SCHEDULED FOR ORAL ARGUMENT ON MARCH 14, 2016

No. 15-7062

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RONALD EUGENE DUBERRY, *et al.*,
APPELLANTS,

V.

DISTRICT OF COLUMBIA, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici*.—Plaintiffs below and appellants here are Ronald Eugene Duberry, Harold Bennette, Maurice Curtis, and Robert Smith. A defendant below and the appellee here is the District of Columbia. The named defendants below also included Mayor Muriel Bowser in her official capacity (as successor to Vincent Gray) and Thomas Faust in his official capacity as Director of the District of Columbia Department of Corrections. The district court dismissed the case as to the Mayor and Director because the claims against them in their official capacities were essentially suits against the District itself. A63. Plaintiffs do not challenge that ruling on appeal. There are no amici.

B. *Rulings under review*.—Plaintiffs appeal from Judge Rudolph Contreras's May 28, 2015, order dismissing the case. Record Document 28; *Duberry v. District of Columbia*, 106 F. Supp. 3d 245 (D.C. Cir. 2015).

C. *Related cases*.—This case has not been before this Court or any other court, except the district court below. Government counsel is not aware of any pending related cases.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction of plaintiffs' 42 U.S.C. § 1983 claim under 28 U.S.C. §§ 1331 and 1343(a)(3). This Court has jurisdiction under 28 U.S.C. § 1291. The June 25, 2015 notice of appeal was timely as to the district court's final order of May 28, 2015.

STATEMENT OF THE ISSUES

The Law Enforcement Officers Safety Act of 2004, 18 U.S.C. §§ 926B-926C ("LEOSA"), allows a qualified retired law enforcement officer to carry firearms if the officer meets certain criteria and carries the necessary identification. Four former correctional officers with the District of Columbia Department of Corrections asked the District to certify that they were former law enforcement officers for purposes of LEOSA. The District would not because District correctional officers lack the "statutory powers of arrest" necessary to qualify under LEOSA. The issues on appeal are:

1. Whether the district court properly dismissed this action for failure to state a claim considering that LEOSA does not unambiguously confer any right to a certification from a former employing agency, and so no such right is enforceable in an action under 42 U.S.C. § 1983.

2. In the alternative, on the underlying merits, whether the District properly denied the certification requests since corrections officials do not have "statutory

powers of arrest," but rather only the limited authority to execute parole violator warrants.

STATEMENT OF THE CASE

Four former correctional officers with the District of Columbia Department of Corrections filed this action for injunctive and declaratory relief against the District of Columbia, claiming that the District had illegally refused to certify them as former law enforcement officers, thereby preventing them from qualifying under LEOSA to carry concealed firearms. The district court granted the District's motion to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6), concluding that plaintiffs had no enforceable rights under LEOSA and therefore no actionable claim. Appendix ("A") 43. Plaintiffs appeal from that judgment.

1. LEOSA.

LEOSA authorizes "a qualified retired law enforcement officer" with an identification credential issued by his former law enforcement employer to carry firearms transported in interstate commerce (subject to certain limits), regardless of state criminal laws to the contrary. 18 U.S.C. § 926C; *see Johnson v. N.Y. Dep't of Corr. Servs.*, 709 F. Supp. 2d 178, 184 (N.D.N.Y. 2010). LEOSA, which is codified in the United States criminal code, provides in pertinent part:

> (a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified retired law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has

> been shipped or transported in interstate or foreign commerce, subject to subsection (b).

18 U.S.C. § 926C(a).[1]

LEOSA defines a "qualified retired law enforcement officer" who may receive the benefits of the law if he or she carries the necessary identification as an individual who, among other things:

> (1) separated from service in good standing from service with a public agency as a law enforcement officer; [and]
>
> (2) before such separation, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, *and had statutory powers of arrest* or apprehension under section 807(b) of title 10, United States Code (article 7(b) of the Uniform Code of Military Justice) . . . .

18 U.S.C. § 926C(c)(1)-(2) (emphasis added).[2]

The requisite identification referenced in § 926C(a), meanwhile, is defined in subsection (d):

> (d) The identification required by this subsection is—

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[1] LEOSA similarly allows a qualified active law enforcement officer with the requisite identification to carry a concealed firearm (again subject to certain limits). 18 U.S.C. § 926B.

[2] The referenced provision of the Uniform Code of Military Justice reads: "Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it." 10 U.S.C. § 807(b).

> (1) a photographic identification issued by the agency from which the individual separated from service as a law enforcement officer that identifies the person as having been employed as a police officer or law enforcement officer and indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the active duty standards for qualification in firearms training as established by the agency to carry a firearm of the same type as the concealed firearm; or
>
> (2)(A) a photographic identification issued by the agency from which the individual separated from service as a law enforcement officer that identifies the person as having been employed as a police officer or law enforcement officer; and
>
> (B) a certification issued by the State in which the individual resides or by a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State that indicates that the individual has, not less than 1 year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the State or a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State to have met—
>
> (I) the active duty standards for qualification in firearms training, as established by the State, to carry a firearm of the same type as the concealed firearm; or
>
> (II) if the State has not established such standards, standards set by any law enforcement agency within that State to carry a firearm of the same type as the concealed firearm.

18 U.S.C. § 926C(d).

LEOSA by its terms does not entitle any individual to such an identification or require any agency to issue one. Nor does LEOSA by its terms require a former employing agency to certify on outside inquiry whether an individual is a qualified retired law enforcement officer.

2. Plaintiffs' Factual Allegations.

According to the complaint and its exhibits, plaintiffs Ronald Duberry, Harold Bennette, Maurice Curtis, and Robert Smith are all former correctional officers who retired in good standing from the D.C. Department of Corrections and who wish to take advantage of LEOSA. A17-20. Each already claims to possess the necessary identification from the Department under 18 U.S.C. § 926C(d)(2)(A). A17, 33. To obtain the separate certification that he met firearms-training standards under § 926C(d)(2)(B), however, each asked the Department to certify that he was a retired law enforcement officer for purposes of LEOSA. A15-17.[3]

The Department of Corrections denied each of those requests, explaining that it did not deem correctional officers to be law enforcement officers within the meaning of LEOSA because correctional officers do not have general arrest

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[3] The application form that Duberry submitted to the Department of Corrections was issued by the Prince George's Community College, Prince George's Municipal Police Academy. A26. Duberry resides in Prince George's County, Maryland, and was apparently applying for a LEOSA credential there. A26, 46-47. That application form had a section that was to be completed by the applicant's former employer. The actual forms submitted to the Department of Corrections by the other plaintiffs, one of whom lives in the District, A7, are not in the record. Plaintiffs asserted that the LEOSA application process for Prince George's County and the District of Columbia both require the employing agency to certify that the applicant is a retired law enforcement officer. A47-48 n.4. The district court accepted the truth of this assertion for purposes of adjudicating the motion to dismiss. A47 n.4.

powers under District law. A15-17. On Duberry's application form, which was attached to the second amended complaint, a Department official answered "no" to the following two questions:

> Was the applicant authorized to engage in or supervise the prevention, detection, investigation or prosecution of, or the incarceration of any person for, [sic] any violation of law, and did he/she have the statutory powers of arrest?
>
> Before separation, was the applicant regularly employed as a law enforcement officer with your agency for the months of service provided above . . . ?

A26.

3. District Court Proceedings.

Plaintiffs filed their second amended complaint against the District under 42 U.S.C. § 1983.[4] They alleged that the District had wrongfully failed to certify them as retired law enforcement officers under LEOSA, thus denying them their "right to carry a concealed firearm under the federal statute." A17. They sought a declaration that they qualify as retired law enforcement officers under LEOSA and an injunction directing the District to certify them as retired law enforcement officers for purposes of that statute. A22-23.

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[4] Plaintiffs also named as defendants the Mayor of the District and the Director of the Department of Corrections in their official capacities. The district court dismissed the case as to them because the claims duplicated the claims against the District. A63-64. Plaintiffs do not challenge that ruling on appeal.

The District of Columbia moved to dismiss under Rule 12(b)(6) because, *inter alia*, LEOSA does not create a private cause of action or any rights that plaintiffs could enforce through 42 U.S.C. § 1983. Record Document ("RD") 19 at 1, 4-5; RD 24 at 2.[5] The District explained that LEOSA does not require a state agency to classify any particular retired employee as having been a "law enforcement officer," but rather leaves that determination to the discretion of the state agency, and therefore plaintiffs had no actionable federal claim. RD 19 at 11; RD 24 at 6. The District suggested that plaintiffs could litigate whether they qualified as law enforcement officers within the meaning of local District law in an appropriate local court or administrative agency. RD 19 at 11; RD 24 at 7.

The District explained in the alternative that District of Columbia correctional officers are not considered law enforcement officers because they do not have "statutory powers of arrest" under District law. RD 19 at 25-26 (citing D.C. Code §§ 23-501(2), 23-562 (authorizing law enforcement officers to make arrests, and defining "law enforcement officer" as a member of the Metropolitan Police Department or other police force operating in the District, District animal control officers, certain members of the Fire Department of the District of Columbia, and agents of the United States). The District distinguished other

[5] Page numbers for record documents are to the numbers at the top of the page inserted by the Court's PACER system.

District statutory provisions cited by plaintiffs as not conferring powers of arrest on correctional officers. RD 19 at 26-27 (discussing D.C. Code § 22-4505, which excludes prison or jail wardens and their deputies from the prohibition against carrying a pistol without a license; § 24-405, which authorizes an officer of a penal institution to execute parole violator warrants issued by the parole authority; and § 22-2106, which defines the crime of murder of a law enforcement officer to include murder of a correctional officer).

The district court granted the District's motion to dismiss. It concluded that Congress did not intend to confer upon plaintiffs the right they seek to enforce in this action. A73. The court analyzed the issue under *Blessing v. Freestone*, 520 U.S. 329, 340 (1997), which establishes that a § 1983 "plaintiff must assert the violation of a federal *right*, not merely a federal *law*," and *Gonzaga University v. Doe*, 536 U.S. 273, 282 (2002), which "requires an 'unambiguously conferred right' borne out in the 'text and structure' of the statute." A64-68. The court concluded that LEOSA did not create any right to have the District of Columbia classify any particular persons as retired "law enforcement officers" so as to enable them to qualify to carry concealed weapons under the law, and therefore plaintiffs had no federal right to enforce under § 1983. A71-72, 75-77. Even if the Department of Corrections misclassified plaintiffs for purposes of LEOSA, "Congress did not intend through LEOSA to confer a 'right' to have this mistake

corrected, at least *by way of § 1983*." A77. The court concluded that 'the text and structure of LEOSA do not manifest an unambiguously conferred right." A75 n.27. The court noted that it was not deciding the issue of whether plaintiffs qualified as law enforcement officers, and noted that plaintiffs might be able to pursue their claim in that regard in the District's local courts. A77.

STANDARD OF REVIEW

The Court reviews *de novo* a district court order dismissing a complaint for failure to state a claim. *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009). The Court assumes the truth of all well-pleaded factual allegations in the complaint and makes reasonable inferences from those allegations in the plaintiff's favor, but is not required to accept the plaintiff's legal conclusions as correct. *Doe v. Rumsfeld*, 683 F.3d 390, 391 (D.C. Cir. 2012). The Court reviews issues of statutory construction de novo. *Blackman v. District of Columbia*, 456 F.3d 167, 174 (D.C. Cir. 2006).

SUMMARY OF ARGUMENT

1. The district court correctly held as a matter of law that LEOSA does not create the right that plaintiffs seek to enforce under 42 U.S.C. § 1983. The essence of plaintiffs' claim is that, as retired District of Columbia correctional officers, they have a federal right to force the District to certify that they qualify as law enforcement officers under LEOSA. There is no merit to this claim. Congress did

not require any state to certify that any former employee is a qualified retired law enforcement officer under LEOSA.

Under Supreme Court case law, to obtain redress through § 1983, a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*. It is only unambiguous rights, not broader or vaguer benefits or interests, that may be enforced under § 1983. It is plaintiffs' burden to show that Congress intended for the statute at issue to create an enforceable right.

Plaintiffs fail to show any right enforceable under § 1983 here. LEOSA provides a federal right for qualified retired law enforcement officers who possess the requisite identification to lawfully carry concealed firearms across state lines. But the statute leaves it to the states and the District to decide what actions to take to facilitate individuals' applications to satisfy those prerequisites for LEOSA protection.

To qualify to carry a firearm under LEOSA, an individual must both satisfy the definition of "qualified retired law enforcement officer" under subsection (c) and be in possession of an identification required under subsection (d). Nothing in the text or structure of LEOSA suggests that Congress explicitly or impliedly intended to create a federal right to have a local jurisdiction issue the identification, and plaintiffs admit as much. Congress left that authority in the hands of the

relevant state agency. Any conclusion to the contrary has Tenth Amendment anti-commandeering implications.

Nor does LEOSA create the right plaintiffs seek to enforce here to have the District certify that they are qualified former law enforcement officers within LEOSA's meaning so as to facilitate the completion of their firearms qualification training and their credentialing under LEOSA. LEOSA does not mandate that states have a process for such certification. Indeed, LEOSA lacks any indication that Congress intended to mandate that states must issue any identification or certification under the law. The law lacks any language imposing a binding obligation on the states in this regard, much less unambiguously doing so.

Every court to consider whether LEOSA creates any enforceable right has answered the question in the negative, in addition to the district court here. Plaintiffs cite to no law in support of their position. Plaintiffs should pursue their asserted rights against the District in the local courts.

2. In the alternative, on the merits, the Court should affirm because the District was correct to deny plaintiffs' requests to be certified as law enforcement officers under LEOSA because corrections officers in the District do not have the requisite "statutory powers of arrest" under the law.

Correctional officers are not included in the statute conferring general arrest authority on police officers in the District. Plaintiffs' asserted experience

supervising prisoners in and out of the penal facilities, pursuing escapees, and the like is beside the point because LEOSA requires "*statutory* powers of arrest."

Correctional officers do have statutory authority to execute parole violator warrants issued by the parole authority, but that statute does not even use the word "arrest" but speaks only of "retaking" a prisoner who is a parole violator to return him to prison. That does not amount to powers of arrests under LEOSA.

Correctional officers in the District have not been trained to determine whether probable cause exists to make a warrantless arrest for any crime in the community. LEOSA did not intend to arm individuals to "respond immediately to crime" across state lines, when those individuals have not spent their career assessing whether a crime has been committed and whether probable cause exists to arrest.

ARGUMENT

I. Plaintiffs Have No Rights Enforceable Through 42 U.S.C. § 1983 To Require The District To Certify That They Are Qualified Former Law Enforcement Officers Under LEOSA.

A. Plaintiffs can invoke 42 U.S.C. § 1983 only upon meeting their burden to show that the right they attempt to enforce is "unambiguously conferred" by federal law.

Under § 1983, the District may be liable if it deprives an individual of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. This provision authorizes lawsuits to enforce certain rights conferred by federal statutes. *Blessing*, 520 U.S. at 340 (citing *Maine*

v. Thiboutot, 448 U.S. 1, 4 (1980)). But it "does not provide an avenue for relief every time a state actor violates a federal law." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (2005). To obtain redress through § 1983, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340.

Moreover, as the Supreme Court clarified in *Gonzaga University*, nothing "short of an unambiguously conferred right" will "support a cause of action brought under § 1983." 536 U.S. at 283. It is only "rights, not the broader or vaguer 'benefits' or 'interests' that may be enforced under the authority of" § 1983. *Id*. A court must find that Congress spoke "with a clear voice" to confer individual rights. *Id.* at 280. Plaintiffs bear the burden of showing that Congress intended for the statute at issue to create an enforceable right. *Id.* at 284.

The Supreme Court in *Blessing* identified three relevant factors to help determine whether a federal statute creates and confers a federal right: (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) the asserted right must not be "so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) "the statute must unambiguously impose a binding obligation on the States" by being "couched in mandatory, rather than precatory, terms." 520 U.S. at 340-41. But a court need not apply the *Blessing* factors in a "rigid and superficial" manner before concluding that

Congress did not create a federal right for plaintiffs under a particular statute. *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 136 (2d Cir. 2010). Further, even if all three *Blessing* factors are satisfied to show the creation of a federal right, a defendant may still show that Congress either expressly or impliedly foreclosed the § 1983 remedy for that right. *Blessing*, 520 U.S. at 341.

This inquiry as to whether a statute creates a right enforceable under § 1983 overlaps with the inquiry as to whether a statute creates an independent implied right of action. *Gonzaga Univ.*, 536 U.S. at 283-84. Both inquiries look to whether "Congress intended to confer individual rights upon a class of beneficiaries." *Id.* at 285. A "court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context." *Id.* "[W]here the text and structure of a statute provide no indication that Congress intends to create individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286; *see also Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (recognizing that whether a private right of action exists depends on Congress's intent); *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 889 (D.C. Cir. 2014) (similar).

B. Plaintiffs do not carry their burden to show that LEOSA unambiguously confers a right to require states to certify whether former employees are qualified retired law enforcement officers.

With these principles in mind, it is clear that while LEOSA does provide a right, it does not provide the one plaintiffs seek to enforce. "LEOSA provides a federal right for qualified retired law enforcement officers who possess the requisite identification to lawfully carry concealed firearms across state lines." *Johnson*, 709 F. Supp. 2d at 184; 18 U.S.C. § 926C(a) (emphasis omitted). While it thus protects individuals meeting certain prerequisites from prosecution under state law, LEOSA leaves it to the states and the District to decide what actions to take to facilitate individuals' attempts to satisfy those prerequisites for LEOSA protection.

Under 18 U.S.C. § 926C(d), a person has no rights under LEOSA unless and until the individual's employing agency issues the credential identifying the individual "as having been employed as a police officer or law enforcement officer" and until that agency or the individual's home state indicates that the individual met the requisite firearms training. 18 U.S.C. § 926C(d)(1)-(2). "Congress therefore established two distinct limitations to the class of persons for whom LEOSA was enacted to benefit." *Johnson*, 709 F. Supp. 2d at 185. To qualify to carry a firearm under LEOSA, an individual must both satisfy the

definition of "qualified retired law enforcement officer" under subsection (c) and be in possession of an identification required under subsection (d). *Id.*

Plaintiffs repeatedly admit that they have no right to a LEOSA identification. *E.g.*, Br. 2 ("[S]tate agencies may choose or not to issue the identification cards necessary to exercise the LEOSA 'right to carry.'"); Br. 16-17 (similar). That admission is appropriate, as nothing in the text or structure of LEOSA suggests—let alone unambiguously suggests, as *Gonzaga University* requires—that Congress explicitly or impliedly intended to create a federal right to have a local jurisdiction issue the identification. "Congress expressly left the authority to issue the identification described in subsection (d) in the hands of the relevant state agency." *Johnson*, 709 F. Supp. 2d at 185; *see Mpras v. District of Columbia*, 74 F. Supp. 3d 265, 270 (D.D.C. 2014) ("In enacting LEOSA, Congress clearly recognized the states' authority to establish their own firearm permit standards and make their own decisions whether to issue the photographic identification required by subsection (d)."). Indeed, it would have been surprising if Congress had compelled states officers to implement this federal regulatory program given the Tenth Amendment anti-commandeering implications. *See Johnson*, 709 F. Supp. 2d at 184 (concluding that Congress could not compel states to issue documents to implement LEOSA, relying on *Printz v. United States*, 521 U.S. 898, 117 (1997)); *see also Lomont v. O'Neill*, 285 F.3d 9, 14 (D.C. Cir. 2002).

Even more clearly, LEOSA does not provide the right that plaintiffs seek to enforce. While they claim already to have the necessary identification from the Department of Corrections under 18 U.S.C. § 926C(d)(2)(A), they lack the certification that they have met firearms-training standards under § 926C(d)(2)(B). A15-17. The latter provision does not on its face have anything to do with whether they are qualified former law enforcement officers within LEOSA's meaning, but the LEOSA application paperwork requires the Department's certification that they are so qualified. A16-17, 26. They thus claim a right to force the Department to certify as much. But LEOSA does not even make such certification a prerequisite for protection, let alone mandate that states have a process for certification. Indeed, LEOSA lacks any indication that Congress intended to mandate that states must issue the certifications that are actually mentioned in 18 U.S.C. § 926C(d)(2)(B)—certifications regarding satisfaction of firearms-training standards. *Johnson*, 709 F. Supp. 2d at 184; *Zarrelli v. Rabner*, 2007 WL 1284947, at *2 (N.J. Super. Ct. App. Div. 2007) (per curiam) ("The statute may bar one State from preventing an individual who meets the criteria of the statute and has received a certification from his or her home state from carrying a weapon into that State. It does not, however, require a State to issue a certification in order to permit an individual to qualify under the statute.").

LEOSA thus does not confer, let alone unambiguously confer, the right plaintiffs seek to enforce. Under the first *Blessing* factor, Congress did not intend "that the provision in question benefit" plaintiffs here. 520 U.S. at 340. As already explained, the intended beneficiaries of 18 U.S.C. § 926C were not all retired law enforcement officers in general, but those who have been issued the requisite identification and certification described in subsection (d). *Johnson*, 709 F. Supp. 2d at 184-85. Under the second *Blessing* factor, the right plaintiffs identify—evidently, to require the District to answer all inquiries related to their LEOSA prerequisites in the manner they prefer—is "vague and amorphous" enough to cast doubt that Congress intended the judiciary to enforce it. 520 U.S. at 340-41. And under the third *Blessing* factor, there is no provision "unambiguously impos[ing] a binding obligation on the States" that is "couched in mandatory, rather than precatory, terms." 520 U.S. at 341. Indeed, plaintiffs' claimed right is not supported by any statutory language at all.

It is thus not surprising that plaintiffs can cite no authority supporting their position. Every court to consider whether LEOSA creates any enforceable right has answered the question in the negative, in addition to the district court here. *See Ramirez v. Port Auth. of N.Y. & N.J.*, ___ F. Supp. 3d ___, 2015 WL 9463185 (S.D.N.Y. Dec. 28, 2015) ("Congress did not intend to make [LEOSA's] violation actionable under § 1983."); *Friedman v. Las Vegas Metro. Police Dep't*, 2014 WL

5472604, at *5 (D. Nev. Oct. 24, 2014) ("Rather than affirmatively requiring states to issue concealed carry licenses to retired police officers, LEOSA merely permits retired officers who already possess a concealed-carry permit to bring a concealed firearm across state lines."); *Mpras*, 74 F. Supp. 3d at 270 ("[N]othing in LEOSA bestows a federal right to the identification required by subsection (d)."); *Moore v. Trent*, 2010 WL 5232727, at *4 (N.D. Ill. Dec. 16, 2010) ("The text of [LEOSA] reveals Congress' decision to preserve the States' authority in establishing eligibility requirements for qualified retired law enforcement officers."); *Johnson*, 709 F. Supp. 2d at 187-88 (holding that LEOSA does not create federal mandate for state officials to issue LEOSA identifications); *Zarrelli*, 2007 WL 1284947, at *2 ("[LEOSA] is bereft of any indication that Congress, on passing the Act, intended to mandate that the various States implement a procedure for issuing certifications in accordance with 18 U.S.C. § 926C(d)."); *see also In re Carry Permit of Andros*, 958 A.2d 78, 84-85 (N.J. Super. 2008) (holding that LEOSA does not preclude a state from revoking a permit to carry a handgun); *cf. Morello v. District of Columbia*, 621 F. App'x 1, 2-3 (D.C. Cir. 2015) (per curiam) (rejecting claim that the District violated plaintiff's constitutional rights by denying his application for LEOSA credential).

Although plaintiffs do not seek damages here, the Court should be cognizant that any conclusion that plaintiffs have an enforceable right under LEOSA would

potentially enable other similarly situated plaintiffs to seek damages against District officials for the denial of that right. There is simply no evidence in the text or legislative history of LEOSA that local officials responsible for reviewing applications for LEOSA credentials would be liable for damages for failing to correctly apply the law. Support for this conclusion comes from *Torraco*, in which the Second Circuit considered a suit under § 1983 to enforce 18 U.S.C. § 926A, which allows individuals to transport firearms from one state where they are legal, through another state where they are illegal, to a third state where they are legal, provided certain conditions are met, without incurring criminal liability under any local gun laws. The Second Circuit held that there was "no evidence either in the text or structure of Section 926A that would indicate that Congress intended that police officers tasked with enforcing state gun laws should be liable for damages when they fail to correctly apply" that law. 615 F.3d at 137. The same holds true here. There is no evidence that, in enacting LEOSA, Congress intended that police and correctional officers assigned to review applications for LEOSA certifications should be liable for damages when they fail to correctly apply the law.

As the district court determined here, plaintiffs should pursue their remedy against the District in the local courts. A77; *see Morello*, 621 F. App'x at 2 (citing *District of Columbia v. Sierra Club*, 670 A.2d 354, 358 (D.C. 1996) (articulating the presumption that agency action is reviewable in the Superior Court of the

District of Columbia)); *see also In re A.T.*, 10 A.3d 127, 134-35 (D.C. 2010) (explaining how the Superior Court has direct authority to review in "non-contested cases"). They have no entitlement to relief in federal court under 42 U.S.C. § 1983.

II. In The Alternative, Correctional Officers In The District Do Not Have The Statutory Powers Of Arrest Necessary To Qualify As Law Enforcement Officers For Purposes of LEOSA.

In the alternative, if the Court concludes that plaintiffs have an actionable claim under § 1983, the Court should nevertheless affirm because the District was correct to deny plaintiffs' requests to be certified as law enforcement officers under LEOSA. Although the government employees potentially eligible for LEOSA identifications include those "authorized by law to engage in . . . the incarceration of any person for . . . any violation of law," LEOSA specifies that the putative "qualified law enforcement officer" also must have "statutory powers of arrest or apprehension under section 807(b) of title 10, United States Code (article 7(b) of the Uniform Code of Military Justice)." 18 U.S.C. § 926C(c)(2). District correctional officers do not have such powers.

To be sure, correctional officers in the District serve a vitally important function by overseeing the incarceration of detainees and convicts. But correctional officers are not included in the statute conferring general arrest authority in the District. D.C. Code §§ 23-501(2), 23-562 (authorizing law

enforcement officers to make arrests, and defining "law enforcement officer" as a member of the Metropolitan Police Department or other police force operating in the District, District animal control officers, certain members of the Fire Department of the District of Columbia, and agents of the United States).

Plaintiffs claim that their "actual experience" on the job shows that they functioned as law enforcement officers because they engaged in activities like helping United States Marshals track down escapees and supervising inmates transferring between facilities and on authorized visits to funerals and hospitals. Br. 10-11, 15, 31 (citing D.C. Code § 22-4505 and § 24-405). Similarly, they repeatedly assert that their identification cards recited that they had arrest powers. *E.g.*, Br. 11. These assertions are beside the point, however, because they need to demonstrate that they had "*statutory* powers of arrest." 18 U.S.C. § 926C(c)(2) (emphasis added).

The closest plaintiffs come to this is to cite D.C. Code § 24-405, but that statute does not give them "powers of arrest" within LEOSA's meaning. Under § 24-405, when the parole authority has reliable information that "a prisoner has violated his parole," it may issue a warrant "for the retaking of such prisoner." "Any officer of the District of Columbia penal institutions . . . to whom such warrant shall be delivered is authorized and required to execute such warrant by taking such prisoner and returning or removing him" to a penal institution. D.C.

Code § 24-405. But having the authority to execute a limited type of warrant does not amount to having "statutory powers of arrest." The statute speaks only of executing warrants and "retaking" a prisoner who is a parole violator to return him to prison.

That is not properly considered "arrest" under LEOSA. One of its purposes, after all, was to enable off-duty or retired law enforcement officers to carry concealed firearms "in situations where they can respond immediately to a crime across state and other jurisdictional lines." S. Rep. No. 108-29, at 4 (2003), *available at* 2003 WL 1609540. It is focused on officers "trained to uphold the law and keep the peace." *Id.* at 3. That is why LEOSA defines a law enforcement officer as, *inter alia*, someone with "statutory powers of arrest." 18 U.S.C. § 926C(c)(2). "Generally, an arrest is effected when the police have made a determination to charge the suspect with a criminal offense and custody is maintained to permit the arrestee to be formally charged and brought before the court." *In re M.E.B.*, 638 A.2d 1123, 1126 (D.C. 1993). Correctional officers do not make any determination to charge parole violators with any particular crime, but rather merely execute a warrant issued by the parole board. Indeed, they cannot detain even a known parole violator without such a warrant.

Moreover, the immediate context for the phrase "statutory powers of arrest" shows that Congress did not mean to extend LEOSA's benefits to those with any

type of detention authority whatsoever. LEOSA requires either "statutory powers of arrest or apprehension under section 807(b) of title 10, United States Code (article 7(b) of the Uniform Code of Military Justice)." 18 U.S.C. § 926C(c)(2). In citing the Uniform Code of Military Justice, Congress referred specifically to a statutory provision that permits apprehension only "upon reasonable belief that an offense has been committed and that the person apprehended committed it." 10 U.S.C. § 807(b). That is the same understanding that should apply to the partner phrase "statutory powers of arrest." *See Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) ("The canon of statutory construction *noscitur a sociis*, i.e., a word is known by the company it keeps[,] is often wisely applied where a word is capable of many meanings in order to avoid giving unintended breadth to the Acts of Congress." (internal quotation marks omitted)).

Furthermore, the body of § 24-405 does not even use the word "arrest." When the statute was originally enacted by Congress in 1932, the heading used in the margin of the United States Statutes at Large was "Apprehension of prisoner" for violation of parole. Act of July 15, 1932, ch. 492, § 5, 47 Stat. 696, 698. In 1940, the law was amended and the margin heading was "Retaking of prisoner" for violation of parole. Act of June 6, 1940, ch. 254, § 4, 54 Stat. 242, 243. The word "arrest" appears to have been added to the heading of the statute ("Arrest for violation of parole.") by the publisher of the modern codified code for the District

of Columbia; Congress itself did not use the word when it authorized correctional officers to retake parole violators. As such, the word "arrest" is not properly considered part of the statute. *See Maranatha Faith Cent., Inc. v. Colonial Trust Co.*, 904 So. 2d 1004, 1008 (Miss. 2004) ("[I]n the instant case, the headings at issue are the product of the publisher and have never been considered by the Legislature."); *State v. Linthwaite*, 665 P.2d 863, 867 (Ore. 1983) ("Of course, the bold face heading is only the opinion of the code compiler as to the meaning of the statute; it is not part of the statute.").

Section 24-405 thus does not give correctional officers powers of arrest. Correctional officers in the District have not been trained to determine whether probable cause exists to make a warrantless arrest for any crime in the community. LEOSA did not intend to arm individuals to "respond immediately to crime" across state lines, S. Rep. No. 108-29, at 4, when those individuals have not spent their career assessing whether a crime has been committed and whether probable cause exists to arrest, even if they may have supervised prisoners, worked with federal marshals to track escapees, and served parole violator warrants. Br. 19. Thus, even if plaintiffs here did have a cause of action, their claim fails on the merits.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 11, 2016, electronic copies of this brief were served through the Court's ECF system, to:

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CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 6,110 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point.

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