ORAL ARGUMENT SCHEDULED FOR MARCH 14, 2016

No. 15-7062

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

RONALD DUBERRY, HAROLD BENNETTE,
MAURICE CURTIS, AND ROBERT SMITH,
Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Columbia
Case No. 14-cv-01258 (Contreras, J.)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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GLOSSARY

BOP	U.S. Bureau of Prisons
The District	Defendants-Appellees
DOC	District of Columbia Department of Corrections
HRA	District of Columbia Home Rule Act, 87 Stat. 777, Pub. L. 93-198, *codified at* D.C. Code §§ 1-201.01 *et seq.*
LEOSA	Section 3 of the Law Enforcement Officers Safety Act of 2004, Pub. L. 108–277, 118 Stat. 865 (2004), *codified at* 18 U.S.C. § 926C
Officers	Plaintiffs-Appellants Ronald Duberry, Harold Bennette, Maurice Curtis, and Robert Smith
The Statute	*See* LEOSA

INTRODUCTION AND SUMMARY

Section 1983 was designed to provide a "broad remedy for violations of federally protected civil rights." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 685 (1978). "Th[e] legislative history makes evident that Congress . . . was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). "The very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Id.* at 242.

Appellants will not go too far in drawing comparisons between the situation they face today and what the country faced in 1871 when the section 1983 remedy was introduced. Yet there are dynamics and realities that survive the specific challenges that motivated Congress at that time. It should surprise no one that the District of Columbia is none too happy about the changes that litigation has in recent years forced upon the District's strict firearm licensing and carry regulations. The District sees in this case the prospect of yet more carrying in the District, contrary to its preferred vision for the city. Indeed, LEOSA[1] of was ***designed*** to intrude on local

[1] Generally in this brief, "LEOSA" refers to Title III the Law Enforcement Officers Safety Act of 2004, 18 U.S.C. § 926C (also "§ 926C" or "the statute"), unless another Title is specifically referenced.

carry regulations, and surely no one in Congress had reason to think it would arrive in the States to a warm welcome. *See, e.g.*, H.R. Rep. 108-560 (2004), 2004 WL 5702383 at *22 (Comments of Chairman Sensenbrenner) (LEOSA "violates the principles of federalism and undermines the authorities of the States").

Appellants fully recognize that LEOSA emerged from the legislative process in its current form after detailed and difficult compromise, and that it is appropriate for courts to recognize that part of the deal was that "the identification card required in § 926C(d) [would] constitute[] a reservoir of powers set aside for the States" to help counter-balance the intrusion. *Moore v. Trent*, No. 09-cv-1712, 2010 WL 5232727 *3 (N.D. Ill. Dec. 16, 2010). But for the same reason, courts should be attuned to the contours of the deal in both directions; a "reservoir" is a precise measure, not a bottomless well, and as explained below (Section III) it is much harder to make the case that the firearms certification requirement constitutes part of that same reservoir.

But more importantly, this case, on its facts, is not a challenge to the District of Columbia's ("the District") or the Department of Correction's (DOC) exercise of discretion under any legitimate reservoir or power. This is not a case where plaintiffs are demanding that a state agency produce the specialized identification/firearms qualification document articulated at § 926C(d)(1), as in *Johnson v. N.Y. Dep't of Corr. Servs.*, 709 F. Supp. 2d 178 (N.D.N.Y. 2010) and *Mpras v. District of*

Columbia, 74 F. Supp. 3d 265 (D.D.C. 2014); nor where plaintiffs are demanding implementation of a LEOSA-compatible scheme for firearms qualification, as in the unpublished[2] New Jersey state appellate case *Zarrelli v. Rabner*, 2007 WL 1284947 (N.J. Super. Ct. App. Div. 2007). Retired DOC officers Duberry, Bennette, Curtis, and Smith ("the Officers") all have identification sufficient for § 926C(d)(2)(A) purposes, and for Maryland residents Duberry, Bennette, and Curtis, the District has ***no*** statutorily indicated role in the firearms qualification process of § 926C(d)(2)(A) whatsoever. *See infra* Section III. Rather, the District has sought to insert itself and its views into that process by concocting an invalid, results-oriented reading of D.C. law and the federal LEOSA eligibility requirements, and using that reading to provide legally and factually inaccurate responses on an out-of-state form in order to deprive the Officers of their ability to exercise their LEOSA right to carry. *See infra* Section IV (responding to the "merits" question of whether the Officers had statutory powers of arrest during their decades of tenure with the DOC and the federal Bureau of Prisons (BOP)).

Rather, this is a case about city officials acting "out of bounds" of any conferred discretion to achieve a desired result, namely and precisely the deprivation of the Officers' federally-defined and mandated LEOSA rights. For this sort of

[2] *See* Rules Governing the Courts of the State of New Jersey, Rule 1:36-3 (Unpublished Opinions) ("No unpublished opinion shall constitute precedent or be binding upon any court.").

conduct, which actually upsets the delicate political compromises built into LEOSA, Congress must be "presumed to legislate against the background of section 1983," *Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985), and this "uniquely federal remedy" should be available to review the District's "incursion" on the LEOSA scheme and the Officers' federally-secured rights. *Mitchum*, 407 U.S. at 239.

ARGUMENT

I. Unrebutted Points

In its Responding Brief ("Res. Br."), the District fails to respond to or otherwise contest the following key arguments made in the Opening Brief ("Op. Br.").

- The district court's conclusion that the Officers could not proceed on the basis of LEOSA's clear "right to carry" in § 926C(a) because that right had not "attached" to them, *see* Appendix to Opening Brief ("A") at 64-78, was unwarranted because courts will allow prospective rights-holders to use section 1983 to challenge official conduct that interferes with conditions or prerequisites necessary for otherwise lawful exercise of a right. *See* Op. Br. at 22-28. There is good reason for the District to concede that the district court's categorical application of the "attachment" concept is untenable, as it would allow a state to foreclose § 1983 relief simply by redirecting its conduct; in the example offered in the Opening Brief, a state could foreclose § 1983 relief for violations of the right to a provisional ballot under the Help America Vote Act (HAVA) by denying individuals the form required to be executed for the HAVA right to "attach," rather than overtly denying individuals

a provisional ballot. Op. Br. at 26-27. Rather than use (lack of) "attachment" so rigidly, the district court should have considered factors that illuminate how the state conduct interacts with the right (and prerequisite) at stake. Where, as in this case, the interference was an intentional means to effect deprivation of the right, the prerequisite is perfunctory or ministerial in nature, and the conduct was without lawful basis (*see infra* at Section IV), a failure of "attachment" caused by such conduct cannot be blamed on the prospective rights-holder and used to insulate the wrongful state actor. Indeed, the district court hinted that there might be "some cases" that would justify § 1983 relief notwithstanding non-satisfaction of the prerequisites in § 926C(d), but failed to elucidate the contours of any such category or explain why this case would not be among them. See Op. Br. at 29-30.

- The district court's re-framing of the right the Officers asserted below was inappropriate because it effectively required them to demonstrate that LEOSA supplies a remedy, whereas the law is clear that in a § 1983 case a plaintiff does not have this burden. Op. Br. at 33-34. The 1983 enforceability inquiry under *Gonzaga University v. Doe*, 536 U.S. 273, 282 (2002), requires the tightrope act of asking whether "Congress intended to confer individual ***rights*** upon a class of beneficiaries," Res. Br. at 14 (quoting *Gonzaga*, 536 U.S. at 285), while still recognizing that "[p]laintiffs suing under § 1983 do ***not*** have the burden of showing an intent to create a private ***remedy***"—rather that burden shifts to require the government to "show[] that Congress 'specifically foreclosed'" and "shut the door" to the possibility of § 1983 relief. *Gonzaga*, 536 U.S. at 284 n.4 (emphasis added) (quoting *Smith v. Robinson*, 468 U.S. 992, 1004-1005, n.9 (1984), and citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987)). By re-framing the right the Officers seek to vindicate, from the individualized and concrete right to carry in § 926C(a), into a purported "procedural

right to be classified correctly," A68-71, the district court conflated the right and remedy inquiries. Whether or not there exists a "procedural right to be classified correctly" is the same as whether or not there exists a remedy to address incorrect classification. This kind of underlying procedural right to seek vindication is exactly what is "generally supplie[d]" in the § 1983 context. *Gonzaga*, 536 U.S. at 284. In its brief, the District simply re-asserts that the Officers' have no "right to force the [DOC] to certify" them as LEOSA eligible, without addressing the contention that this is inappropriately requiring the Officers to show a remedy. Res. Br. at 17.

- The district court concluded that it was constrained to re-frame the right at issue by language in *Blessing v. Freestone* that instructs courts consider the enforceability of a right "in [its] most concrete, specific form." A68 (quoting *Blessing v. Freestone*, 520 U.S. 329, 346 (1997)). In their opening brief, the Officers put that language in context, showing that the Supreme Court in *Blessing* was concerned with the assertion of entirely unspecified "rights" in a complex statutory program, and required only that asserted rights be analytically "manageable." Op. Br. at 35-37. The Officers argued that the right to carry in § 926C(a) is certainly manageable in this regard, and that "[w]here a plaintiff proceeds on the basis of a specific, defined, manageable right, *Blessing* does not require a court to look past it if the court can conceive of an arguably more 'specific' one." Op. Br. at 36. The District does not contest this characterization of the law governing the framing of the right here.

The District does contest the argument, made by Appellants in the alternative, that even under the district court's re-framing of the right at stake, a "right to be classified correctly" exists in the statute and is enforceable under § 1983. The District engages in a cursory review of the *Blessing* factors, largely consisting of

conclusory assertions that the factors are not met. Res. Br. at 18. The Officers maintain that the more multidimensional analysis presented in Section IV of their Opening Brief establishes that the right does indeed exist and is enforceable. Op. Br. at 38-47 (examining LEOSA's language, specificity, structure, operation, purpose, and lack of an alternative remedy).

II. The Anti-Commandeering Doctrine Is Inapplicable, And In Any Event Unpersuasive On These Facts

Whereas the district court based its resolution of the enforceability question on the framing of the right at stake, and thus on interpretation of the statute and the complaint, the District bases its opposition largely on a pet argument that it advanced in the briefing below but that the district court declined to take up, namely that the (re-framed) right asserted by the Officers is unenforceable under section 1983 because it would implicate Tenth Amendment "anti-commandeering" concerns. *See* Res. Br. at 10-11, 16-17 (citing *Printz v. United States*, 521 U.S. 898, 117 (1997), and *Lomont v. O'Neill*, 285 F.3d 9, 14 (D.C. Cir. 2002)).[3]

[3] The district court "decline[d] to reach the . . . arguments concerning whether the anti-commandeering doctrine creates constitutional doubt sufficient to disfavor Plaintiffs' construction of LEOSA," A64-65, but to the extent this Court disagrees with the lower court on the availability of § 1983 on these particular facts, the District's anti-commandeering argument could require attention. This Court could leave the question for the district court on remand, or, given that the District has raised it here but provided ***no*** authority for the proposition that the doctrine applies to bar federal "commandeering" of District officials, *see infra*,

The parties raising anti-commandeering concerns in *Printz*, *Lomont*, and every other anti-commandeering case counsel is aware of were not officials of the District of Columbia but rather officials of one of the fifty states. *See Printz*, 521 U.S. at 904 ("Petitioners [are] Jay Printz and Richard Mack, the [Chief Law Enforcement Officers] for Ravalli County, Montana, and Graham County, Arizona, respectively"); *Lomont*, 285 F.3d at 13 ("Two of the plaintiffs, if not any of the others, have standing to raise this claim. Plaintiff Dennis McClure is the sheriff of Orange County, Vermont, and plaintiff Stephen L. Hose is the Chief of the Clinton, Indiana Police Department."). Below, the District argued that its lack of statehood was irrelevant because the District of Columbia Home Rule Act ("HRA"), 87 Stat. 777, Pub. L. 93-198, title I, § 101, *codified at* D.C. Code §§ 1-201.01 *et seq*., grants the District broad sovereign legislative power "analogous to the powers of the States." *District of Columbia v. Owens-Corning Fiberglas Corp.*, 572 A.2d 394, 406 (D.C. 1989). But the *Printz* doctrine, which acts as a powerful limit on the scope of federal authority, was required by much deeper separation of powers concerns than are at stake in the HRA, which voluntarily concedes to the District "powers of local self-government," "[s]ubject to the retention by Congress of the ultimate legislative authority," in order to "relieve Congress of the burden of legislating upon essentially

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could also resolve the issue prior to remand for reasons of efficiency and convenience.

local District matters." D.C. Code § 1-201.02(a). *Printz* derives from the need to respect the "residuary and inviolable sovereignty" that States did not surrender upon ratification of the Constitution, 521 U.S. at 919 (quoting The Federalist No. 39, at 245 (J. Madison)), but that is instead "reflected throughout the Constitution's text" and in the basic principle of "dual sovereignty." *Id.* There are, of course, no such ***limits*** on federal control over the District of Columbia. *See* U.S. CONST., art. I § 8, cl. 17. Again, it is telling that the District cites no authority applying the *Printz* doctrine to constrain federal "commandeering" of District officials.

Moreover, as a practical matter, there is no issue here of "commandeering" or the sort of "federal control" that *Printz* was concerned about. *Printz* was deemed to be an issue in *Johnson* not only because the State of New York was affected but because the plaintiffs there sought to compel New York to fulfill a substantive role in the federal LEOSA scheme by "issu[ing] the appropriate photographic identification" and "administer[ing] firearm training or certification for retired law enforcement officers." *Johnson*, 709 F. Supp. 2d at 181. Here, as articulated in Section III, *infra*, District officials are not being asked to implement or operate any substantive LEOSA scheme, but are being asked not to obstruct, using a patently invalid reading of D.C. and federal law, the Officers' ability to resort to a LEOSA scheme established by Maryland, or in the case of Officer Smith, his ability to use procedures already put in place by the District, at his own expense. The most that

can be argued is that the DOC would be "compelled" to check one box on a form (the accurate one) over another. This does not rise anywhere near the level of "commandeering" or "compelling" that would raise *Printz* issues even if the District were a State, and to the degree that *Johnson* suggests otherwise it is not consistent with the view of *Printz* articulated in this Circuit. *See, e.g.*, *Gordon v. Holder*, 721 F.3d 638, 655 (D.C. Cir. 2013) ("the type of burden the [challenged federal legislation] creates is different in kind from the burdens the Supreme Court [has] held to violate the Tenth Amendment . . . [in that it] is merely incidental to Congress's lawful exercise of its power to regulate the private participants in interstate commerce").

III. The District's Challenged Conduct Is Not Within The "Reservoir Of Power" Left To It By LEOSA

Throughout its brief, the District seeks to conflate the identification card and firearms qualification certificate prerequisites of LEOSA in terms of their nature and function, suggesting that they both, as one court put it, "constitute[] a reservoir of powers set aside for the States." *Moore*, 2010 WL 5232727 *3. But in fact, that court only made that characterization as to the identification card; a view sustained by other courts, *see, e.g.*, *Johnson*, 709 F. Supp. 2d at 185 ("Congress expressly left the authority to issue the identification described in subsection (d) in the hands of the relevant state agency."), and indeed by the district court below. A68 n.18

(distinguishing *Johnson* and *Moore* from the instant case because "Plaintiffs here do not assert a right to the identification required in subsection (d).").

The District quotes *Johnson* to suggest that the ID and firearms qualification are identical reservations of power, but here the District (as well as *Johnson* and district court) miss an important feature of the statute. There are actually two ID/firearm qualification approaches provided in subsection (d), separated by an "or" so as to be alternatively or electively available to the LEOSA carrier.

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

§ 926C (emphasis added). *Johnson* quotes from and analyzes the identification described in subsection (d)(1), which is indeed enmeshed with the firearms qualification, with indication that its issuance (or not) is left to the discretion of the relevant agency. But subsection (d)(2) breaks the two components apart, and quite clearly—especially in light of the opposite approach just taken in subsection (d)(1)—takes discretionary power regarding the firearms qualification certificate away from the relevant agency, and thus away from the agency's state oversight, handing it instead to "the State in which the individual resides." Thus with respect to the firearms qualification certificate which the Maryland-resident Officers are trying to obtain, only Maryland, not the District, can purport to retain some reservoir of power. The District's attempted incursion into the § 926C(d)(2)(B) process of the Maryland Officers despite not being the resident state is unconnected to any legitimate reservoir of power the District has under the LEOSA scheme. The fact that the substance behind the District's incursion is contrary to D.C. law and transparently designed to prevent the Officers from exercising their LEOSA rights is what gives rise to the violation actionable under § 1983.

Additionally, the discretion-granting terms of subsection (d)(2)(B), regarding resident state firearms qualification certification, are considerably more limited than those in either (d)(1) or (d)(2)(A) dealing with agency identification. The latter two require a document issued, without exception, "by the agency"; the former requires a document issued "by the State . . . ***or*** by a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers." When it comes to the applicable standards, the statute goes to considerable lengths to provide for a situations where the State may not have prescribed particular standards. In both cases, the statute appears to be moving away from requiring the state to set up any LEOSA-specific regime (and from requiring individuals to rely on any LEOSA-specific regime) and instead grounds the LEOSA requirements in processes the state will almost necessarily have in place anyway. *See, e.g.*, § 926C(d)(2)(B)(II) ("if the State has not established such standards, standards set by ***any law enforcement agency within that State***") (emphasis added). Congress essentially appears to want individuals to "free ride" on existing structures (paying their own way, *see* 926C(c)(4)) that would not have to be modified in any way. While the (resident) state can still technically exercise power over this LEOSA documentation because it controls those existing structures, the sense of a specific reservation of power is lost. It would be even harder to maintain that any such reservoir of power should extend so far as to allow a state to exercise or distort those separately established

processes, using a substantively invalid reading of the law, to intentionally effect a deprivation of a federal right.

IV. On The Merits, The District's Attempt To Read LEOSA As Requiring A Particular Type Of Arrest Authority Is Unsupported By The Statutory Text, Based On Confused Citations To D.C. Law, And Unwarranted And Unsound As A Matter Of Policy

Despite the fact that the district court went out of its way to clarify that its dismissal of the case on the enforceability question "in no way implies that DOC's determination of [the Officers' LEOSA] status complied with [the statute]," noting that this was "a matter for the merits, which the Court does not reach," A77, the District dedicates nearly half its argument to the suggestion that this Court can and should resolve this appeal by reaching those same merits. The Officers, who have spent the last year and a half advocating with District officials and litigating this case, all while living with a degree of precariousness absent the protections LEOSA was designed to provide them, *see* Op. Br. at 12-13, are on one level attracted to this proposal as it could lead to vindication of their rights on an expedited basis. At the same time, there are due process concerns, in particular given that while the Officers' LEOSA eligibility is largely a question of law that this Court would review *de novo* in any event, there are some mixed questions of fact involved—such as extent to which the Officers did exercise the arrest authority conferred on them by D.C. law—that could warrant the taking of evidence and further proceedings below. If the

Officers' status as law enforcement officers with arrest powers is sufficiently clear to the Court to allow it to resolve the issue in the Officers' favor, that is obviously acceptable to them, but otherwise the Officers would respectfully stand by their right to further development of the issue in the trial court.

The Officers' status ***is*** clear. As argued in the Opening Brief, LEOSA unequivocally aims to include officers who engaged in "the ***incarceration*** of any person"—and for very good reasons. Op. Br. at 2; § 926C(c)(2). In the course of their decades of service to the DOC and the District, the Officers routinely made arrests in a variety of situations and carried ID cards that said, in no uncertain terms, that they had the power "to make arrest"—with a citation to D.C. law (then § 24-205, now § 24-405) on the card itself. Op. Br. at 3.

The District now appears to claim that was all a misunderstanding. But as an initial matter, the legal question here is whether the Officers "***had*** statutory powers of arrest, § 926C(c)(2) (emphasis added), not whether current occupants of the same position now have that power, an issue which the Officers need not address. The contemporaneous ID cards alone show that the Officers were understood to have an "arrest" power at the time and thus their eligibility under this part of § 926C(c)(2) is established.

Of course, the most fundamental problem with the District's "powers of arrest" argument (the only argument they now maintain against the Officers'

LEOSA eligibility) is that it reads LEOSA to require a very specific power of arrest, namely arrest for the commission of a crime (as the District called it in the briefing below). But LEOSA's actual language requires no such thing. Again, LEOSA only requires that the individual "had statutory powers of arrest or apprehension under [10 U.S.C.] § 807(b)." The plain language here encompasses ***any*** statutory power of arrest. The District argues that the nature of the apprehension power in § 807(b) should be read backwards to limit the scope of meaning of "powers of arrest," but there is no ambiguity in that phrase (***any*** power of arrest is a perfectly legitimate plain reading) sufficient to justify supplementing the meaning with another term. The reason there are two terms (*i.e.* that "power of arrest" alone might have been deemed insufficient coverage) is because "'arrest' in military law is a term of art," *United States v. Harris*, 29 M.J. 169, 170 (C.M.A. 1989) (citing 10 U.S.C. § 809), and thus use of the term "apprehension" ("the equivalent in military law of an arrest in civilian practice," *id.*) was necessary to make sure that military officers who exercised functional "arrest" power were not excluded.

While the District asserted its one-kind-of-arrest-only theory in the briefing below, it did so without any articulate justification. Here, belatedly but admittedly, it offers a rationale: the particular arrest authority it chooses to read as exclusive, which is says resides in D.C. Code § 23-562 in connection with the definition provided at § 23-501(b), implies a practiced ability to determine probable cause,

whereas "[c]orrectional 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," Res. Br. at 25, "but rather merely execute[d] warrants issued by the parole board," *id.* at 23.

This is a nice try, but it falls apart completely on closer analysis. First of all, the Officers did effect arrest in circumstances beyond executing warrants—on prison grounds, during transport, and during inter-agency fugitive search efforts. Op. Br. at 10-11. The District dismisses this arrest activity as "beside the point" because, it claims, this arrest power is not "statutory" in that it is not spelled out in the statute as clearly as the Officers' warrants-based arrest power is. Res. Br. at 22. But as we will see, the District's favored statutory arrest power, § 23-562, doesn't provide any specificity on probable-cause arrests either, and in any event the real facts undercut the District's policy argument that "arrest power" should only extend to those trained in effecting probable-cause-based arrests.

Second, the provision the District relies on to define who exercises the particular probable-cause-based arrest power that it prefers goes well beyond police personnel to include animal control officers, fire marshals, and indeed anyone "so designated in writing by the Fire Chief." D.C. Code § 23-501(2). There is no reason to believe that these people have more training or experience in probable-cause-based arrests than corrections officers. Third (and perhaps not surprisingly given the

presence of animal control officers and such in the definition), the provisions the District cites do not in fact articulate, much less confer, the particular arrest authority the District claims is there. Ironically, the first two subsections of § 23-562 deal with law enforcement officers making arrest ***by executing warrants***. Then, subsection (c) only provides that upon "making an arrest under a warrant issued pursuant to this subchapter, [or] making an arrest without a warrant . . . [an officer] shall take the arrested person without unnecessary delay before the court"—that is, a substantive requirement of presentment that only mentions the making of a warrantless arrest (presumably but not explicitly on the basis of probable cause) in passing.

Almost gallingly, the District argues further that § 23-562 (captioned "Execution and return") is the exclusive "arrest" authority for LEOSA purposes, dismissing § 24-405 (captioned "Arrest for violation of parole") because it does not use the word "arrest" in the text of the provision and the caption was supposedly written "by the publisher of the modern codified code," not by Congress. Res. Br. at 24-25. On the latter point as to the caption, the Officers would submit that the fact that the publisher found the language so obviously indicative of "arrest" that it used that word in the caption, and that that decision has apparently never been questioned, is not helpful to the District's argument. On the former point about use of the precise term "arrest" in the statute, the Officers submit that the phrase the text uses ("execute such warrant by taking") is an elaboration of the term arrest, and in any event leads

back to the point that no specific arrest power is required in LEOSA. The arrest—or "taking"—power provided in § 24-405 (and provided far more clearly than any power is provided in § 23-562) is a "statutory power of arrest." That should be the end of the inquiry.

But indulging the District's argument and pushing past the plain language of LEOSA and D.C. law, ***should*** the LEOSA right be limited to keep out "individuals [who] 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?" Res. Br. at 25. Even if the District were "right" on this question in some policy sense, it would not be for the Court to insert it into the statute where there is no textual ambiguity that requires a decision one way or the other. Indeed, the intent of Congress on this question is clear from § 926C(c)(2), which references "incarceration" officers. Unless there is some category of incarceration officers the District can point to that are better trained in probable cause arrests than the Officers (who, incidentally, not only served the current DOC but served under—and retired under—the federal BOP when the DOC was a sub-agency of the BOP in earlier decades), the inclusion of "incarceration" officers clearly indicates that the sort of arrest power incarceration officers typically exercise would be sufficient for them to qualify under the statute.

Finally, the District is ***not*** "right" on the policy question. While it is true that one aim of LEOSA was, as the District emphasizes, "to arm individuals to 'respond immediately to crime' across state lines," Res. Br. at 25 (quoting S. Rep. No. 108-29 (2003), 2003 WL 1609540 at *4), the primary aim was that reflected in the title of the act: the ***Law Enforcement Officers Safety*** Act. *See, e.g.*, S. Rep. 108-29 at *4 (LEOSA "is designed to protect officers and their families from vindictive criminals"); *id.* ("[C]riminals often have long and exacting memories. A law enforcement officer is a target in uniform and out; active or retired; on duty or off."); H.R. Rep. 108-560 at *3-4 ("retired officers need to be able to protect"). Moreover, the Act had two sections—one for current law enforcement (now § 926B), and one for retired law enforcement (§ 926C). It is not hard to see that the community safety purpose is primarily fulfilled by the former section, with the latter section motivated primarily (if not exclusively) by the officer safety objective. The discussion in the House Report is particularly revealing on this:

> [The the Law Enforcement Alliance of America] argues that this legislation will "allow tens of thousands of additionally equipped, trained and certified law enforcement officers to continually serve and protect our communities regardless of jurisdiction or duty status at no cost to taxpayers." [The Fraternal Order of Police] contends that this legislation will help its members to protect citizens in the wake of a terrorist attack and that it is even more necessary since September 11, 2001.
>
> Additionally, supporters argue that this legislation must include retired officers as well as current officers because retired officers need to be able to protect themselves and their families and because they are just

> as trustworthy as they were when they were employed full time. Supporters also maintain that active and retired law enforcement officers often have to defend themselves outside their own State from criminals whom they have arrested.

H.R. Rep. 108-560 at *3-4. Thus to the extent there is merit to a policy of limiting those authorized under the statute to individuals trained in responding to crime with probable cause arrests, and to the extent that policy could be read into the statute to inform the term "powers of arrest," it would only make sense to do so as to § 926B, which is not at issue in this appeal.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Officers' Opening Brief, the Court should reverse the lower court's final order of dismissal and remand for further proceedings.

Dated: January 29, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this it contains 5,544 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1). As permitted by Fed. R. App. P. 32(a)(7)(C), undersigned has relied upon the word count feature of Word 2016 in preparing this certificate.

Dated: January 29, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this day of January 29, 2016, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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