

No. 20-989

SUPREME COURT OF THE UNITED STATES

City of Newark,

Petitioner,

vs.

Fraternal Order of Police Newark Lodge No. 12,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Tables of Contents and Authorities

Table of Contents

Introduction 1

Argument 5

 A. Newark’s Petition Is Timely 5

 B. The NJSC’s Reliance on State Law Does Not Abrogate the Federal
 Constitutional Issues at Bar 5

 C. This Court May Review All Constitutional Issues Presented by the Record 9

 D. Public Policy Requires Immediate Consideration of the Constitutional
 Consequences of Racially Disparate Policing..... 10

Conclusion..... 12

Table of Authorities

	Page(s)
<u>Cases</u>	
<i>Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza</i> , 88 S. Ct. 1601 (1968).....	6, 7, 9
<i>Atlantic Richfield Co. v. Christian</i> , 140 S. Ct. 1335 (2020).....	6, 7, 9
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	9
<i>Cardinale v. Louisiana</i> , 394 U.S. 437 (1969).....	9
<i>Chambers v. Miss.</i> , 93 S. Ct. 1038 (1973).....	6, 7, 9
<i>Danforth v. Minnesota</i> , 128 S. Ct. 1029 (2008).....	6, 7, 9
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004).....	7
 <u>Statutes</u>	
28 U.S.C. § 1257(a)	6, 7, 9

Introduction

Respondent Fraternal Order of Police's opposition is squarely premised on the institutional view that race-based policing can and will be eliminated by police officers themselves. Fraternal Order of Police ("FOP") is wrong. As the old chestnut goes, "snow and adolescence are the only problems that go away if you ignore them long enough." All of America—particularly our justice system—is now confronting the fact that racially motivated policing is neither snow nor adolescence. The longer our legal establishment continues to pretend that race-based policing is anecdotal and not a centuries-old, American institution requiring reform from outside the law enforcement silo, the longer the problem will persist as a stain on our democracy. Correspondingly, the longer we pretend that this case is about the narrow application of New Jersey's statutory code and not the sweeping unconstitutionality of FOP's racist policing practices, the longer those practices remain woven into the fabric of New Jersey's legal system. Newark is done pretending.

America's police departments have a long and well-documented history of discrimination against our communities of color. America's police unions, including FOP, have an equally long and well-documented history of fighting to protect that institutionalized discrimination against reform. One historical highlight is FOP's 1967 national convention, where the keynote speaker was none other than George Wallace. Speaking on a platform of white grievance, Wallace received two standing

ovations from FOP members.¹ For FOP, keeping the status quo means keeping their discriminatory practices in place.

Indeed, since at least the 1960's, FOP has brought litigation against cities with large Black populations whenever they attempt to establish citizen review boards to combat race-based policing. Although Philadelphia was able to operate a citizen complaint review board ("CCRB") intermittently from 1958 to 1966, it was largely unable to hold hearings or make findings due to lawsuits from FOP. After idling for years pending the litigation, Philadelphia's CCRB was ultimately shuttered by FOP's lawsuit in 1966.² More recently, FOP has filed suits to prevent CCRBs from functioning in Baltimore (2016),³ Chicago (2016),⁴ Newark (2018), Nashville (2019),⁵ Chicago again (2019),⁶ and Louisville (2020).⁷ In each of these cases, FOP argued that local statutes and codes prevented the CCRB from holding investigative or supervisory power over police; that only police officers are qualified to investigate, supervise, and discipline other police officers.

¹ Kim Barker et. al., *How Cities Lost Control of Police Discipline*, N.Y. Times (March 10, 2021), <https://www.nytimes.com/2020/12/22/us/police-misconduct-discipline.html>.

² Charles E. Reardon, *Encyclopedia of Race and Crime* (2009), excerpt available at <https://www.britannica.com/topic/citizen-review>.

³ Catherine Rentz, *Baltimore Police Win Lawsuit Against Union Over Civilian Oversight*, The Baltimore Sun (November 4, 2016), <https://www.baltimoresun.com/news/crime/bs-md-fop-lawsuit-20161104-story.html>.

⁴ Lisa Klein, *Police Union Calls Investigators Unqualified*, Courthouse News Service (December 23, 2016), <https://www.courthousenews.com/wp-content/uploads/2016/12/FOPChicago.pdf>.

⁵ Natalie Allison, *Tennessee Republicans File Bill Stripping Nashville Police Oversight Board's Subpoena Powers*, Tennessean (February 4, 2019), <https://www.tennessean.com/story/news/politics/2019/02/04/police-oversight-board-subpoena-power-tennessee-house-bill/2773233002/>.

⁶ David Struett, *Police Union Says COPA Isn't Qualified to Investigate Officer Shootings*, Chicago Sun Times (March 15, 2019), <https://chicago.suntimes.com/2019/3/15/18420886/police-union-says-copa-isnt-qualified-to-investigate-officer-shootings>.

⁷ Eleanor Klibanoff, *Louisville's Two-Decade Fight for Civilian Oversight of Police*, Kentucky Center for Investigative Reporting (July 2, 2020), <https://kycir.org/2020/07/02/louisvilles-two-decade-fight-for-civilian-oversight-of-police/>.

Yet, it is widely understood that **civilian** oversight is required to reform institutionalized discrimination among police. When the United States Department of Justice (“DOJ”) sued Newark over the Newark Police Department’s (“NPD”) unconstitutionally racist policing, Newark settled the suit by (1) admitting that constitutional deficits result when NPD alone reviews police misconduct, and (2) agreeing to cure those constitutional infirmities by creating a CCRB with substantive investigative power. The NPD is comprised of FOP members. To posit that this case is about anything *other* than curing the **still ongoing constitutional violations** found by a federal District Court borders on absurd. FOP’s position is solely about preserving their members’ demonstrated discrimination against communities of color, safe from reform or consequences.

FOP raises four arguments in opposition to Newark’s petition. Each relates to this Court’s jurisdiction, and each is mistaken. FOP’s first argument, however, most graphically demonstrates its inherent bias against communities of color.

FOP first argues that Newark’s petition is untimely. FOP is incorrect. One-hundred-fifty days from the August 19, 2020 New Jersey Supreme Court (NJSC) decision on petition is Saturday, January 15, 2021. Because of the weekend and Martin Luther King, Jr. Day federal holiday, Supreme Court Rule 30.1 automatically moved that deadline to Tuesday, January 19, 2021. Whether FOP’s omission was intentional or subconscious, the irony that FOP “forgot” to count our only national holiday dedicated to the civil rights of America’s Black citizens is not lost on Newark. In this case, such a small omission speaks volumes.

Second, FOP argues that there is no jurisdiction because the underlying decision was based solely on state law. To the contrary, the NJSC's failure to address whether the FOP's proffered interpretation of state statutes violates the Constitution does not deprive this Court of jurisdiction; it is the *very reason* this Court's intervention is required. The NJSC's erroneous omissions neither abrogate the existence of the constitutional issues at bar nor limit this Court's review of them. A contrary rule would allow States to avoid redressing constitutional violations intentionally and without consequence simply by ignoring them.

Third, FOP argues that there is no jurisdiction because the constitutional issues presented in Newark's petition were not raised in the state court proceedings. FOP ignores that this entire litigation arises from Newark's obligation to create a CCRB with investigative powers to cure **specific constitutional violations** that a federal District Court found arose from NPD's racist police practices. The proceedings below unquestionably involved the scope of the guarantees afforded by the Equal Protection, Due Process, and Necessary and Proper Clauses, as well as the limitations required by the Separation of Powers doctrine. Certainly, the constitutional issues asserted on petition are sufficiently preserved in the record for this Court to determine their existence. In any event, the United States Supreme Court may review state court proceedings for constitutional violations regardless of whether those violations were directly considered by the state court.

Fourth, FOP argues that "good public policy" is insufficient to confer jurisdiction. Newark agrees. Jurisdiction is conferred by the federal constitutional

issues raised by the nature, process, and outcome of the state court proceedings below. The policy reasons advanced in Newark’s petition are to underscore the need to cure the unconstitutionality of racially disparate policing **now**. In short, today’s cultural context demands that this Court determine whether the New Jersey state statutes at issue, as interpreted by the NJSC, foreclose Newark’s ability to eliminate unconstitutional racial discrimination in its own police force.

Argument

A. Newark’s Petition Is Timely

FOP first argues that Newark’s petition is untimely as outside the 150-day jurisdictional deadline. FOP is incorrect, and demonstrably racist, in its position. One-hundred-fifty days from the August 19, 2020 NJSC decision on petition is Saturday, January 15, 2021. Because of the weekend and Martin Luther King, Jr. Day federal holiday, Supreme Court Rule 30.1 automatically moved that deadline to Tuesday, January 19, 2021. It is unclear whether FOP’s failure to count MLK Day was intentional or subconscious. Either way, it is certainly ironic and not the least surprising to Newark that FOP “forgot” to count our only national holiday dedicated to the civil rights of America’s Black citizens while calculating deadlines in this matter.

B. The NJSC’s Reliance on State Law Does Not Abrogate the Federal Constitutional Issues at Bar

FOP erroneously claims that this Court lacks jurisdiction because the underlying NJSC decision was based solely on state law and did not discuss the federal questions on petition. FOP is mistaken for at least three reasons.

First, FOP clearly misunderstands Newark's argument. Newark's position is that the NJSC's **very failure to recognize or address the constitutional issues** raised by its interpretation of state statutes **requires** this Court's intervention. This Court is the forum charged with overseeing the constitutionality of state supreme court decisions, including decisions which unconstitutionally interpret state statutes. 28 U.S.C. § 1257(a); *Danforth v. Minnesota*, 128 S. Ct. 1029, 1047 (2008) (whether a constitutional violation has occurred "is a pure question of federal law, our resolution of which should be applied uniformly throughout the Nation"); *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza*, 88 S. Ct. 1601, 1603 (1968) (abrog. on other grounds) (certiorari granted to consider whether state supreme court's interpretation of state trespass statute resulted in violations of petitioner's First and Fourteenth Amendment rights).

Indeed, this Court long ago clarified that a state court's failure to address significant constitutional issues implicated in a particular case neither abrogates their existence nor limits this Court's review of them. *See Chambers v. Miss.*, 93 S. Ct. 1038, 1043 & n.3 (1973) (certiorari granted although claim that evidentiary rulings deprived defendant of due process was neither raised until motion for new trial nor addressed by the state supreme court in its decision). More recently, this Court confirmed its jurisdiction extends to reviewing the constitutionality of the state proceedings themselves, in addition to the legal questions presented to the state court below. *See Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349, 1357 (2020) (unconstitutional nature of Montana state court proceedings, not the issues reviewed

by state court, established Supreme Court jurisdiction). FOP's principal argument—that the NJSC's failure to discuss the constitutional issues deprives this Court of jurisdiction—is simply “nonsense on stilts,” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 743 (2004) (Scalia, J., concurring in the judgment), and serves only to bolster Newark's position that certiorari review is appropriate here.

Second, the NJSC's decision to discuss only state law was not, in fact, **adequate** to dispense with all the issues in this case and support its judgment. As described above, the NJSC failed to examine the constitutional issues present here. Newark has properly petitioned this Court to review and reverse the NJSC's interpretation of state statutes because its interpretation violates clauses of our federal constitution. 28 U.S.C. § 1257(a); *Atlantic Richfield*, 140 S. Ct. at 1357; *Danforth*, 128 S. Ct. at 1047; *Chambers*, 93 S. Ct. at 1043; *Logan Valley Plaza*, 88 S. Ct. at 1603.

Third, the NJSC's decision was not **independent** of the federal constitutional issues. Although discussed in the rubric of state statutes and administrative code, the state courts nonetheless squarely discussed the concepts of constitutional due process, necessary and proper government functioning, and the separation of powers. In limiting its analysis of these concepts to state law, the NJSC ignored that a state statute may provide more protection, but not less, than the U.S. Constitution. *Danforth*, 128 S. Ct. at 1046. The NJSC should have acknowledged the limits of these concepts lie in the federal constitution and not state statutes; its failure to do so does not foreclose resolution of the actual issues presented here. *Id.* at 1047.

Indeed, FOP and their amicus insist that this case is not about racially disparate policing, but merely about the application of New Jersey statutes and administrative code. Nothing could be further from the truth, and nothing could be more offensive to the Black Americans who have suffered at the hands of FOP members for decades.

Although FOP asks this Court to ignore relevant context and procedural history, this entire litigation arises from the DOJ's determination that the NPD acted unconstitutionally because it possessed neither the ability to self-regulate its racist police practices nor conduct adequate internal affairs investigations into that racism. This entire litigation is about Newark's efforts to enforce the District Court's so-ordered Consent Decree to protect its Black citizens from the **legally-sanctioned and legally-insulated racist conduct of FOP members**, and FOP's decades-long war to frustrate that protection.

Since at least the 1960's, FOP's *modus operandi* is to bring litigation against cities with large Black populations whenever they attempt to establish citizen review boards or any other oversight outside the law-enforcement silo. This litigation, ostensibly over mere administrative code provisions, is precisely FOP's *modus operandi* to keep the racist status quo wherever it holds power. If nothing changes for FOP, nothing changes for Newark's residents. Pretending this suit is about anything other than equal protection of the law is not only a façade impeached by history and common sense, it is an ongoing assault on the civil rights of our country's Black citizens. Our justice system owes Black Americans better. Now.

This Court must intervene to announce that race-based policing is unconstitutional and leave to local authorities the power to craft appropriate solutions. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495-96 (1954). FOP has been violating the constitutional rights of Newark's Black citizens for over seven decades; yet New Jersey's legislative, executive, and now judicial branches have failed to address the grave constitutional issues relative to race-based policing. The state law grounds addressed by the NJSC are neither adequate nor independent of the federal constitutional issues that, here and now, require this Court's review.

C. This Court May Review All Constitutional Issues Presented by the Record

FOP next argues that there is no jurisdiction because the constitutional issues presented in Newark's petition were not raised by Newark in the state court proceedings. FOP is again mistaken.

The law cited by FOP regards the necessity of allowing a state court to pass upon the constitutionality of a state statute before allowing this Court to review its constitutionality. (Opp. Br. At 8-10 (citing *Cardinale v. Louisiana*, 394 U.S. 437 (1969))). Newark is not facially challenging a state statute; Newark is challenging the NJSC's interpretation of a state statute as unconstitutional and with necessarily unconstitutional consequences. The United States Supreme Court may review state court proceedings for constitutional violations even where those violations were not considered by the state court. 28 U.S.C. § 1257(a); *Atlantic Richfield*, 140 S. Ct. at 1357; *Danforth*, 128 S. Ct. at 1047; *Chambers*, 93 S. Ct. at 1043; *Logan Valley Plaza*, 88 S. Ct. at 1603.

Moreover, the constitutional issues were sufficiently preserved for this Court's review. Although FOP is correct that the concepts of due process and necessary and proper government functioning were discussed below in the rubric of state statutes, FOP is incorrect that that discussion was adequate or constitutionally sound. The NJSC discussed the state statutes as though they were dispositive of what "due process" or "necessary and proper" mean. They are not. The NJSC failed to consider whether constitutional due process or necessary and proper rights required more or otherwise trumped New Jersey's statutes and administrative code. It failed to consider whether its decision would necessarily result in continuing unconstitutional conduct toward Newark's citizens. Both failures require this Court's attentive review.

D. Public Policy Requires Immediate Consideration of the Constitutional Consequences of Racially Disparate Policing as a Practice

FOP's final argument is that "good public policy" is insufficient to confer jurisdiction. Newark agrees. Jurisdiction is conferred by the federal constitutional issues raised by the nature, process, and outcome of the state court proceedings below. The policy reasons advanced in Newark's petition simply underscore the **urgent need** for this Court to immediately weigh in on the constitutionality of institutionalized, racially disparate policing and which stakeholders get to participate in crafting its future.

Lest we in the legal establishment forget, at this very moment Black individuals in Newark remain subject to the same unconstitutionally racist police misconduct that was established by DOJ's years-long investigation, admitted by

Newark in federal court proceedings, and confirmed by the New Jersey District Court in the Consent Decree. **The people of Newark have been trying for fifty years to have a seat at the table where the decisions affecting their physical safety are made.** The legal institutions of New Jersey—that is, the entirety of the legislative, executive, and now judicial branches—have repeatedly and consistently removed that seat and shut the door to their participation. It is difficult to imagine a more **disenfranchising** experience for an American citizen than to have no say in how you are physically treated by the State and State actors.

DOJ concluded and the District Court ordered that the best way to cure the ongoing constitutional defects committed by FOP members was for Newark to create a CCRB with investigative powers outside of the law enforcement silo. In response, the NJSC chose to protect the status quo for FOP, where police misconduct is only ever investigated, evaluated, and disciplined by other police officers. **The status quo is no longer good enough because it has been found by DOJ and determined by a District Court to be squarely unconstitutional.** It borders on ludicrous for FOP to argue that constitutionality was not at issue in the state court proceedings. This case is and always has been about the government's insulation of unconstitutionally racist policing. This Court must intervene to stop it.

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: April 12, 2021

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