  
5 operates including its effects in the same way as the  
6 State has acted. If the field or the subject matter of  
7 the ordinance and State Law are not the same, there is  
8 no preemption. However, if they are the same, then the  
9 question of preemption is further explored.

10 The ultimate question is whether -- oh I'm  
11 sorry -- "The ultimate question is whether upon a  
12 survey of all the interest involved in the subject can  
13 be said with confidence that the legislature intended  
14 to immobilize the municipalities from dealing with  
15 local aspects otherwise within their power to act."  
16 Summer Super. 53, N.J. at 555.

17 "It is not enough that the legislature has  
18 acted upon the subject. Id. 554. In Overlook this  
19 Court set the following five factor test for  
20 determining whether a State Law preempts a municipal  
21 ordinance.

22 (1) Does the ordinance conflict with State  
23 Law either because of conflicting policies, or  
24 operational effect? That is does the ordinance forbid  
25 what the legislature has permitted? Or does the

1 ordinance permit what the legislature has forbidden?

2 (2) Was the State Law intended expressly or  
3 impliedly to be exclusive in the field?

4 (3) Does the subject matter reflect a need  
5 for uniformity?

6 (4) Is the State scheme so pervasive  
7 incomprehensible that it precludes municipal  
8 regulation?

9 (5) Does the ordinance stand as an obstacle  
10 to the accomplishment and execution of the full  
11 purposes and objectives of legislative?"

12 And I have previously addressed a number of  
13 the conflicts between the CCRB and the internal affairs  
14 function. But I would like for a minute to focus on  
15 the third factor which is does the subject matter  
16 reflect a need for uniformity? And In RE: Carol 339  
17 N.J.Super. 429, (APP. DIV. 2001), the Court stated at  
18 page 439, "we note that the Attorney General is the  
19 chief law enforcement officer of the State. N.J.S.A.  
20 52:17B-98. The legislature has authorized the Attorney  
21 General to provide for 'uniform and efficient  
22 enforcement of the criminal law in the administration  
23 of criminal justice throughout the State.' Consistent  
24 with the authority the Attorney General has issued  
25 guidelines concerning the appropriate application of

1 criminal laws."

2 The Court in Carol goes onto state on page  
3 442, 443, in our view at a minimum the AG Guidelines  
4 fall within the statutory exception for statements  
5 concerning the internal management or discipline of an  
6 agency. The AG Guidelines expressly govern internal  
7 affairs investigations with local law enforcement  
8 agencies. The purpose of the guidelines is to  
9 establish procedures for investigating employee  
10 misconduct and for determination whether criminal or  
11 disciplinary action is required."

12 And as I indicated earlier that there is a  
13 direct conflict as well, because and an operational  
14 effect, because there doesn't need to be -- because of  
15 the potential criminal conduct, there needs to be  
16 expertise and training of individuals in law  
17 enforcement and the CCRB is incapable of doing that.  
18 Which creates such a conflict, that also conflicts with  
19 the uniformity goals of the legislation concerning the  
20 guidelines.

21 The Court would also note that in O'Shea v.  
22 Township of West Milford, 410 N.J.Super. 371, (2009),  
23 the Court at page 382 stated under the Criminal Act --  
24 Justice Act of N.J.S.A. 52:72B-97 to 117, the Attorney  
25 General as the chief law enforcement officer of this

1 State, see N.J.S.A. 52:17B-98, is charged with adopting  
2 guidelines, directives, and policies that bind local  
3 police departments in the day-to-day administration of  
4 the law enforcement process." See In RE: General  
5 Disciplinary Hearing of Carberry 114 N.J. 574, 577-78  
6 (1989).

7 The articulated design is to promote the,  
8 "Uniform and efficient enforcement of the criminal law  
9 and the administration of criminal justice."

10 Throughout the State such provisions shall be --  
11 N.J.S.A. 52:17B-98, such provisions shall be liberally  
12 construed. The Court reads that to mean that in order  
13 to be uniform and efficient the Attorney General as the  
14 Chief Law Enforcement officer of the State is the one  
15 who is to set the underlying means by which such  
16 investigations will be conducted. And they're  
17 mandatory and running a parallel investigation which is  
18 concurrent, which can result in two different results,  
19 clearly conflicts. And if anything, rather than  
20 creating clarity would create confusion.

21 Although that's an unintended consequence,  
22 it's a consequence nonetheless of which this Court  
23 needs to be mindful. The Court in O'Shea goes on to  
24 say AG Guidelines directives and this is at pages 382  
25 to 383, AG Guidelines and directives -- AG Guidelines

1 directives and policy of this type are not  
2 "administrative rules" as defined in N.J.S.A. 52:14B-  
3 2(e) and thus do not require formal promulgation under  
4 the Administrative Procedure Act. N.J.S.A. 52:14B-1 to  
5 15(c), Doe versus Poritz, 142 N.J. 1, (1995). Those  
6 guidelines, directives, or policies cannot be ignored,  
7 however they are binding and enforceable on law  
8 enforcement agencies. And at a minimum there are  
9 statements governing the internal management of or  
10 discipline of an agency.

11 And turning to N.J.S.A. 52:17B-98, the  
12 legislature has a declaration of policy that Attorney  
13 General Guidelines are intended to secure the benefits  
14 of uniform and efficient administration of the criminal  
15 law. And rather than reading the entire statute, I've  
16 done enough of that today, I think if you read the  
17 statute it clearly sets out the policy of the  
18 guidelines is to have uniform and efficient  
19 enforcement. And certainly if there are two agencies  
20 providing the same function, it's going to undermine  
21 uniform and efficient performance. And in this Court's  
22 view there is a conflict between the guidelines and the  
23 CCRB's function.

24 Both the O'Rourke and Gauntt cases reflected  
25 the Attorney General's Guidelines require investigation

1 of police misconduct to be conducted by the internal  
2 affairs unit, and not by the appointing authority. The  
3 ordinance attempts to accomplish indirectly through the  
4 CCRB, what it can't accomplish directly. Essentially  
5 the appointing authority, the council, and the mayor  
6 have been given responsibilities to the CCRB which  
7 under the guidelines must be performed by internal  
8 affairs under the direction of the chief of police.  
9 Thus the CCRB intrudes in an area which is preempted by  
10 State Law.

11 It bears noting that N.J.S.A. 40A:14-118  
12 which as the City points out should be read together  
13 with N.J.S.A. 40A:14-181, requires that the chief of  
14 police run the police department. The statute was  
15 passed to create uniformity because elected officials  
16 were interfering in the day-to-day operations of the  
17 police department.

18 So there is a very clear conflict in the CCRB  
19 and the guidelines, and also in it's operational  
20 effect. And I would point out that given the language  
21 of the statute, the cases, and the mandatory nature of  
22 the guidelines, they were intended or expressly or  
23 impliedly, to be exclusive in the field.

24 You know the CCRB clearly conflicts with the  
25 uniform goals of sections 118 and 181 of the Statutes.

1 Goals which are intended to clarify that the chief of  
2 police runs the day-to-day operations of the force and  
3 the appointing authority, which includes the council,  
4 the mayor, and police director in Newark set the policy  
5 to be implemented.

6 The Guidelines recognize these goals by  
7 providing that the police chief manages the internal  
8 affairs function, and the rules and regulations are  
9 established by the appointing authority consistent with  
10 the requirements of the guidelines, as tempered by the  
11 individual needs of the community that implement the  
12 guidelines.

13 A careful review of the guidelines also  
14 reflects that they preempt the field, because if you  
15 read the guidelines carefully, there is a requirement  
16 that the -- that investigators of police misconduct  
17 have expertise and training unique to police officers.  
18 And that there certainly is a conflict with this goal  
19 and this goal, in this Court's view is so pervasive and  
20 comprehensive, that it precludes the coexistence of  
21 municipal regulation. And as the Court had indicated,  
22 the ordinance could be an obstacle to the  
23 accomplishment and execution of the purposes of the  
24 internal affairs function.

25 But on the issue of expertise, I would -- in



1 addition to what I pointed out before, I would like to  
2 point out the following. On page 10 of the guidelines,  
3 it states every supervisor must establish a familiarity  
4 with the agency's disciplinary process and develop an  
5 understanding of how to implement specific disciplinary  
6 procedures when called upon to deal with inappropriate  
7 behavior, or misconduct.

8 Investigation -- and this is on page 13 it  
9 states, investigations of an officer's misconduct may  
10 proceed in one of two ways. An investigation may be  
11 conducted for the purpose of imposing a disciplinary  
12 sanction or initiating a criminal prosecution. The  
13 distinction between the two is important because each  
14 type of investigation has different legal requirements.

15 Consequently it is important that the  
16 internal affairs investigator be familiar with proper  
17 investigative techniques and the legal standards for  
18 each type of proceeding, certainly in the area of  
19 expertise.

20 It is essentially that the experienced  
21 investigators be assigned to internal affairs  
22 investigation. Each must be skilled in interviews and  
23 interrogation, observation, surveillance, and report  
24 writing. These are very important mandatory directives  
25 which the CCRB intentionally or unintentionally would

1 violate. And it's not lost on the Court that the CCRB  
2 has no individuals with police experience, other than  
3 perhaps the inspector general who is a member of the  
4 board.

5 So assuring that this is going to happen  
6 properly would be impossible. Certainly, I went back  
7 to you know, so the -- in this way the CCRB conflicts  
8 with the guidelines. It -- you know, certainly the  
9 scheme setup by the guidelines is so pervasive that it  
10 precludes coexistence of municipal regulation, because  
11 of the need for expertise. And the ordinance would  
12 stand as an obstacle to the accomplishment of the  
13 execution of the purposes, of the -- objectives of the  
14 legislature because there is specific expertise is  
15 needed. And going on with this expertise, which also  
16 sets the CCRB apart from internal affairs is that,  
17 reading again from page 13 of the 2017 internal affairs  
18 policies and procedures, it states "internal affairs  
19 investigators should be trained not only in the  
20 elements of criminal law, court procedures, rules of  
21 evidence, and use of technical equipment, but also in  
22 disciplinary and administrative law process. Initially  
23 upon assignment and on an ongoing basis, these  
24 investigators should receive training in the internal  
25 affairs disciplinary procedures, including training

1 required by the provision of criminal justice."

2 Again, that is a specific meaningful level of  
3 expertise, which the CCRB is not guaranteed to have.  
4 And I think we have already gone over, so I'm not going  
5 to over it again, the conflict between the guidelines  
6 that an investigation has to be deferred if there's  
7 criminal prosecution.

8 Now I understand that the argument is that  
9 the provisions of the CCRB are distinction without a  
10 difference. But that really draws into focus what  
11 concerns the Court. There are many aspects of the  
12 policy which -- of the guidelines which is over 40  
13 pages and the policies that are set forth in the CCRB  
14 that cover a number of single-spaced pages, where there  
15 are conflicts, it would be impossible for the Court to  
16 identify every one of them.

17 But I would point out that is of particular  
18 meaning to the Court. The -- on page eight, under I  
19 think it's Article 5, the rules and regulations of the  
20 Board, Section 1-07 states, that if -- it says during  
21 the investigatory process neither the identity of, nor  
22 personally identifiable information about complainants  
23 or witnesses shall be released beyond the CCRB staff,  
24 board members, and NPD staff engaged in the specific  
25 investigation of the complainant's allegations. If the

1 complaint is substantiated and is referred to a CCRB  
2 hearing, the complainant's identity may be released in  
3 the course of any public hearing about the alleged  
4 misconduct.

5           The internal affairs policy requires strict  
6 confidentiality. On page 42, it states "The nature and  
7 source of internal allegations, the progress of  
8 internal affairs investigations, and the resulting  
9 materials are confidential information. The contents  
10 of internal affairs investigation cases filed shall be  
11 retained in the internal affairs bureau and clearly  
12 marked as confidential. The information and record of  
13 all internal investigations shall be released under the  
14 following circumstances: if administrative charges  
15 have been brought against an officer, and a hearing  
16 will be held, a copy of all discoverable materials  
17 shall be provided to the officer and the hearing  
18 officer before the hearing; if the subject officer,  
19 agency, or governing jurisdiction has been named as a  
20 defendant in the lawsuit or arising out of a specific  
21 incident, the incident covered by an internal  
22 investigation, a copy of the internal investigative  
23 report may be released to the attorney representing the  
24 subject officer, agency, or jurisdiction; upon the  
25 request or direction of the county prosecutor or

1 Attorney General, or upon a Court order.

2 In addition the law enforcement executive may  
3 authority access to a particular file or record for  
4 good cause. The -- it goes on to say on page 42, law  
5 enforcement executive shall grant such access sparingly  
6 given that the purpose that the internal affairs  
7 process and the nature of many allegations against  
8 officers.

9 So there are strict confidentiality  
10 provisions. And in each instance, in each and every  
11 instance of these investigations the underlying names  
12 of individuals are mandated to be provided to the CCRB.  
13 And the complainant may have his name released which  
14 also is contrary to the confidentiality provisions.  
15 And Path versus Bergen County, (2017) N.J.Super.  
16 unpublished Lexus 627 at page 9, (APP. DIV. March 13,  
17 2017); the Court indicated -- that case as counsel  
18 correctly pointed out regarded to OPRA disclosures.  
19 But I think that the judge's reasoning with regard to  
20 the need for confidentiality is reasoning this Court  
21 adopts and thinks it generates one of the many areas of  
22 conflicts and issues that may be created by the CCRB  
23 that are unintended.

24 So I'll quote from the opinion as follows.  
25 "Examination of the guidelines reveals they contain

1 specific provisions directly on point stating that 'the  
2 nature and source of internal allegations, the progress  
3 of internal affairs investigations, and the resulting  
4 materials of confidential information, and shall only  
5 be released under limited circumstances.' Requirement  
6 eight" and that's what we're referring to requirement  
7 eight of the Attorney General Guidelines, "addresses  
8 the treatment of internal affairs records. The records  
9 are accessible only to internal affairs personnel, and  
10 the law enforcement agency executive, keeping the  
11 number of individuals with access to a minimum."  
12 Guidelines Super at 40. "Obviously this restriction is  
13 designed to preserve the integrity and secrecy of any  
14 investigation. This requirement also addresses  
15 confidentiality, stating the nature of the source of  
16 internal investigations and progress, internal  
17 investigations and the resulting materials are  
18 confidential."

19 Requirement ten expresses the mechanism for  
20 release. And the Court identified some of the mischief  
21 that can be visited by disclosing material to anyone  
22 other than those in internal affairs. And we -- the  
23 CCRB has a lot of members. And unintentionally  
24 confidentiality may be compromised by showing this to  
25 so many people. And in terms of the issues that

1 discovery trouble the Court with respect to the  
2 discovery of confidential information are the  
3 following. Disclosure -- and this is at page five of  
4 the Lexus opinion, "Disclosure of the complainant and  
5 subject officer could thwart the very purpose of an  
6 internal investigation designed to ferret out proper  
7 compliance with established policies and procedures by  
8 law enforcement agencies, impede further investigation  
9 of discovered criminal conduct, subject to prosecution,  
10 undermine the disciplinary process of the law  
11 enforcement agency necessary for it's work, unduly  
12 taint officers when the basis for an alleged complaint  
13 was not established, reveal the name and location of  
14 inmates which may subject the inmate to harm, target  
15 informants. Caldwell v. N.J. Department of Correction,  
16 250 N.J.Super. 529, 615 (APP. DIV. 2015), (recognizing  
17 safeguarding the staff and inmates requires the  
18 identity of witnesses in a disciplinary hearing should  
19 be kept confidential.)

20 Discourage complaints because a complainant  
21 will not be able to -- will not obtain anonymity,  
22 concern for the risk of informer of disclosure of his  
23 identity, as well as the chilling effect that  
24 disclosure may have on sources of valuable information  
25 relevant in a prison setting.

1 In short the Attorney General Guidelines is  
2 promulgated pursuant to N.J.S.A. 40A:14-181 precluded  
3 the CCRB from performing an investigation of police  
4 misconduct. The CCRB investigative powers violates  
5 statutory law and due process principles.

6 And lastly I turn to the subpoena power, I  
7 again ask anyone if they want a break before I finish  
8 that. Okay I'm sorry, my court clerk needs a break, so  
9 I'm just going to take a ten minute recess.

10 MR. AREMAN: Ten minutes, thanks, Your Honor.

11 (Recess taken from 1:42 to 1:58)

12 THE COURT: Okay, be seated. Okay, Mr.  
13 Lustberg, you have my apologies I understand that you  
14 couldn't hear me at some points.

15 MR. LUSTBERG: No, no it's just when the air  
16 conditioning is on it's a little harder to hear.

17 THE COURT: Okay. But if you run into that  
18 problem just tell me, I'll certainly be more than happy  
19 to repeat myself. It's not a good situation if you  
20 can't hear what I'm saying.

21 MR. LUSTBERG: We got it.

22 THE COURT: Okay. So turning now the  
23 subpoena, in City of Newark versus Benjamin, 144  
24 N.J.Super. 58, (Chancery Div. 1976) (affirmed 144  
25 N.J.Super. 389, (Affirm. 75 N.J. 311 (1978))). The



1 Chancery Division was presented with the review of the  
2 subpoena which was created in connection with a  
3 civilian complaint review board to investigate abuses  
4 of police power. The ordinance stated in relevant part  
5 that the board would have jurisdiction over complaints  
6 from the citizens of Newark alleging police misconduct  
7 that the board would receive complaints and conduct  
8 hearings. The board could issue subpoenas to compel  
9 the appearance of witnesses and the production of  
10 documents and it could also conduct public hearings  
11 with respect to police practices and make  
12 recommendations to the police director or municipal  
13 counsel as to appropriate disposition charges of police  
14 misconduct. And it could also assist the police  
15 director or such persons as the director would  
16 designate to develop rules and regulations, and  
17 policies to eliminate police misconduct.

18 Under the facts of Benjamin the Court held  
19 that the provisions of the ordinance authorizing the  
20 CCRB to issue subpoenas was invalid because, "a  
21 municipality may not create the power of a subpoena."  
22 Instead the Court held the subpoena power must be  
23 issued based on constitutional or legislative  
24 authority. The Court elaborated on it's principle  
25 stating that the subpoena power of a municipal

1 investigating body is set by N.J.S.A. 40:48-25, and  
2 that particular statute provides that when the  
3 governing body of a municipality shall have appointed a  
4 committee of it's members upon any subject or matter  
5 within it's jurisdiction, the committee may issue a  
6 subpoena *ad testificandum* or subpoena *duces tecum* to  
7 any person within the State to appear before it, or to  
8 give testimony or information required.

9 The Benjamin -- the Court in Benjamin held  
10 that because the ordinance in issue was compromised of  
11 individuals other than members of the council, they  
12 granted the subpoena process was -- I'm sorry -- the  
13 subpoena power was unlawful. The Benjamin Court  
14 probed the issues of the subpoena power further and  
15 said that CCRB would not be viable in the absence of  
16 the subpoena power. Certainly the Court has rejected  
17 those findings for the purpose of this case.

18 Amici argues that Benjamin -- Amici and the  
19 City argue that Benjamin is not controlling. Benjamin  
20 an autonomous civilian compliant review board which was  
21 created by a voter initiative with members to be  
22 elected by the public at large, was formed. Amici and  
23 the City distinguish the CCRB in Benjamin from the  
24 presently -- present CCRB which was created by  
25 ordinance and consists of members appointed by the

1 mayor on the advice and consent of the City Council.

2 Amici arguments that -- and the City argue,  
3 that Benjamin made clear that powers conferred upon a  
4 municipality by statute may not be exercised or amended  
5 by the public through the initiative process, but  
6 instead (indiscernible) government. See Benjamin 144  
7 N.J.Super. at 68-69.

8 Thus Benjamin according to the City and  
9 Amici, held that the council is empowered to conduct  
10 investigations by N.J.S.A. 2A:67A-1, and because  
11 N.J.S.A. 40:48-25 confers subpoena power upon the  
12 council during such an investigation, Newark could now  
13 view the board with subpoena power. Amici and the City  
14 are careful to point out that the Benjamin court  
15 indicated that "what is involved here is not whether  
16 the Newark Council had the power to enact an ordinance  
17 for the review of police misconduct, but whether it  
18 could be done by initiative in a Faulkner Act." The  
19 City id. 68.

20 They further argue that equally essentially  
21 to the Benjamin holding was the fact that the board in  
22 issue was publicly elected not appointed, and that the  
23 Court in Benjamin at page 69, indicated that creating  
24 another elected body, having powers coextensive with  
25 the council was improper, thus according to Amici and

1 the City, Benjamin held that an elected review board  
2 impermissibly created an independent additional  
3 governing body in violation of the Faulkner Act.

4 As the -- this Court has indicated the  
5 appointment of the CCRB for the purpose of oversight or  
6 making policy recommendations is proper. N.J.S.A.  
7 40A:14-118, and the Guidelines themselves both allow  
8 such policy oversight bodies. The DOJ consent order  
9 likely envisions such an oversight body.

10 However, as the Court in Benjamin observed no  
11 case holding that the authority to issue subpoenas may  
12 be created by ordinance has been cited, and research  
13 disclosed any. Benjamin 144 N.J.Super at 72, and the  
14 Court has not been provided with a single case where  
15 the power has been extended to the third party.

16 The City and Ms. Benjamin certainly made a  
17 very patient plea, which was appropriate here, contends  
18 that the CCRB is authorized to issue subpoenas because  
19 of office misconduct is a matter of public concern.  
20 And as both the City and Amici argue, the -- it's  
21 required by the necessary and proper clause. They also  
22 point out that municipal government has brought  
23 constitutional and statutory powers.

24 Municipalities in New Jersey have the express  
25 statutory authority to adopt ordinances that preserve

1 the public peace, and order in addition to such  
2 ordinances as may be deemed necessary and proper for  
3 the good of government, ordering protection of persons  
4 and property, and for the preservation of public  
5 health, safety, and welfare of a municipality and it's  
6 inhabitants.

7 Pursuant to N.J. 40:48-2, any municipality  
8 "may make, amend, repeal, and enforce any such  
9 ordinance, regulations, rules, and bylaws not contrary  
10 to the laws of the State or the United States as it  
11 deems necessary and proper for good government, order,  
12 and protection of persons and property, and for the  
13 preservation of public health, safety, and welfare of  
14 the municipality and it's inhabitants, and as may be  
15 necessary to carry into effect the powers and duties  
16 conferred and imposed by the subtitle or any law. The  
17 statute is to be construed liberally in favor of local  
18 government, New Jersey Constitution, Article 4, Section  
19 7, Paragraph 11."

20 This Constitutional mandate has been held to  
21 provide a broad grant of municipal police powers.  
22 There is however, an important limitation on this  
23 purported extensive grant. The grant relates to  
24 matters of -- "the grant relates to matters of public  
25 concern which may be determined to be necessary and

1 proper for the good and welfare of local policy in the  
2 realm of affairs of general public interest and  
3 applicability. (Citing to Wagner v. Mayor and  
4 Municipal Council of Newark, N.J. 467, 478 (1957))...  
5 the municipality may not legislate upon an aspect of a  
6 subject 'inherently' in need of uniform treatment."  
7 Citing In RE: Public Service & Electric Gas 35 N.J.  
8 358, 371; Summer v. Teaneck 53 N.J. 548, 552-53 (1969).

9           The City contends that as a result of the  
10 2011 Department of Justice investigation into the  
11 Newark Police Department, creation of the CCRB by  
12 ordinance 6PSF-B became necessary and proper. At the  
13 conclusion of the investigation that began in 2011, the  
14 DOJ identified a number of specific areas where  
15 problems were persistent, which I cited earlier  
16 including the -- there are a number of deficiencies,  
17 statement of facts, so I'm not going to go through them  
18 again.

19           But as Ms. Benjamin ably argued, that creates  
20 the need for a DCPD -- I'm sorry a CCRB that has  
21 subpoena powers. To remedy the deficiencies covered by  
22 the investigation, the consent order provided for the  
23 oversight CCRB functions which were cited in the  
24 Statement of facts. That -- it's not disputed by the  
25 parties that the language of the consent decree do not

1       require a civilian oversight entity to perform  
2       investigations into individual officer conduct or  
3       allegations relating thereto.

4               The consent decree only requires that the  
5       CCRB engage in oversight and review of "internal  
6       investigation and the procedures for the resolution of  
7       civilian complaints." Under a necessary and proper  
8       analysis the City claims that they were authorized to  
9       -- it was authorized to promulgate ordinance rules and  
10      regulations that allowed a civilian entity authority to  
11      oversee the investigatory procedures of the Newark  
12      Police Department.

13             And that both parties agree that the CCRB  
14      would be powerless without it. In terms of looking at  
15      the necessary and proper aspects of it, I would first  
16      start with the following. The CCRB does not, in this  
17      Court's judgment, have powers to investigate individual  
18      complaints. And the subpoena here is not purely an  
19      investigative subpoena which is what is authorized by  
20      statute. But it's both an investigative subpoena and  
21      adjudicative subpoena.

22             And as I've indicated before those rules  
23      conflict. But putting that to the side, I fail to see  
24      how under the necessary and proper clause there could  
25      be -- a CCRB could be empowered to have an

1 investigation subpoena of an individual complaint. As  
2 I indicated -- as I've previously discussed at length,  
3 the investigative power belongs to internal affairs,  
4 not the CCRB. So that aspect of the subpoena would be  
5 invalid.

6 There is a question as to whether the  
7 subpoena power would be required for the other purposes  
8 that the oversight role of the CCRB. And based on the  
9 record before me, I can't decide this and I want to say  
10 why.

11 The under -- under the terms of this -- of  
12 the ordinance, the individual police officers are  
13 required to cooperate with the CCRB and the police  
14 chief and the police director are required to make sure  
15 that they do so. They're also required to turnover  
16 records. I mean there is an issue about redaction of  
17 those records, which I'm not going to address today in  
18 terms of confidentiality.

19 But there -- so the CCRB is going to have  
20 those records. They're going to have the access to the  
21 officers. And if someone comes in with an individual  
22 complaint, they're going to have access to that  
23 individual. No one has explained to me what else you  
24 would need under subpoena. I'm not saying -- just the  
25 issue that I need more to be able to evaluate this and



1 I also appreciate that there are a number of bodies in  
2 New Jersey that -- you know, in the municipalities that  
3 have the investigative powers. But I don't have  
4 information as to how or why those subpoena powers were  
5 created.

6 So without knowing that, I'm -- I can't just  
7 provide a leap because someone else does it. There may  
8 be reasons, I need to know what those reasons are.

9 There are -- also at least at this juncture  
10 Traino versus McCoy 187 N.J.Super. 638, (Law Div.  
11 1982), undermines the City and Amici's arguments.  
12 Traino's conduct in that case was reviewed by a local  
13 board of ethics established by an ordinance. The board  
14 of ethics consisted of two Mt. Laurel citizens and a  
15 citizen from a neighboring community. I think I said  
16 this earlier but Traino was 187 N.J.Super. 638 (Law  
17 Div. 1982).

18 In Traino, Traino filed an action against  
19 defendant -- defendants who were members of a board of  
20 ethics challenging their decision that Traino had  
21 violated the conflict of interest of the Township's  
22 Code of Ethics. The board of ethics filed an opinion  
23 with the Council finding that Traino's conduct violated  
24 conflict of interest in the Township Code of Ethics.  
25 And among other things, there was a subpoena issued by

1 the Township Board of Ethics.

2 In Traino, the Court evaluated the ordinance  
3 as an exercise of the municipality's broad police  
4 powers and to enact ordinances which are necessary and  
5 proper. And although it's not directly relevant to  
6 this case, in Traino it was found that the board of  
7 ethics was not necessary and proper. There's no  
8 material to the Court's decision here, is the Court's  
9 analysis of the authority of the board of ethics to  
10 issue subpoenas. The Court in Traino, I believe  
11 starting at page 649, well in Traino the Court was  
12 presented with the issue as to whether the council  
13 could confer the power to issue subpoenas to the board  
14 of ethics.

15 The Court rejected the Council's attempt to  
16 confer the subpoena power to the board of ethics, using  
17 the following reasoning which is instructive and going  
18 to page 649. The express statutory authority for the  
19 issuance of subpoenas in connection with the municipal  
20 investigation is found in N.J.S.A. 40:48-25 and  
21 provides in pertinent part "when the governing body of  
22 a municipality shall appoint -- have appointed a  
23 committee of its members upon any subject or matter  
24 within the jurisdiction the committee may issue a  
25 subpoena. It is apparent that this statute limits the

1 power to issue subpoenas to committees composed of  
2 members of the governing body. It does not confer such  
3 power upon any other committees such as a board of  
4 ethics." Evanko versus Duff 63 N.J.Super. 548, 554.

5 The board suggests that it's power to  
6 subpoena witnesses is conferred by N.J.S.A. 2A:67A-3  
7 which in part provides any such officer, board of  
8 commissioner committee, or body authorized by law to  
9 exercise the power of subpoena may -- may be its  
10 subpoena. The statute does not confer subpoena power  
11 upon any municipal body. It relies on legislation to  
12 provide that power. N.J.S.A. 40:69A-91 is not helpful,  
13 after authorizing the appointment of committee to  
14 conduct investigations it provides that the municipal  
15 council may delegate such committee or commission such  
16 power of inquiry as a municipal council may deem  
17 necessary. This would permit the delegation of any  
18 power possessed by the governing body. The only  
19 subpoena power possessed by the council was that  
20 granted pursuant to N.J.S.A. 40:48-25 as noted above.  
21 It limits the power of a committee composed of members  
22 of the governing body, general rules related to the  
23 subdelegation of municipal powers and therefore not  
24 helpful.

25 As stated in Jansco v. Waldron, 70 N.J. 320,

1 (1976), "Whether or not local government itself is  
2 required to exercise total power granted to it, or  
3 whether a proper or valid exercise of such power may be  
4 had by subdelegated particular details to a subordinate  
5 person or body, depends upon the expression viewed in  
6 light of the power granted."

7 Then the -- quoting now from the case, "the  
8 total power granted to the governing body by statute is  
9 to appoint a committee of its members with the power to  
10 issue subpoenas. There is no residue of subpoena  
11 power, which could be subdelegated to a committee under  
12 N.J.S.A. 69A-91. The conclusions are confirmed the  
13 holding in Newark versus Benjamin, 144 N.J.Super. 58  
14 (Law Div. 1976).

15 Now continuing from page 18 of that opinion,  
16 affirmed 144 N.J.Super. 389 (APP. DIV. 1976) (Affirmed  
17 75 N.J. 311 (1977)) and Evanko versus Duff, 63 N.J. at  
18 554, both of which concluded that the only -- that only  
19 the municipal governing body or a committee thereof  
20 could issue subpoenas.

21 In the Newark opinion the trial court said,  
22 and this is a quote from the Newark case, "the final  
23 matter to be considered is whether the provision of  
24 this ordinance authorizing the issue of -- authorizing  
25 issue of subpoena are valid. Clearly they are not.

1 Subpoenas may not be issued except upon constitutional  
2 and legislative authority. See United States v. Minko,  
3 350 N.J. 179 (1956) (95 CJS Witnesses Section 21 at 372)  
4 no case holding the authority to issue subpoenas may be  
5 created by ordinance has been cited and research has  
6 not disclosed any. Every instance in which subpoenas  
7 may be issued in the State is one in which the basic  
8 authority comes from the statute. 144 N.J. at 72.

9 The City contends that the Faulkner Act  
10 contained in N.J.S.A. 40:69A-31 provides for the mayor  
11 of Newark to create the CCRB. Under the Faulkner Act  
12 the Mayor is in charge of the administration of the  
13 municipality and has enforcement responsibilities for  
14 all ordinances.

15 The City contends that the serious  
16 irregularities in the implementation -- I'm sorry --  
17 the serious irregularities which were uncovered by the  
18 Newark Police Department cause Mayor Baraka to have the  
19 responsibility to enforce the consent decree and  
20 therefore he is authorized to empower the CCRB with  
21 subpoena power to avoid these problems.

22 In making this argument the City relies on  
23 the matter of Shane 92 N.J. 524 (1983), where the  
24 Supreme Court of New Jersey affirmed that the decision  
25 of the lower court that a special investigatory

1 committee for the City of Orange had the authority to  
2 issue subpoenas to compel testimony of the mayor and  
3 other executive officials. Joel Shane was elected  
4 mayor of the City of Orange, a municipal corporation  
5 organized under the Faulkner Act. Immediately upon  
6 assuming office Mayor Shane named a lieutenant in the  
7 Orange Police Department as Acting Police Director.  
8 The appointee's name was submitted to the City Council  
9 for confirmation. This gave rise to a political  
10 conflict between the council and the mayor, which  
11 culminated in a lawsuit.

12           The City Council established the resolution  
13 for a special investigatory committee comprising of  
14 the entire council to investigate new acting police --  
15 that the new actor police director had interfered with  
16 the duties of the Orange Chief of Police. The  
17 committee conducted a public hearing, which the police  
18 chief, deputy chief, and acting director voluntarily  
19 testified about their respective duties and the  
20 procedures followed in a recent department  
21 reorganization.

22           The City Council sitting as an investigatory  
23 committee of the entire council, adopted a resolution  
24 that incorporated the committee's preliminary findings  
25 of fact. The resolution recited that the Mayor's

1 appointed acting police director had interfered with  
2 the duties of the police chief and that such  
3 interference potentially endangered the health and  
4 welfare of the people of Orange. Shane 92 N.J. 528.

5 The Committee then subpoenaed certain  
6 additional police officers at a later hearing and served  
7 the Mayor with a subpoena to testify. The Mayor failed  
8 to appear at the scheduled hearing. Shane 92 N.J. 528.  
9 The Supreme Court affirmed the ruling of the lower  
10 court holding that under the Faulkner Act the municipal  
11 council exercised its legislative power and therefore  
12 exercises the power to issue subpoenas.

13 The Court stated "the intent is embodied in  
14 N.J.S.A. 69A-36 and N.J.S.A. 69A-61 by voluntarily  
15 choosing to pattern your City Government after an  
16 optional mayor council plan, the citizens of Orange  
17 have affirmatively vested their elected council with  
18 such legislative powers...the language and purposes of  
19 Faulkner Act establish that the legislature intended  
20 the council under a municipal council government to  
21 have power to issue subpoenas in the exercise of its  
22 proper legislative function." And this is from Shane  
23 92 N.J.Super. at 529.

24 The City of Newark is governed under the  
25 Faulkner Act like the City of Orange. The Shane Court

1 certainly reflects that the power is granted to the  
2 council. I understand and appreciate Mr. Lustberg's  
3 argument about the broader subpoena power. But I  
4 simply at this point don't have enough information as  
5 to why the subpoena -- the information which is  
6 mandated under the ordinance is insufficient and why  
7 the subpoena is necessary.

8 For the reasons stated previously regarding  
9 N.J.S.A. 40A:14-118 and 14-181, and due process  
10 principles the issuance of a subpoena for the purposes  
11 of bringing charges against individual officers is  
12 contrary to applicable law. In additionally, as the  
13 Court indicated it has not been presented with  
14 sufficient reasons why the subpoena is required for the  
15 CCRB's oversight functions, given the information  
16 that's otherwise available to the CCRB.

17 Thus under the circumstances here, the Court  
18 does not find that the subpoena power is required. The  
19 Court, however, does not agree that the CCRB is an  
20 nullity without the subpoena process.

21 There are important functions that are  
22 identified in the DOJ consent order which it can  
23 fulfill. One of them is the disciplinary matrix, that  
24 I talked about earlier. There are a number of other  
25 steps that they can take to look at the circumstances



1 in the Newark Police Department. Unfortunately, the  
2 ordinance as drafted with respect to the subpoena  
3 power, at least based on the record here goes too far.  
4 So that concludes my opinion. I don't know if counsel  
5 wants to talk about the form of the order. You know,  
6 there are parts of the ordinance that can survive. So  
7 the question is whether I just strike the parts that I  
8 discussed or I strike the entire ordinance.

9 At this point, I'm prepared to limit my --  
10 just so it can be clear I'm prepared to limit my ruling  
11 to what I stated on the record. But I do think that  
12 the CCRB as a whole provides a very essential and  
13 oversight function. As I've said, the goals are  
14 laudable, but it can have unintended consequences that  
15 violate State Law in this Court's opinion.

16 MR. STONE: Your Honor, Kenyatta Stone on  
17 behalf of the City of Newark, Judge. Maybe it's a good  
18 idea for plaintiff to put together a form of order. We  
19 can go back and forth on it, Judge and then submit it  
20 to the court.

21 THE COURT: That's fine with me. But as I  
22 said, it is not my intent to strike the entire  
23 ordinance.

24 MR. AREMAN: Duly noted, Your Honor.

25 THE COURT: And there are elements of the

1 ordinance that can continue to be pursued in connection  
2 with the consent order in terms of oversight. I issued  
3 some restraints from doing any further work. But I am  
4 not going to restrain the activity to engage in  
5 oversight.

6 MR. STONE: And we'll do that swiftly, Judge,  
7 because every day misses another day that they can't do  
8 it.

9 THE COURT: That's one of the reasons why I  
10 appreciate counsel's patience. If I had more time to  
11 write this, I might have done otherwise. But I thought  
12 it was important to get to this quickly.

13 MR. AREMAN: Thank you, Your Honor. It will  
14 take some time to get the transcript to review to  
15 prepare the order. But we will make sure we do it in  
16 an expeditious fashion and I'll share it with the City.

17 THE COURT: You know, I think you can do it  
18 without the transcript. Let me just give you the  
19 contours of what I think should really be in the order.  
20 I think that essentially my order essentially says is  
21 that CCRB does not have the power to investigate and  
22 hold separate additional hearings on police misconduct.  
23 And it does not have the subpoena power to investigate  
24 and to perform judicial functions, since it's contrary  
25 to statutory -- contrary to law. We don't even have to

1 go there. But both the statute and due process  
2 principles. And that at this point there is not  
3 sufficient evidence before the Court, so I am not  
4 foreclosing, that the subpoena power is needed for the  
5 CCRB engaging in their oversight functions.

6 And that they are empowered to conduct the  
7 oversight functions and begin them with undue delay --  
8 without undue delay. And that's why I want to get to  
9 this order quickly. I did this today so that we can at  
10 least get the CCRB rolling.

11 MR. AREMAN: Understood, Your Honor.

12 THE COURT: So I don't want you to wait for  
13 a transcript. I really don't. I would like to get  
14 this order by tomorrow. And for this purpose, this  
15 closes the case for me. It doesn't mean that it can't  
16 be reopened at some other time. But in the short-term  
17 it closes the case for me.

18 MR. AREMAN: Understood, Your Honor. I'll  
19 prepare something and have it to Mr. Stone or Ms.  
20 Benjamin tomorrow.

21 THE COURT: And as I said, there may be an  
22 appeal to the Appellate Division.

23 MR. STONE: Judge, there certainly will be,  
24 Judge.

25 THE COURT: I'm not offended by it. I

1 would've frankly been surprised if there wasn't. This  
2 is a case of first impression. Another reason why I  
3 wanted to get to this quickly, was so whoever prevailed  
4 could have that right to appeal quickly. That's  
5 another reason why I got to get to the final order.  
6 Without the final order nobody can take an appeal. So  
7 I'm mindful of that.

8 I try to do my best. You know, I believe in  
9 my opinion. But I also recognize that the Appellate  
10 Courts could disagree with me. You know, there's  
11 certainly -- so that's why I need this order by  
12 tomorrow. I think we really need to get to some  
13 measure of finality so that everyone can move forward.  
14 That's why you need to craft it as a final order.

15 So I hope everyone would agree with that and  
16 I'm really doing that for the benefit of both parties.

17 MR. AREMAN: Understood, Your Honor.

18 THE COURT: And as I said, there will be an  
19 appeal. At least since this involves the Attorney  
20 General's Guidelines, they should weigh in on it  
21 because they may disagree with me. But I think that  
22 it's important for the Appellate Court to hear -- as I  
23 said, I would've like to have them here myself.

24 MR. AREMAN: Understood.

25 THE COURT: So that might have had an effect

1 on the position and an effect on me.

2 Okay, with that, I thank you. I thank  
3 counsel for your good work.

4 (Hearing concluded at 2:44 p.m.)

5 \* \* \* \* \*

6  
7  
8 CERTIFICATION

9 I, Sharon Conover, the assigned transcriber, do  
10 hereby certify the foregoing transcript of proceedings  
11 on CourtSmart, Index No. from 9:13:52 to 2:44:59, is  
12 prepared to the best of my ability and in full  
13 compliance with the current Transcript Format for  
14 Judicial Proceedings and is a true and accurate non-  
15 compressed transcript of the proceedings, as recorded.

16  
17  
18  
19 /s/ Sharon Conover

20 Sharon Conover

AD/T 625

AOC Number

21  
22  
23 Phoenix Transcription LLC

24 Agency Name

04/25/18

25 Date

## **APPENDIX D**

New Jersey Statutes Annotated  
Title 40. Municipalities and Counties  
Subtitle 3. Municipalities Generally (Refs & Annos)  
Chapter 48. General Powers (Refs & Annos)  
Article 1. General and Regulatory Powers

N.J.S.A. 40:48-2

## 40:48-2. Other necessary and proper ordinances

### Currentness

Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good 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 this subtitle, or by any law.

N. J. S. A. 40:48-2, NJ ST 40:48-2

Current with laws through L.2020, c. 136 and J.R. No. 2.

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New Jersey Statutes Annotated  
Title 40a. Municipalities and Counties (Refs & Annos)  
Chapter 14. Fire and Police  
D. Police--Municipalities (Refs & Annos)

N.J.S.A. 40A:14-118

40A:14-118. Police force; creation and establishment;  
regulation; members; chief of police; powers and duties

Currentness

The governing body of any municipality, by ordinance, may create and establish, as an executive and enforcement function of municipal government, a police force, whether as a department or as a division, bureau or other agency thereof, and provide for the maintenance, regulation and control thereof. Any such ordinance shall, in a manner consistent with the form of government adopted by the municipality and with general law, 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 for the discipline of its members. The ordinance may provide for the appointment of a chief of police and such members, officers and personnel as shall be deemed necessary, the determination of their terms of office, the fixing of their compensation and the prescription of their powers, functions and duties, all as the governing body shall deem necessary for the effective government of the force. Any such ordinance, or rules and regulations, shall provide that the chief of police, if such position is established, shall be the head of the police force and that he shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof, and that he shall, pursuant to policies established by the appropriate authority:

- a. Administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel;
- 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.

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.



Except as provided herein, the municipal governing body and individual members thereof shall act in all matters relating to the police function in the municipality as a body, or through the appropriate authority if other than the governing body.

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. In addition, nothing herein contained shall infringe on or limit the power or duty of the appropriate authority to act to provide for the health, safety or welfare of the municipality in an emergency situation through special emergency directives.

#### **Credits**

L.1971, c. 197, § 1, eff. July 1, 1971. Amended by L.1981, c. 266, § 1, eff. Aug. 24, 1981.

N. J. S. A. 40A:14-118, NJ ST 40A:14-118

Current with laws through L.2020, c. 136 and J.R. No. 2.

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New Jersey Statutes Annotated  
Title 40a. Municipalities and Counties (Refs & Annos)  
Chapter 14. Fire and Police  
F. Fire and Police--Counties and Municipalities Generally

N.J.S.A. 40A:14-181

## 40A:14-181. Adoption of consistent guidelines by law enforcement agencies

Effective: September 1, 2015

[Currentness](#)

Every law enforcement agency, including a police department of an institution of higher education established pursuant to P.L.1970, c. 211 ([C.18A:6-4.2 et seq.](#)), shall adopt and implement guidelines which shall be consistent with the guidelines governing the “Internal Affairs Policy and Procedures” of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.

### Credits

[L.1996, c. 115, § 10, eff. Jan. 9, 1997.](#) Amended by [L.2015, c. 52, § 1, eff. Sept. 1, 2015.](#)

N. J. S. A. 40A:14-181, NJ ST 40A:14-181

Current with laws through L.2020, c. 136 and J.R. No. 2.

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