

No. 20-989

IN THE
Supreme Court of the United States

CITY OF NEWARK,

Petitioner,

v.

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Respondent.

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

**BRIEF OF AMICUS CURIAE JERSEY CITY
POLICE OFFICERS BENEVOLENT
ASSOCIATION IN SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
THE PETITION MUST BE DENIED BECAUSE THE NEW JERSEY SUPREME COURT HAS PROPERLY DECIDED THIS MATTER BASED ON STATE LAW	4
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Dome Realty, Inc. v. City of Paterson</i> , 83 N.J. 212 (1980).....	13
<i>Durley v. Mayo</i> , 351 U.S. 277 (1956).....	5
<i>Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark</i> , 244 N.J. 75 (2020)..... <i>passim</i>	
<i>Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark</i> , 459 N.J. Super. 458 (App. Div. 2019).....	8
<i>Groppi v. Wisconsin</i> , 400 U.S. 505 (1971).....	9
<i>Henry v. Rahway State Prison</i> , 81 N.J. 571 (1980).....	17
<i>Honeyman v. Hanan</i> , 300 U.S. 14 (1937).....	5
<i>Hortonville Joint Sch. Dist., No. 1 v. Hortonville Educ. Ass'n</i> , 426 U.S. 482 (1976).....	3, 9
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983).....	2, 7
<i>In re Shain</i> , 92 N.J. 524 (1983).....	15
<i>Kingsley Pictures Corp. v. Regents</i> , 360 U.S. 684 (1959).....	9
<i>Lynch v. People of New York ex rel. Pierson</i> , 293 U.S. 52 (1934).....	5, 6

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940).....</i>	6, 7
<i>Rivell v. Civil Service Comm'n, 115 N.J. Super. 64 (App. Div. 1971).....</i>	17
STATUTES	
28 U.S.C. § 1257	4, 5
N.J.S.A. 11A:2-13.....	9, 18
N.J.S.A. 11A:2-15	18
N.J.S.A. 40:48-2.....	3, 8, 10, 13
N.J.S.A. 40A:14-118.....	<i>passim</i>
N.J.S.A. 40A:14-147.....	9, 18
N.J.S.A. 40A:14-150	18
N.J.S.A. 40A:14-181.....	<i>passim</i>
N.J.S.A. 52:17B-101	11
OTHER AUTHORITIES	
New Jersey Office of the Attorney General, <i>Internal Affairs Policy and Procedures,</i> August 2020 version	2, 12, 17, 18
N.J. A.B. No. 4656 (Sept. 17, 2020)	15
N.J. S.B. No. 2973 (Sept. 24, 2020).....	14

INTEREST OF THE *AMICUS CURIAE*¹

Amicus curiae, Jersey City Police Officers Benevolent Association, (hereinafter, “POBA”) is a public sector labor union that serves as the exclusive negotiations representative for more than seven hundred non-supervisory sworn Police Officers employed by the City of Jersey City (hereinafter, “Jersey City”). The POBA and its members have a substantial interest in ensuring that investigations into police officer conduct are performed in a uniform and consistent manner as required by the statutory and common law of the State of New Jersey. The New Jersey Supreme Court’s decision in *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75 (2020), strikes an appropriate balance between the City of Newark’s (hereinafter, “Newark” or “Petitioner”) asserted goal of improving oversight of its police department through the creation of a civilian complaint review board (hereinafter, “CCRB”) while maintaining the integrity of the department’s internal affairs process.

This case concerns *Amicus* because Jersey City, like Newark, seeks to pass an ordinance implementing a CCRB. Thus, the outcome of this case will directly affect the POBA and its members.

¹ Pursuant to Supreme Court Rule 37.2, the parties were notified more than 10 days prior to the filing of this brief. Blanket letters of consent to file *amicus curiae* briefs have been filed by the parties with the Clerk of the Court pursuant to Supreme Court Rule 37.3. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

In New Jersey, the internal affairs function of municipal, county, and higher education law enforcement agencies is governed by the Internal Affairs Policy and Procedures (hereinafter, “IAPP”) promulgated by the State’s Attorney General. Pursuant to N.J.S.A. 40A:14-181, the IAPP has been given the force of law. Discipline and disciplinary procedures for law enforcement officers are established by statutory and common law. The statutory requirements provide for an orderly and consistent means of discipline. The POBA has an interest in ensuring that its members are investigated and disciplined in a manner consistent with New Jersey law. Accordingly, *Amicus* files this brief in support of Respondent, Fraternal Order of Police, Lodge No. 12 (hereinafter, “FOP”), in this matter.

SUMMARY OF THE ARGUMENT

This Honorable Court should not grant Newark’s Petition for Writ of Certiorari in this matter. The New Jersey Supreme Court’s decision in *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75 (2020) was properly decided based on applicable New Jersey statutory and common law. Petitioner and its supporting *Amicus*, Jersey City, attempt to create federal constitutional issues out of whole cloth, which were not argued below and are an after-the-fact attempt to invoke the jurisdiction of this Court. This Court need not consider Petitioner’s federal claims that were not addressed or properly presented to the New Jersey Supreme Court (hereinafter, “NJSC”). *Illinois v. Gates*, 462 U.S. 213, 217-219 (1983). Accordingly, this Honorable Court must deny the Petition.

The NJSC properly limited the power of Newark’s CCRB in accordance with the statutory and common law of the State. This Court is bound to accept the

interpretation of New Jersey law by the NJSC. *Hortonville Joint Sch. Dist., No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976). As New Jersey's highest court properly recognized, N.J.S.A. 40:48-2 provides a broad grant of police power to municipalities. *Fraternal Order of Police, Newark Lodge No. 12*, 244 N.J. at 102. This broad grant of power was sufficient to support the creation of the CCRB. *Id.* at 103. However, N.J.S.A. 40A:14-181 does not permit the CCRB to conduct concurrent investigations with a department's internal affairs unit. *Id.* at 106. Similarly, the statutory and common law of New Jersey does not permit a municipal governing body to delegate its subpoena power to the CCRB. *Id.* at 112. These issues involve New Jersey law and the NJSC's decision was based solely on its interpretation of New Jersey law.

Despite never raising federal constitutional issues below, Petitioner and its supporting *Amicus*, Jersey City, argue that 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." *Amicus* recognizes that this is a significant matter that must be addressed, however, that is not what this case is about. This case concerns whether New Jersey's statutory scheme grants the CCRB, a body separate and distinct from a municipal governing body, the power to issue subpoenas and to perform complaint-based investigations of allegations of police misconduct concurrently with internal affairs investigations. As the NJSC properly determined, it does not.

As set forth more fully below, this Honorable Court should decline to grant the Petition for Certiorari in this matter.

ARGUMENT

THE PETITION MUST BE DENIED BECAUSE THE NEW JERSEY SUPREME COURT HAS PROPERLY DECIDED THIS MATTER BASED ON STATE LAW.

Petitioner claims that the NJSC's decision violates the United States Constitution. These constitutional claims, however, were never raised by Petitioner before the NJSC. For this reason alone, the Petition must be denied.

Even if this Honorable Court were to review the merits of this case, the NJSC properly decided it based on applicable state law. In so doing, the NJSC's decision ensures that internal affairs investigations and law enforcement discipline will be administered uniformly. Had the NJSC decided differently, law enforcement officers throughout New Jersey would be subject to different standards of conduct, one promulgated by their agency and one created by the CCRB. The NJSC's decision avoids this result. Accordingly, this Court must not grant Newark's Petition for Certiorari.

1. Petitioner alleges that the NJSC's decision violates the Equal Protection and Necessary and Proper Clauses of the Constitution as well as the Separation of Powers doctrine. *Amicus Jersey City* adds that Newark's Due Process Rights have been violated and the decision is contrary to the Political Process doctrine. These claims, however, were never raised before the NJSC. Thus, this Court should refrain from hearing this matter.

This Court's jurisdiction over state court decisions derives from 28 U.S.C. §1257. The statute provides that "[f]inal judgments or decrees rendered by the

highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . .” 28 U.S.C. §1257(a) (2021). However, such a decision may only be reviewed “where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.” 28 U.S.C. §1257(a) (2021).

It is not sufficient, however, that the matter sought to be reviewed concerns a federal question. Rather, the specific federal question must be pressed and passed upon by the highest court of the state in which a decision could be had. “It is a well-established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause.” *Durley v. Mayo*, 351 U.S. 277, 281 (1956), quoting, *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937); *Lynch v. People of New York ex rel. Pierson*, 293 U.S. 52, 54 (1934).

In *Lynch v. People of New York ex rel. Pierson*, 293 U.S. 52 (1934), this Court held:

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its

decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *Lynch*, 293 U.S. at 54.

In *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940), this Court stated: “But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.” *McGoldrick*, 309 U.S. at 434. This Court further explained:

In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. *McGoldrick*, 309 U.S. at 434.

In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court acknowledged, without deciding, that the “not pressed or passed upon below” rule may be a prudential restriction and not a jurisdictional bar. *Id.* at 222. However, the distinction was immaterial in that case and the Court declined to decide the issue not raised below. *Id.* The Court identified several reasons for this decision. First, “questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind.” *Id.* at 221. Second, “due regard for the appropriate relationship of this Court to state courts requires that state courts be given an opportunity to consider the constitutionality of the action, as well as proposed changes in existing remedies for unconstitutional actions.” *Id.* at 222, *citing McGoldrick*, 309 U.S. at 434. Finally, by requiring that the matter be raised in the state court, the state court is availed of the opportunity to rest its decision on an adequate or independent state ground. *Id.*

Here, the NJSC did not have the opportunity to review and pass upon Petitioner’s claimed federal constitutional violations because it never raised these claims before New Jersey’s highest court. The NJSC issued a thorough and thoughtful opinion addressing the arguments raised by the FOP and the arguments raised by Newark in its opposition. *See Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75 (2020). The only constitutional claim raised before the NJSC was the FOP’s argument that Newark’s Ordinance violated the due process rights of officers, which the Court found to be premature. *Id.* at 113.

The NJSC did not have the opportunity to address any of the claims that Petitioner advances now

because none of those claims were raised before it. Petitioner did not raise claimed violations of the United States Constitution’s Equal Protection and Necessary and Proper Clauses and the Separation of Powers doctrine before the NJSC, nor did it raise these claims before the Appellate Division below. *See Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 459 N.J. Super. 458 (App. Div. 2019).² Similarly, the alleged violations of the Due Process Clause and the Political Process doctrine of the Equal Protection Clause raised by *Amicus Jersey City* in its brief were not before the NJSC.

Because Petitioner failed to raise these claims before the NJSC, the NJSC never had the opportunity to pass upon them. This Court should not grant the Petition because Petitioner’s claims have not been pressed or passed upon by New Jersey’s highest court. This is especially so in this case, where the NJSC’s decision rests on an independent and adequate state ground. Indeed, the NJSC’s decision is based solely on its careful analysis of what New Jersey law allows, and what it does not. Because the NJSC did not have the opportunity to decide Petitioner’s claims, this Court must not grant the Petition.

2. Even if the claims had been properly raised below, this Court should still decline to exercise its jurisdiction. It is well settled that this Court is bound

² The Appellate Division did address N.J.S.A. 40:48-2, which it found “akin to the necessary and proper clause in the United States Constitution.” *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 459 N.J. Super. 458, 489 (App. Div. 2019). However, the NJSC did not draw the same comparison and did not analyze that statute in the same manner. *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75, 117 (2020).

to accept the interpretation of New Jersey law by the NJSC. *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976), *citing*, *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959). Here, the NJSC's decision is based entirely on its interpretation of state law. As this Honorable Court is constrained to the NJSC's interpretation of New Jersey law, the Petition must be denied.

In New Jersey, the administration of municipal police departments and the investigation and discipline of municipal, county, and higher education law enforcement officers are regulated by statute. *See, e.g.*, N.J.S.A. 40A:14-118 (2021); N.J.S.A. 40A:14-147 (2021), N.J.S.A. 40A:14-181 (2021); N.J.S.A. 11A:2-13 through 22 (2021). The NJSC properly analyzed the applicable New Jersey statutes in determining (1) that Newark had the right to create the CCRB by ordinance; (2) that the CCRB did not have the authority to conduct complaint-based investigations concurrently with an internal affairs investigation; (3) that the CCRB could investigate citizen complaints for which no internal affairs investigation was undertaken; (4) that the CCRB could create a disciplinary matrix to be used by the public safety director, conduct oversight reviews and report periodically to the public safety director and municipal council; and (5) that the municipality lacked the authority to enact an ordinance that delegated subpoena power to the CCRB. *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75 (2020).

After initially acknowledging that Newark had “the power to act legislatively where such authority has been delegated by the Legislature,” the NJSC recognized that “where municipal power to act exists,

municipal action cannot run contrary to statutory or constitutional law.” *Id.* at 92-93. To determine whether Newark’s ordinance was contrary to law, the NJSC examined N.J.S.A. 40:48-2, N.J.S.A. 40A:14-118 and N.J.S.A. 40A:14-181.

N.J.S.A. 40A:14-118 allows the governing body of a municipality to create and establish a police force by ordinance and requires the ordinance to provide for a “line of authority relating to the police function and for the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and the discipline of its members.” N.J.S.A. 40A:14-118 (2021). The statute further outlines the duties and responsibilities of the chief of police, if such position is established and defines “appropriate authority.”³ The statute also provides that:

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 such powers of inquiry as the governing

³ “Appropriate authority” is defined as:

the mayor, manager, or such other appropriate executive or administrative officer, such as a full-time director of public safety, or the governing body or any designated committee or member thereof, or any municipal board or commission established by ordinance for such purposes, as shall be provided by ordinance in a manner consistent with the degree of separation of executive and administrative powers from the legislative powers provided for in the charter or form of government either adopted by the municipality or under which the governing body operates. N.J.S.A. 40A:14-118 (2021).

body deems necessary or to conduct such hearing or investigation authorized by law. N.J.S.A 40A:14-118 (2021).

The NJSC properly determined, based on the text and legislative history, that N.J.S.A. 40A:14-118 created a single “appropriate authority” designated to buffer the police force from political interference. *Fraternal Order of Police, Newark Lodge No. 12*, 244 N.J. at 97. As a result, the CCRB could not be a second “appropriate authority” pursuant to the statute as Newark’s municipal code designated the Public Safety Director as the “appropriate authority.” *Id.* Only the appropriate authority may establish the rules and regulations of the department, which the police chief must enforce. *Id.* at 98. The police chief reports on day-to-day operations, including the disciplining of officers, to the appropriate authority. *Id.* The NJSC noted that while N.J.S.A. 40A:14-118 preserves to the governing body the ability to create committees, it similarly reserved to the “appropriate authority or any executive or administrative officer charged with general administrative responsibilities within the municipality,” the ability to examine “operations of the police or the performance of any officer or member thereof.” *Id.* at 99.

The NJSC next considered the role of N.J.S.A. 40A:14-181 in the analysis. *Fraternal Order of Police, Newark Lodge No. 12*, 244 N.J. at 100. New Jersey’s Criminal Justice Act provides the State’s Attorney General with broad law enforcement authority. N.J.S.A. 52:17B-101 (2021). Pursuant to that authority, the Attorney General promulgated the IAPP. N.J.S.A. 40A:14-181 requires every municipal, county, and higher education institution law enforcement agency within New Jersey to adopt and implement

internal affairs policies consistent with the IAPP. N.J.S.A. 40A:14-181 (2021).

As the NJSC recognized, the IAPP establishes uniform procedures for investigating complaints of officer misconduct. *Fraternal Order of Police, Newark Lodge No. 12*, 244 N.J. at 100. The IAPP, which was last updated in August 2020, requires all municipal and county law enforcement agencies to establish, by written policy, an internal affairs unit or function.⁴ It also requires that reports by the public alleging officer misconduct be accepted and fully and promptly investigated and that confidential information is safeguarded. The IAPP sets forth exhaustive procedures for the investigation of internal affairs complaints as well as the rights officers retain during the internal affairs process. The NJSC acknowledged that the internal affairs process is insular, consisting of trained law enforcement personnel who are directly responsible to the law enforcement executive or the designated internal affairs supervisor. *Fraternal Order of Police, Newark Lodge No. 12*, 244 N.J. at 101.

The NJSC further recognized that while there is some discretion granted to law enforcement agencies to fulfill the requirements of the IAPP, there are also mandatory provisions. *Id.* These include the requirement that each agency establish and maintain a confidential process, including an internal affairs record system that includes an internal affairs index and filing system for all documents and records. *Id.* Internal affairs records must also be managed and

⁴ IAPP, August 2020 Version, available at <https://www.nj.gov/oag/dcj/agguide/directives/IAPP-August-2020-Version.pdf> (last visited March 17, 2021).

secured, and internal affairs personnel must receive certain training. *Id.*

After examining these State statutes, the NJSC applied the law to Newark's ordinance establishing the CCRB pursuant to the three-part test outlined in *Dome Realty, Inc. v. City of Paterson*, 83 N.J. 212, 225-26 (1980). This test requires a court reviewing the validity of a challenged municipal action to determine (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) if 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. *Fraternal Order of Police, Newark Lodge No. 12*, 244 N.J. at 93. In its analysis, the NJSC relied solely on New Jersey statutory and common law and did not address the Constitution of the United States or any federal statute.

The NJSC acknowledged that N.J.S.A. 40:48-2 provides a broad grant of police powers to municipalities. *Id.* at 102. Accordingly, the NJSC determined that questions concerning Newark's ability to create the CCRB arose solely under the third prong of the analysis. *Id.* at 103.

Regarding this prong, the NJSC first determined that neither N.J.S.A. 40A:14-118 nor N.J.S.A. 40A:14-181 preempt the creation of the CCRB. *Id.* However, both statutes serve to limit certain powers that the ordinance grants the CCRB. *Id.* In this regard the NJSC determined that the prospect of concurrent investigations by the CCRB and the internal affairs unit created a conflict between the ordinance and

statutory policies. *Id.* at 105. The NJSC stated: “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 IA operation and separated on a reporting basis from others on the force.” *Id.* at 106. The NJSC also recognized that the IAPP’s strict confidentiality requirements are mandated by N.J.S.A. 40A:14-181 and “no creation of a municipality can interfere with the IA function as it is required to operate.” *Id.* at 107.

A concurrent investigation between the internal affairs unit and the CCRB does not comport with N.J.S.A. 40A:14-181 and the IAPP’s requirements. The NJSC opined: “The IA investigatory process is disrupted, the police chief’s authority over IA function and its proper operation is 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.” *Id.* at 107. Basing its decision entirely on New Jersey statutory law, the NJSC determined that “[u]nless legislative change occurs, we are constrained to preclude the CCRB from employing its delegated authority to conduct complaint-based investigations in any matter where there is an IA investigation.” *Id.* at 108.⁵

⁵ The New Jersey Legislature is considering the NJSC’s decision and the authority of a CCRB in Senate Bill No. 2973 (Introduced September 24, 2020) and Assembly Bill No. 4656 (Introduced September 17, 2020).

In making this determination, the NJSC necessarily limited its holding to conform to the State statutes that it had analyzed. To that end, the NJSC determined that the investigatory power of the CCRB poses no conflict with statutory law when used to investigate a citizen complaint that is not subject to an internal affairs investigation. *Id.* at 108-09. The NJSC similarly determined that Newark's Public Safety Director, as the appropriate authority, could direct the chief of police to initiate charges against a police officer based on the findings of the CCRB. *Id.* at 109. The NJSC also determined that the CCRB's power to create a disciplinary matrix to be used by the Director of Public Safety, conduct oversight reviews of the department (which includes the internal affairs unit) and report periodically to the Director of Public Safety and the Council were consistent with N.J.S.A. 40A:14-118. *Id.* These determinations were also based solely on New Jersey statutory law.

Next, the NJSC addressed the delegation of subpoena power to the CCRB, and determined that this grant could not be "squared with existing statutes." *Id.* at 111. Relying on its decision in *In re Shain*, 92 N.J. 524, 539 (1983), the NJSC explained that pursuant to its legislative function, the governing body has the inherent legislative power to investigate and interrogate officials under oath and to, among other things, issue subpoenas in furtherance of its proper legislative function. *Fraternal Order of Police, Newark Lodge No. 12*, 244 N.J. at 111. However, the CCRB is not the governing body, nor is it a subcommittee of the governing body. *Id.* "Therefore, it cannot derive from the Council the subpoena power recognized in *Shain*." *Id.* Similarly, the NJSC found that the subpoena power cannot be derived from N.J.S.A. 40A:14-118. *Id.* (Citing to numerous instances in which the Legislature

specifically granted certain individuals and bodies subpoena power). In the absence of a clearly expressed intent by the Legislature, the NJSC concluded that the Legislature did not intend to give municipalities the ability to distribute subpoena power to public-member commissions. *Id.*

At the conclusion of its decision, the NJSC addressed the FOP's argument concerning due process, finding it premature. *Id.* at 113. This is the only instance in its decision where the NJSC passed upon a federal constitutional issue.

The NJSC's decision rests squarely, and solely, on its interpretation of the statutes and common law of the State of New Jersey. It does not implicate the Equal Protection Clause or the Necessary and Proper Clause of the United States Constitution, nor does it violate the Separation of Powers doctrine as Petitioner claims. It does not violate Newark's Due Process rights or the Political Process doctrine as *Amicus Jersey City* claims. The entire decision is based on the NJSC's analysis of New Jersey law. Petitioner did not raise any of these arguments to the NJSC. Accordingly, this Honorable Court must not grant the Petition.

3. The NJSC made the only decision possible under New Jersey's current statutory scheme. As the NJSC noted, the applicable statutes "do not bespeak a moving target." *Id.* at 98. Granting the CCRB the power to conduct concurrent investigations with internal affairs and granting them subpoena power would create multiple lines of authority and thus multiple standards by which law enforcement officers' conduct will be judged. The standards in New Jersey would be a "moving target" that is not contemplated by statute. Such a "moving target" would make it impossible for

law enforcement officers, like the members of the POBA, to properly function.

Law enforcement agencies in New Jersey are paramilitary organizations. *Rivell v. Civil Service Comm'n*, 115 N.J. Super. 64, 72 (App. Div. 1971), *rev'd on other grounds by Henry v. Rahway State Prison*, 81 N.J. 571 (1980). Maintaining discipline within such an organization is paramount. *Rivell*, 115 N.J. Super. at 72. However, the Newark Ordinance undermines the strict hierarchical structure established by N.J.S.A. 40A:14-118 and the IAPP through N.J.S.A. 40A:14-181.

Currently, the conduct of municipal and county law enforcement officers in New Jersey is governed by the Rules and Regulations of their respective departments, which are approved by the appropriate authority and enforced by the chief of police, if such position is established. N.J.S.A. 40A:14-118 (2021). If a law enforcement officer is alleged to have violated those Rules and Regulations, or if a complaint is made about the law enforcement officer's conduct by a member of the public or the department, the procedures set forth in the IAPP provide a uniform and consistent means of investigating the complaint.

The IAPP ensures that investigations of employee misconduct are conducted swiftly and require that in most cases they be completed within 45 days of receipt of the complaint. *IAPP*, 6.1.2. When the complaint involves a criminal matter, the IAPP requires that the internal affairs investigator defer to the County Prosecutor. *IAPP*, 8.0.7. The IAPP further outlines the rights of law enforcement officers subject to the investigation, including the right to representation. *IAPP*, 8.1.1.

Importantly, the IAPP requires that the complaint be investigated in a confidential manner. *IAPP*, 9.6. The IAPP provides: “The nature and source of internal allegations, the progress of internal affairs investigations and the resulting materials are confidential information. The contents of an internal investigation case file, including the original complaint, shall be retained in the internal affairs function and clearly marked as confidential.” *IAPP*, 9.6.1. The confidentiality of the complaint, the complainant and the process are essential to ensure that individuals are not dissuaded from filing complaints.

If the internal affairs investigation reveals wrongdoing, the subject law enforcement officer is entitled to due process such as notice and a hearing on the charges. N.J.S.A. 40A:14-147 (2021); N.J.S.A. 11A:2-13 (2021). There are also statutorily defined procedures for appealing any discipline issued. N.J.S.A. 40A:14-150 (2021); N.J.S.A. 11A:2-15 (2021).

The NJSC’s decision granted as much latitude to the CCRB as it could without upending the entire statutorily defined process. There is no doubt that other law enforcement agencies will seek to implement CCRB’s like the one created in Newark. *Amicus Jersey City* has indicated that it too has an ordinance creating a CCRB advancing through its municipal council. If the NJSC had allowed concurrent investigations and granted subpoena power, law enforcement officers throughout New Jersey would be subject to conflicting requirements.

While New Jersey’s statutory law and the IAPP provide consistency throughout the State, each municipality and county could create different standards for its CCRB. While the IAPP requires that all complaints and investigations remain confidential, had the NJSC ruled differently, a CCRB could

subpoena an officer and compel him or her to provide testimony concerning an open internal affairs investigation. This would place the officer in a position where he or she is subject to discipline for refusing to comply with the CCRB's orders or subject to discipline for violating the IAPP. The NJSC's decision avoids this result.

Moreover, if a CCRB is permitted to conduct investigations concurrent with internal affairs, there is the possibility for different results. This creates a situation where law enforcement officers can be held to different and possibly conflicting standards of conduct. Allowing concurrent investigations alters the line of authority and weakens the paramilitary structure of the organization. When a law enforcement officer is faced with a life-or-death situation, hesitation caused by divergent standards of conduct could be the difference between returning home safely to their families or being killed or injured in the line of duty. The NJSC's decision, based entirely on New Jersey law, avoids this outcome.

Although law enforcement discipline is regulated by statute, it is easy to envision a situation in which an officer charged with misconduct and subject to a disciplinary hearing could be subpoenaed by a CCRB, had it been granted that power. That officer would then be in a position where he or she would have to either decline to testify before the CCRB, thus being subject to further discipline, or potentially giving up certain rights during their disciplinary hearing. Neither option is a good one.

This Honorable Court must not grant the Petition in this matter. The NJSC made its determination based solely on New Jersey law. It did not have the opportunity to review and pass upon the federal

constitutional issues it raises now for the first time before this Court. Accordingly, this Court must not grant Certiorari.

CONCLUSION

For the foregoing reasons, this Honorable Court should not grant the Petition for Certiorari in this matter.

Respectfully submitted,

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