

No. 20-989

IN THE
Supreme Court of the United States

CITY OF NEWARK, NEW JERSEY,

Petitioner,

v.

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

QUINTES D. TAGLIOLI
Counsel of Record
STEPHEN C. RICHMAN
MATTHEW D. AREMAN
MARKOWITZ AND RICHMAN
123 South Broad Street, Suite 2020
Philadelphia, PA 19109
(215) 875-3100
qdtaglioli@markowitzandrichman.com

Counsel for Respondent

303296



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

**RESTATEMENT OF THE QUESTION
PRESENTED:**

Should this Court grant certiorari where the Supreme Court of New Jersey invalidated certain portions of a municipal ordinance solely on the grounds that the offending provisions conflict with state law and New Jersey Attorney General guidelines governing police internal affairs investigations?

CORPORATE DISCLOSURE STATEMENT:

The Fraternal Order of Police, Newark Lodge No. 12 (“FOP”) is a public sector labor organization in the State of New Jersey, and it has no parent company and no stock of which a publicly held company might hold 10% or more.

RESTATEMENT OF THE RELATED CASES:

The Petition filed by the City of Newark (“Newark”) improperly includes *United States v. City of Newark*, Dkt. No. 16-1731 (D.N.J.) as a related case. This District Court case brought by the United States Department of Justice against the City of Newark does not meet the definition of “directly related” as set forth in SUP. CT. R. 14(1)(b)(iii) inasmuch as it does not arise from the same trial court case as the case for which certiorari is being sought in this Court.

TABLE OF CONTENTS

	<i>Page</i>
RESTATEMENT OF THE QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
RESTATEMENT OF THE RELATED CASES	iii
TABLE OF CONTENTS.....	iv
TABLE OF CITED AUTHORITIES	v
JURISDICTION.....	1
INTRODUCTION.....	1
RESTATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	7
CONCLUSION	13

TABLE OF CITED AUTHORITIES

Page

CASES

Black v. Cutter Labs,
351 U.S. 292 (1956)8

Cardinale v. Louisiana,
394 U.S. 437 (1969)9

City of Newark v. Benjamin,
364 A.2d 563 (N.J. Ch. Div. 1976), *aff'd*,
365 A.2d 945 (N.J. App. Div. 1976), *aff'd*,
381 A.2d 793 (N.J. 1978)2, 4, 5

Coleman v. Thompson,
501 U.S. 722 (1991)7

Crossley v. New Orleans,
108 U.S. 105 (1883)7

Endicott Johnson Corp. v.
Encyclopedia Press, Inc.,
266 U.S. 285 (1924)12

Fox Film Corp. v. Muller,
296 U.S. 207 (1935)7

Fred v. Mayor & Mun. Council of Old Tappan,
92 A.2d 473 (N.J. 1952)10

Cited Authorities

	<i>Page</i>
<i>Hartford Life Ins. Co. v. Johnson</i> , 249 U.S. 490 (1919)	9
<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945)	8
<i>Michigan C. R. Co. v. Michigan S. R. Co.</i> , 60 U.S. 378 (1857)	9
<i>Monks v. New Jersey</i> , 398 U.S. 71 (1970)	9
<i>N.Y. ex rel. Cohn v. Graves</i> , 300 U.S. 308 (1937)	9
<i>O'Brien v. Skinner</i> , 414 U.S. 1032 (1974)	8
<i>Parker v. McLain</i> , 237 U.S. 469 (1915)	9
<i>Wagner v. Mayor & Mun. Council of Newark</i> , 132 A.2d 794 (N.J. 1957)	10

STATUTES AND OTHER AUTHORITIES

28 U.S.C. §1257	1, 3
28 U.S.C. §1257(a)	7, 8

Cited Authorities

	<i>Page</i>
28 U.S.C. §2101(c)	1, 6, 7
N.J.S.A. §40:48-2	11
N.J.S.A. §40:48-25	2
N.J.S.A. §40A:14-118	<i>passim</i>
N.J.S.A. §40A:14-181	2, 4, 5, 11
Sup. Ct. R. 10	3
Sup. Ct. R. 13.1	1, 6, 7

JURISDICTION:

The Petition filed by the City of Newark improperly invokes this Court's jurisdiction under 28 U.S.C. §1257. The New Jersey Supreme Court considered the facts of the underlying matter and invalidated portions of Newark's municipal Ordinance 6PSF-B exclusively under state law. The adequate and independent state law grounds for the New Jersey Supreme Court's Opinion preclude jurisdiction in this Court.

Moreover, the Petition filed on January 19, 2021 seeking review of the August 19, 2020 Opinion of the New Jersey Supreme Court is untimely and should be dismissed as having been filed outside the 150-day jurisdictional timeframe provided for in SUP. CT. R. 13.1 and 28 U.S.C. §2101(c), as modified by the Court's March 19, 2020 Miscellaneous Order.

INTRODUCTION:

Newark's Ordinance 6PSF-B sought to establish a Civilian Complaint Review Board ("CCRB") with far-reaching power to investigate complaints filed against the Newark Police Department and/or its members, as well as to serve in a policy and oversight role relative to the overall operation of the Department. The New Jersey Supreme Court upheld the portions of Ordinance 6PSF-B, permitting the CCRB to investigate citizen complaints alleging police misconduct and conduct its oversight function, but determined that some of the investigatory power the ordinance conferred upon the board conflicted with existing state law.

Specifically, the New Jersey Supreme Court found that the CCRB could not exercise its investigatory powers when a concurrent investigation is being conducted by the Newark Police Department's internal affairs unit, as internal affairs investigations are carefully regulated by New Jersey law, which mandate that they must operate under the statutory supervision of the police chief and must otherwise comply with guidelines established by the New Jersey Attorney General. *See* New Jersey Statutes Annotated ("N.J.S.A.") §§40A:14-118 and 181. The New Jersey Supreme Court also invalidated the conferral of subpoena power on the CCRB because such authority could not be squared with New Jersey state statutes or judicial precedent. *See* N.J.S.A. §40A:14-118; N.J.S.A. §40:48-25; *City of Newark v. Benjamin*, 364 A.2d 563 (N.J. Ch. Div. 1976), *aff'd* 365 A.2d 945 (N.J. App. Div. 1976), *aff'd* 381 A.2d 793 (N.J. 1978). At its core, this matter involves an interpretation and application of state law, and raises no federal question. Because the New Jersey Supreme Court relied exclusively upon independent and adequate state law grounds when it invalidated portions of Newark's municipal Ordinance 6PSF-B, the Petition must be denied.

Newark's Petition should also be denied because it asks this Court to address issues that were never raised by Newark in the state court action and were not considered or addressed by the New Jersey Supreme Court in its disposition of the underlying litigation. The constitutional principles of equal protection and separation of powers set forth in the Petition were neither raised nor analyzed in the New Jersey Supreme Court Opinion, or any of the lower court decisions. Rather, the New Jersey Supreme Court's Opinion was solely driven by its review of the FOP's facial challenge and the parties' arguments relative

to the scope of authority granted to municipalities by state statute and state judicial precedent.

The Petition should further be denied because it improperly seeks review based upon Newark's contention that Ordinance 6PSF-B in its original form is simply "good public policy," which similarly raises no federal question upon which this Court may exercise jurisdiction under SUP. CT. R. 10 or 28 U.S.C. §1257.

For all of these reasons, Newark's Petition for certiorari should be denied.

RESTATEMENT OF THE CASE:

On March 16, 2016, Newark enacted Ordinance 6PSF-B, which reshaped the administration of discipline for police officers in the Newark Police Department. The ordinance established the CCRB in the Office of the Mayor, and vested the CCRB with the power to independently investigate complaints made against individual police officers and issue findings of fact that are binding on the police department. Ordinance 6PSF-B also conferred upon the CCRB the power to issue subpoenas and authorized the CCRB to make determinations regarding the imposition of discipline against police officers.

After an opportunity for limited discovery, the Chancery Division of the Superior Court of New Jersey for Essex County issued its March 19, 2018 Final Order on cross-motions for summary judgment. The court concluded that Ordinance 6PSF-B was *ultra vires*, void and unenforceable except to the extent the ordinance authorized the CCRB to serve strictly in an oversight capacity. Pet. App C. The Chancery Court based its legal

conclusions on, *inter alia*, New Jersey Supreme Court precedent involving the same defendant attempting this same action several decades earlier and New Jersey statutes regulating police discipline. *See City of Newark v. Benjamin*, 364 A.2d 563 (N.J. Ch. Div. 1976); N.J.S.A. §40A:14-118; N.J.S.A. §40A:14-181.

On appeal by Newark, the Appellate Division of the New Jersey Superior Court embraced Newark's policy argument, reversing in part and affirming in part the Chancery Court's decision. In so doing, the Appellate Division concluded that while the CCRB's findings may not be binding and the identity of complainants and police officers must remain confidential, Ordinance 6PSF-B is otherwise valid under New Jersey law. Thus, the Appellate Division authorized the CCRB to move forward with the issuance of subpoenas, the unfettered investigation of individual police officers, and the recommendation of discipline against individual officers.

On August 19, 2020 the New Jersey Supreme Court issued its Opinion, affirming in part and reversing in part. One of the earlier paragraphs in the majority Opinion provides critical insight into the lens through which Ordinance 6PSF-B was reviewed by the court:

“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... 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." Pet. App. A, pg. 3.

In this context, the New Jersey Supreme Court concluded that state statutes which govern the authority of a police chief and the police internal affairs process in New Jersey, respectively, preclude a concurrent investigation by a CCRB while an internal affairs complaint on the same matter is under review. *See* N.J.S.A. §40A:14-118 and N.J.S.A. §40A:14-181. For concurrent investigations to be permissible, the court concluded, state 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 internal affairs investigatory process no longer enjoy paramountcy. Pet. App. A, pp. 40-44.

The New Jersey Supreme Court also invalidated the provision of Ordinance 6PSF-B which conferred subpoena power upon the CCRB. Relying on state judicial precedent set forth in *City of Newark v. Benjamin*, 381 A.2d 793 (N.J. 1978),¹ the court concluded that there is no inherent authority for Newark's municipal council to delegate subpoena power to a non-legislative body of its creation under the existing statutory scheme, and

1. Contrary to the representation of Newark (Pet. at 4), it was not a police union but rather the City of Newark itself that successfully challenged the 1976 proposal to empower a civilian review board with authority to issue subpoenas in *Newark v. Benjamin*, 364 A.2d 563 (N.J. Ch. Div. 1976).

that any deviation from the statutory restrictions would require affirmative action from the state legislature. Pet. App. A, pp. 48-51. The court also rejected Newark's contention that the power to issue subpoenas could be derived from N.J.S.A. §40A:14-118. In this regard, the court determined that for Newark to confer subpoena power to this municipally created civilian review board, there needs to be clearly expressed evidence of such intent by the state legislature, which simply does not exist under the current statutory scheme. Pet. App. A, pp. 50-51.

The dissent, written by New Jersey Chief Justice Rabner, similarly focuses on questions and analysis of state law, rather than any federal question or constitutional right. In particular, the dissent offers an alternative to the majority's view of N.J.S.A. §40A:14-118, and the concomitant authority that might follow under that alternative interpretation of the state statute.

On January 19, 2021, Newark filed its Petition seeking review of the August 19, 2020 Opinion of the New Jersey Supreme Court outside the 150-day jurisdictional timeframe set forth in SUP. CT. R. 13.1 and 28 U.S.C. §2101(c), as modified by the Court's March 19, 2020 Miscellaneous Order. Newark's Petition notably does not contest the New Jersey Supreme Court's interpretation of state law, but instead, raises for the first time myriad newly proffered constitutional questions not considered below. Contrary to what one might conclude from reading Newark's Petition, this litigation never involved a challenge by the City of the state statutory scheme which Newark now suggests may infringe on its residents' and its own purported constitutional rights. Rather, this litigation involved a facial challenge by the FOP as to whether Ordinance 6PSF-B exceeds Newark's authority under New Jersey law.

Concluding that certain aspects of Ordinance 6PSF-B indeed went beyond Newark’s statutory authority, the New Jersey Supreme Court struck a careful balance within the confines of state law by discerning an important oversight role for Newark’s CCRB. This Court is respectfully urged to deny Newark’s Petition and leave that careful balance undisturbed.

**REASONS WHY THE PETITION
SHOULD BE DENIED:**

In addition to the jurisdictional issue related to the timing of Newark’s Petition,² the Petition should be denied because: 1) the New Jersey Supreme Court relied exclusively upon independent and adequate state law grounds when it invalidated portions of Newark’s municipal Ordinance 6PSF-B; 2) Newark asks this Court to address issues that were never raised or considered in the state court action; and 3) the Petition improperly seeks review on the basis of “public policy.”

This Court’s jurisdiction does not reach state court decisions resting exclusively – or even independently – on state law grounds. 28 U.S.C. §1257(a); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (abrogated in part on other grounds); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Crossley v. New Orleans*, 108 U.S. 105 (1883). This Court must examine the precise grounds on which the opinion is based without considering the broader

2. According to Newark’s Certificate of Service, the Petition was filed electronically and placed in the mail on January 19, 2021, which is one hundred and fifty-three (153) days after the New Jersey Supreme Court issued its August 19, 2020 Opinion, thus exceeding the 150-day jurisdictional timeframe set forth in SUP. CT. R. 13.1 and 28 U.S.C. §2101(c), as modified by the Court’s March 19, 2020 Miscellaneous Order.

opinion. *Black v. Cutter Labs*, 351 U.S. 292 (1956). If independent and adequate state grounds support a lower court's judgment, then exercising this Court's federal question analysis would render any decision on such a mere advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (superannuated on other grounds).

In this case, explicitly absent from the New Jersey Supreme Court Opinion is any discussion or analysis of a federal question and/or a constitutional concern. On the contrary, the New Jersey Supreme Court specifically relied upon its review of state statute and jurisprudence to determine that the creation by ordinance of a CCRB is permissible, but that state law precludes the CCRB from exercising investigatory powers when a concurrent investigation is conducted by the Newark Police Department's internal affairs unit and further bars the CCRB from exercising the power of subpoena.

The New Jersey Supreme Court's interpretation of state law, in this regard, is binding on this Court. *O'Brien v. Skinner*, 414 U.S. 1032 (1974). Newark's attempt to raise a federal question by ignoring the underlying issues directly addressed by the New Jersey Supreme Court must be rejected as this Court lacks jurisdiction to review an appeal where state law proved dispositive. 28 U.S.C. §1257(a). Given the existence of exclusive, independent and adequate state law grounds for the New Jersey Supreme Court's decision, Newark's Petition should be denied.

The Petition's second infirmity is that none of the constitutional issues raised by Newark are in the record as having been raised in the state court proceeding below. Federal question(s) relied upon to confer jurisdiction in the United States Supreme Court cannot first be raised

in a Petition for certiorari. *Monks v. New Jersey*, 398 U.S. 71 (1970)(Writ of certiorari will be dismissed where claim advanced by petitioner's attorney with respect to allegedly unconstitutional application of state statute was raised for first time upon certiorari, and state court had been given no opportunity to pass upon it.); *see also*, *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *N.Y. ex rel. Cohn v. Graves*, 300 U.S. 308, 317 (1937); *Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490 (1919); *Parker v. McLain*, 237 U.S. 469 (1915); *Michigan C. R. Co. v. Michigan S. R. Co.*, 60 U.S. 378 (1857)(Record must show, affirmatively or by fair implication, that some federal question was involved which was necessary to determination of cause). The sound rationale for this type of judicial restraint is that questions not raised below are those on which the record is very likely to be inadequate, since it was not compiled with those questions in mind. *Cardinale*, 394 U.S. at 438-439. Moreover, it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. *Id.* The *Cardinale* Court reasoned that even though states are not free to avoid constitutional issues on inadequate state grounds, they should be given the first opportunity to consider them. *Id.*

Reviewing the Petition alone, one might conclude that the litigation below involved Newark's challenge of state statutory provisions which it felt prevented it from protecting and/or upholding the constitutional rights of its citizens or those purported to be reserved to itself. Of course, this is not the posture of the state court proceeding, which commenced as a facial challenge in the Chancery Court asserting that Ordinance 6PSF-B contravened state law and was decided on cross-motions for summary

judgment after limited discovery. The phrase “equal protection” is not found in any of the underlying state court decisions, and certainly there was no record developed below which might shed light on Newark’s claims that the CCRB, in its legally authorized form, along with the many other legal reforms implemented by Newark and the State of New Jersey relative to law enforcement, cannot adequately protect the constitutional rights of its citizens.

The concept of “separation of powers” is discussed tangentially in the New Jersey Supreme Court Opinion, but only in the context of defining the mayor-council form of government upon which the City of Newark is founded, as well as in the context of the court’s analysis of N.J.S.A. §40A:14-118, where the court concluded that the state statute creates a distinction between the executive power of an “appointing authority” and the administrative power of a police chief. Pet. App. A, pp. 20, 27, 30. Newark’s contention that the New Jersey Supreme Court Opinion triggers a constitutional “separation of powers” dilemma is mistaken (Pet. at 20), as Newark decries not a conflict between two co-equal branches of state or local government, but rather laments the traditional notion that Newark’s municipal authority must bend to the powers and authority of the State of New Jersey. *See e.g., Wagner v. Mayor & Mun. Council of Newark*, 132 A.2d 794, 798 (N.J. 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*, 92 A.2d 473, 474-475 (N.J. 1952) (explaining that municipal power in New Jersey is statutory in origin).

Even Newark’s reference to the “necessary and proper” police power of a public entity was analyzed by the New Jersey Supreme Court not under the rubric of

the United States Constitution and federal jurisprudence, but rather under New Jersey statute N.J.S.A. §40:48-2. Pet. App. A, pg. 20-24. This statutory provision, which is admittedly modeled after the federal principle, provides:

“a 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...” *Id.*

The New Jersey Supreme Court concluded that CCRB investigations and the conferral of subpoena power upon the CCRB was neither necessary nor proper because they expressly conflict with the legislative mandate of N.J.S.A. §40A:14-118 and N.J.S.A. §40A:14-181. Pet. App. A, pp. 37-38. Specifically, the New Jersey Supreme Court analyzed the final paragraph of N.J.S.A. §40A:14-118 to preserve the governing body’s authority to appoint committees “to conduct investigations of the operation of the police force,” but refused to conflate that authority with the following sentence, thus dismissing the notion that such authority could be aggregated to the CCRB. As such, relying on both the language and the history of the statute, the court determined that a CCRB was barred from performing certain investigative responsibilities provided for under N.J.S.A. §40A:14-118. Pet. App. A, pp. 24-32. The court further explained that there is no inherent authority under state law for Newark’s municipal council to delegate its subpoena power to a non-legislative body of its creation, because the council’s subpoena power is limited to its

power to legislate, which can only be delegated to a subcommittee of its own members in furtherance of a proper legislative purpose. Pet. App. A, pp. 48-49. Flowing from that analysis, the New Jersey Supreme Court rejected Newark’s state law “necessary and proper” argument, again relying upon the first sentence of the last paragraph in N.J.S.A. §40A:14-118, which stops far short of supporting the notion that a municipality has the power to confer subpoena power on a public-member commission it chooses to create. Pet. App. A, pp. 49-51.³

Finally, Newark argues that this Court should grant the Petition because “public policy” warrants review. Pet. at 24. The “public policy” of New Jersey is governed by the executive, legislative and judicial branches of the New Jersey state government, and a question as to whether a New Jersey statute meets a standard for good “public policy” does not present federal question reviewable by this Court. *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924). If the time has come in New Jersey for N.J.S.A. §40A:14-118 to be modified to permit civilian entities to displace the duties of a police chief and conduct disciplinary investigations of individual police officers, then that is something that must be done by the legislature, rather than by judicial fiat. If the will of the electorate in New Jersey is to allow civilians to engage in police functions, the legislature has the power to effectuate that change. And if the New Jersey statutory

3. Newark’s suggestion that the Consent Decree it entered into with the United States Department of Justice supports the establishment of a CCRB as set forth in Ordinance 6PSF-B ignores Newark’s own position in the underlying proceedings that the CCRB envisioned by the ordinance was not created for the consent decree and admittedly exceeds that which is provided for in the consent decree. Pet. App. C, pp. 78, 144-145.

scheme governing the power of subpoena is to be upheld, that it is similarly the responsibility of the legislature, rather than this Court, to do so.⁴

As this litigation raises no federal question, and the ruling of the New Jersey Supreme Court is exclusively and independently based upon interpretation of state law, further review by this Court is unwarranted.

CONCLUSION:

For the foregoing reasons, this Court should deny the City of Newark's Petition.

Respectfully submitted,

QUINTES D. TAGLIOLI

Counsel of Record

STEPHEN C. RICHMAN

MATTHEW D. AREMAN

MARKOWITZ AND RICHMAN

123 South Broad Street, Suite 2020

Philadelphia, PA 19109

(215) 875-3100

qdtaglioli@markowitzandrichman.com

Counsel for Respondent

4. The New Jersey legislature is currently considering legislation to specifically allow municipal governments to establish Civilian Review Boards with subpoena power (NJ Assembly Bill A4656, February 20, 2021).