ORAL ARGUMENT NOT YET SCHEDULED

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.)

BRIEF OF PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel of record certifies as follows:

A. Parties and Amici

Plaintiffs below and Appellants here are Ronald Eugene Duberry, Harold Bennette, Maurice Curtis, and Robert Smith, retired officers of the District of Columbia Department of Corrections. Defendants below and Appellees here are the District of Columbia, mayor Muriel Bowser (as successor to Vincent Gray), and Thomas Faust. There were no intervenors or amici curiae before the district court, and none are expected in this Court.

B. Rulings Under Review

Appellants appeal the order of United States District Judge Rudolph Contreras dismissing the action below pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Duberry v. District of Columbia*, 14-cv-01258 (RC), 2015 WL 3413526 (D.D.C. May 28, 2015), Dkt. 28 (Order), Dkt. 29 (Memorandum Opinion).

C. Related Cases

This case has not come before this Court or any other court except the district court below. Counsel is aware of no cases pending in this Court or any other court involving substantially the same parties and the same or similar issues.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Legislative Materials

GLOSSARY

The District	Defendants-Appellees
DOC	District of Columbia Department of Corrections
FERPA	Family Educational Rights and Privacy Act of 1974
HAVA	Help America Vote Act, Pub. L. 107–252, 116 Stat. 1706, *codified at* 52 U.S.C § 21082 (formerly § 15482)
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

PRELIMINARY STATEMENT

"Sergeant ***BENNETTE!***"

When retired Plaintiff-Appellant Officer Harold Bennette heard those words in 2005, he was on a personal trip in Pennsylvania. And rather than feeling an expectation of joy at perhaps seeing an old friend, a chill ran down his spine. He knew that the only person who would be addressing him like that would be one of the thousands of criminal inmates, many of them violent felons, he guarded and disciplined during his more than two decades as an officer with the D.C. Department of Corrections ("DOC"), which for most of his career handled both misdemeanor and felon inmates and was a sub-agency under the Federal Bureau of Prisons. Officer Bennette surmised that any former inmate audacious to call him out in that manner might be looking to settle an old score, could have mental health problems, and could well be armed. Officer Bennette knew he had nothing on him but his wallet and cell phone.

The episode that unfolded was ugly, including threats that Officer Bennette could get his "head blown off," but thankfully steered clear of any violence and obviously Officer Bennette is still with us. Yet it highlights the difficult, dangerous, and unnerving reality that both active and retired law enforcement officers, who make their careers confronting and exercising dominion over the most dangerous elements of our society, face in their off-duty and retirement lives.

It is a problem not easily solved, but Congress has recognized its gravity and taken steps to ameliorate it, in particular, as regards retired officers, with Section 3 of the Law Enforcement Officers Safety Act of 2004, Pub. L. 108–277, § 3, 118 Stat. 865, 866-67 (2004), *codified at* 18 U.S.C. § 926C (LEOSA, § 926C, or "the Statute"). The law provides that qualified retired law enforcement officers may seek to protect themselves and their families, and feel more secure in their retirement, by carrying a concealed weapon under certain conditions despite otherwise prohibitory state laws. LEOSA appropriately includes within its ambit officers who engaged in "the prevention, detection, investigation, or prosecution of, ***or the incarceration of*** any person for, any violation of law," § 926C(c)(2), recognizing that corrections officers, perhaps more than any others, maintained the sort of close, continuing, and often hostile contact with convicted criminals that could lead vindictive sentiments and the attendant dangers.

The statute allows states a limited measure of discretion over LEOSA eligibility in that state agencies may choose or not to issue the identification cards necessary to exercise the LEOSA "right to carry." Plaintiffs-Appellants here—retired Captain Ronald Duberry, Lieutenant Harold Bennette, and Sergeants Maurice Curtis and Robert Smith ("the Officers")—have all received DOC identification they believe is sufficient, and that portion of the statute is not at issue in this case. But when Plaintiffs-Appellants went to get perfunctory firearms

qualification certificates from private and out-of-state examiners—***not*** the DOC—they discovered that the DOC was responding to inquiries regarding their tenure by claiming that they were not in fact "law enforcement officers" under LEOSA because they did not exercise "statutory powers of arrest" as required by § 926C(c)(2).

The legal and factual inaccuracy of this claim is demonstrated below—the Officers routinely made arrests in a variety of situations, pursuant to a statutory authority that was explicitly cited on ID cards authorizing them "to make arrest"—but was ignored by the DOC in repeated attempts to resolve the situation. Nor was the substance of the issue here reached by the district court below. Rather, the district court re-"framed" the right at issue and concluded that "even if DOC misclassified [the Officers] and violated the 'law,' Congress did not intend through LEOSA to confer a 'right' to have this mistake corrected." A77. Disturbingly, the district concluded that the same DOC conduct that effectively deprived the Officers of their LEOSA rights could also simultaneously shut the door to a civil rights action under 42 U.S.C. § 1983 by depriving the Officers of a prerequisite (the firearms qualification certification) necessary for the underlying federal right to "attach."

Stepping back from the rhetorical gymnastics of "framing" the right and when it "attaches," it is clear that Congress intended LEOSA to provide relief to

individuals who, like Officers, engaged in the incarceration of persons during their careers and are feeling the consequences in retirement. Questions of the contours of the scope of LEOSA eligibility are important, but for that reason they should addressed in a considered fashion, on the merits. The statute provides and protects a limited reservoir of state discretion, and states can and should assert their preferences through such lawful channels—but there is no justification for insulating improper efforts to affect LEOSA eligibility in other ways, such as responding to essentially factual questions on an out-of-state form. The merits questions here are neither particularly complicated nor constitutionally or legally sensitive. But they do have a profound effect on the Officers' rights and the quality of their lives in retirement. The Officers should have their day in court and the district court should hear this case.

STATEMENT OF JURISDICTION

The district court correctly determined that it had subject-matter jurisdiction of this matter under 28 U.S.C. § 1331. *See* Appendix ("A") at A60-62. The court issued a final order dismissing the case and disposing of all claims on May 28, 2015. A42, A43. Plaintiffs-Appellants filed a timely notice of appeal on June 25, 2015. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Where a state acts under color of law to prevent, without lawful justification, a prospective rights-holder from satisfying a perfunctory or ministerial prerequisite necessary to properly exercise a right, whether suit under § 1983 is therefore unavailable to the prospective holder because the right has not yet "attached."

2. Whether, in "framing" the right at issue as a subsidiary "procedural right to be certified correctly" rather than the "right to carry" at the center of LEOSA, the district court effectively imposed a burden on the Officers to demonstrate that the statute confers a *remedy*, instead of limiting the inquiry to whether Congress intended to confer a right.

3. Whether the district court erred in holding that LEOSA provides no "right to be certified correctly" or any other right arising from the LEOSA eligibility criteria that would allow the Officers to challenge inaccurate statements regarding their prior employment, made by Defendants-Appellees on out-of-state forms, which have effectively deprived the Officers of the central LEOSA right to carry a concealed weapon for which they otherwise qualify.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are included in the Addendum.

STATEMENT OF THE CASE

After DOC officials made factually false and legally inaccurate representations regarding the prior employment status of and authority exercised by the Officers during their collective 88 years of DOC tenure, and after subsequent correspondence with officials confirmed the purported but unfounded bases for those misrepresentations, the Officers filed suit under 42 U.S.C. § 1983, claiming that the misrepresentations, made under color of law, had the intended and actual effect of depriving them of the right to carry a concealed weapon that would otherwise be available to them LEOSA. *See* A7 (Corrected Amended Complaint (14-cv-1258, Dkt. 15); "the Complaint"); A21 ("By denying certification as retired law enforcement officers to Plaintiffs, Defendants deprived Plaintiffs of their right to carry concealed firearms under LEOSA.").

Defendants-Appellees ("the District") moved to dismiss the Complaint on Nov. 10, 2014, on a wide range of jurisdictional and preliminary grounds, including alleged lack of subject-matter jurisdiction, lack of standing (injury-in-fact and redressability), lack of federal jurisdiction to review the actions of a District of Columbia agency, lack of a cause of action under LEOSA, lack of an enforceable right for § 1983, and failure to state a claim. 14-cv-1258, Dkt. 19. The Officers opposed the motion on Nov. 28, 2014. 14-cv-1258, Dkt. 23.

In its Memorandum Opinion and Order dated May 28, 2014, the district court considered and rejected each of the District's jurisdictional arguments, holding that the Officers had indeed demonstrated an alleged injury-in-fact, causation, and redressability sufficient for Article III purposes, and that the court had subject-matter jurisdiction over the dispute. A50-62. The District has not cross-appealed these holdings and they are not at issue in this appeal. However, the district court proceeded to grant the District's motion to dismiss under Fed. R. Civ. P. 12(b)(6) on the ground that the Officers failed to state a claim because the federal right they sought to exercise was either (a) not enforceable under § 1983, if narrowly framed as "procedural right to be certified correctly"; or (b) if framed as a right to carry, which the district court seemed to agree was enforceable under § 1983, it was not available to the Officers because they did not satisfy the statutory prerequisite found in § 926C(d)(2)(B). A64-78.

The district court reached the first conclusion by finding that it was required by *Blessing v. Freestone*, 520 U.S. 329 (1997) , to re-frame the right asserted by the Officers from the "right to carry," asserted in the Complaint, to a more narrow "procedural right to be certified correctly," and that ***this*** right needed to satisfy the Supreme Court's requirement from *Gonzaga University v. Doe*, 536 U.S. 273 (2002), of being "unambiguously conferred" in the statute in order to be enforceable under § 1983. A77. The court summarily concluded, with minimal

analysis, that this narrow right was no so conferred: "Even if DOC misclassified [the Officers] and violated the 'law,' Congress did not intend through LEOSA to confer a 'right' to have this mistake corrected, at least *by way of § 1983*." A77 (emphasis original); A74-75. The court acknowledged that there was no alternative "federal review mechanism" or other remedy (short of a challenge to a criminal conviction) to address the Officers' alleged "wrongful denial." A75 n.27.

The district court reached the second conclusion—that the LEOSA right to carry was unavailable to the Officers—by noting that the Officers "concede that they have no firearm certification" as required by § 926C(d)(2)(B). A74. Addressing the contention that § 1983 ***must*** be available where it is precisely the alleged action under color of law that improperly ***prevents*** a plaintiff from satisfying a precondition necessary to exercise the right, the district court acknowledged that it could not hold as a general matter that such action would never effect a deprivation. A75-76. "But on the facts alleged here," the Court concluded that it would not allow the Officers to invoke the right to carry for § 1983 purposes, which it claimed would "blur the boundaries of LEOSA's concealed carry right." A76. The only "fact" identified by the district court in support of this conclusion was the fact that the Officers "aver that they have no plans to carry a concealed firearm without first obtaining a LEOSA permit issued by local authorities"—*i.e.*, that the Officers have indicated they will not, after

lifetime careers of upholding the law, break the law in the hopes that they can "exercise their rights" by challenging their convictions on appeal. *Id.*

The district court took pains to note that its analysis was limited to the availability of an enforceable right under § 1983 and "in no way implie[d] that DOC's determination of Plaintiffs' status complied with [LEOSA]," noting that that would be "a matter for the merits, which the Court does not reach." A77.

STATEMENT OF THE FACTS

I. Officers Ronald Duberry, Harold Bennette, Maurice Curtis, and Robert Smith Serve For Decades With The D.C. Department Of Corrections

Officers Ronald Duberry, Harold Bennette, Maurice Curtis, and Robert Smith served with the District of Columbia Department of Corrections (DOC) for the majority of their careers, starting in the 1970s and early 1980s. A17-20. For most of their careers, the DOC was part of the Federal Bureau of Prisons; the Officers were federal officers (today they receive their retirement benefits from the federal government) and served significant portions of their tenure at the federal Lorton Correctional Complex (also called the Lorton Reformatory or Occoquan Workhouse) that housed most D.C. felons at that time. Each Officer retired in good standing in the late 1990s and 2000s. *Id.*

Throughout their tenure, the Officers were required to be in close contact with and exercise discipline over inmates. Suffice to say that many inmates did not respond graciously to the Officers exercise of their duties, leading to routine

incidents of confrontation, necessary use of force, and enraged responses from inmates, including gruesome threats of violence that the inmates claimed they would inflict on the Officers when the inmates were released. A12, A17. It was an ugly and unfortunate part of the job—but it was part of the job.

Another part of the job was exercising a general police power on prison grounds, including arresting inmates and visitors for the commission of crimes. A12. For inmate crime, the Officers would physically arrest the suspect inmate and secure him in "lockdown" conditions; investigate the facts of the crime; fill out arrest paperwork; and liaise with the U.S. Marshalls or FBI officers assigned to further investigate the crime. Sometimes additional investigation was not required and the Officers would work directly with prosecutors. For visitor crime (such as bringing in contraband), the Officers would again arrest the suspect and secure him or her in lockdown, fill out arrest paperwork, and eventually hand the individual over to the Metropolitan Police Department. The Officers were required to carry firearms on-duty, were authorized to carry firearms off-duty, *see United States v. Pritchett*, 470 F.2d 455 (D.C. 1972), and rigorously trained in firearms use and precautions. A11.

Another part of the job involved transferring inmates between facilities (including facilities as distant as Texas and North Dakota), and supervising prisoners on authorized visits to funerals, hospitals, house visits, and others. It was

not uncommon for inmates to take advantage of these transports to attempt escapes, requiring the Officers to engage as necessary hot pursuit and use of force to effect arrest and re-detention. The Officers were also required to engage in search and pursuit in response to escapes from prison grounds. Typically upon an escape, all manner of law enforcement would be mobilized in the area to conduct search, and the Officers would work hand-in-hand with the U.S. Marshalls and state police to locate and re-arrest the escapee. Officer Bennette recalls personally being the law enforcement officer who found and arrested one escapee from the Lorton facility near a gas station in nearby Occoquan, acting on intelligence conveyed to him by state police.

Finally, the Officers were also routinely assigned to a "warrants squad" tasked with investigating the whereabouts of parole violators in the community, arresting them upon finding them, and engaging in hot pursuit and use of force as necessary. In carrying out all these duties, the Officers carried DOC-issued photo identification that expressly cited the provisions of the D.C. Code authorizing them to carry a concealed weapon (§ 22-3205, now § 22-4505) and authorizing them "to make arrest" (§ 24-205, now § 24-405). *See, e.g.*, A33; A11-12, A17-20.

II. The Officers In Retirement Continue To Encounter And Be Recognized By Former Inmates, Often Leading To Threats And Apparent Danger To Them And Their Families And Companions

In their retirement, the Officers have continued to be plagued by deeply disturbing encounters with former inmates. In their Complaint, the Officers recount a handful of illustrative incidents. Officer Smith was fired upon near his home by an individual he believed he recognized as a former inmate. A20. Officer Bennette has repeatedly received menacing stares and threatening gestures, such as a finger pulling a imaginary trigger, from former inmates who have recognized him. A18-19. The incidents do not just occur in the jurisdictions they reside and where they could potentially obtain concealed carry permits. For example, Officer Curtis, who lives in Maryland, must routinely check in on his sick and elderly father in the District of Columbia, and during those visits has repeatedly encountered individuals he recognizes as former inmates. A19-20. As described above, Officer Bennette encountered former inmates while on a trip in Pennsylvania. A18-19. The inmates called him out by name, approached him, and told him he was "out of place" and that they "could blow [his] head off" if they so desired. *Id.*

These sorts of incidents often leave the Officers feeling deeply insecure as they live out what should be, after long careers of placing themselves in harm's way to secure dangerous individuals and protect the public, a retirement as carefree as possible. When Officer Duberry goes to a movie with his wife in the District, he

has to wonder who he might encounter, and how he would keep himself and his wife safe if a violent and vindictive former inmate were to recognize him and decide to take the opportunity to inflict revenge. A18. This is just not right—so much so that Congress has recognized the problem, and taken what steps it can to address it.

III. Congress Enacts LEOSA To Help Retired Corrections Officers, Among Others, Protect Themselves And Their Families And Feel Secure In Their Retirement

Congress passed the Law Enforcement Officers Safety Act of 2004 specifically to address the problematic known reality that active (Section 2) and retired (Section 3) law enforcement officers, in their off-duty, day-to-day lives, will and often do encounter individuals over whom they have exercised dominion in a law enforcement capacity during their careers, and that these individuals often maintain a potentially violent animus against the officer that once held the power of the law over them. *See, e.g.*, S. Rep. 108-29 (2003), 2003 WL 1609540 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 (2004), 2004 WL 5702383 at *3-4 ("retired officers need to be able to protect themselves and their families and . . . are just as trustworthy as they were when they were employed full time"). LEOSA allows retired law

enforcement officers to protect themselves and otherwise feel safe from the threat of potentially vindictive criminals by providing that they "may carry a concealed firearm," irrespective of state law generally prohibiting such carry, so long as they qualify under the statute and are carrying statutorily-specified identification. § 926C(a).

Section 3 of LEOSA ("LEOSA" for purposes of this brief) sets forth an in-depth, seven-part definition of the term "qualified retired law enforcement officer" at sub-section (c). Although the definition requires a number of particularized qualifications, such as service for 10 years or more, (c)(3), separation in good standing, (c)(1), and lack of disqualification for medical reasons, (c)(5), or other reason of federal law, (c)(7), it quite clearly intends to include corrections officers in the ambit of the core substantive component of the definition at (c)(2), which references officers "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." § 926C(c)(2) (emphasis added). This makes abundant sense. Indeed, in light of the Act's purpose, it is arguable more compelling as applied to corrections officers, who often will have engaged a law offender in a hostile environment on a daily basis for years or even decades, as opposed to just a single time or handful times, as would an arresting police officer or a prosecutor.

The definition at § 926C(c)(2) also requires that the officer "had statutory powers of arrest" during his or her law enforcement tenure. *Id.* The Statute provides no further specification or requirement, such as whether the power had to authorize arrest for the original commission of a crime versus a parole violation or anything else. Nor is there any suggestion that the Statute requires an officer to have exercised all available statutory powers of arrest in any particular jurisdiction—nor would this be a feasible exercise for any officer, given the range of different arrest powers typically allocated in different statutory provisions to the different actors who "engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration" of persons under the law. As long as an officer has ***an*** arrest authority provided by statute in connection with his or her position—as the Officers here did, as so plainly evidenced by § 24-405 and their DOC ID cards referencing the same—the arrest authority requirement of § 926C(c)(3) is satisfied.

IV. The Officers Seek To Exercise Their LEOSA Rights But Are Intentionally Blocked By Misrepresentations Made By District Officials On Out-Of-State And Non-DOC Paperwork

LEOSA does not implement any LEOSA-specific licensing scheme. Rather, it simply provides a superseding federal right to carry to a concealed firearm that may be exercised by any qualifying individual who possesses the requisite identification. Under the Statute, the identification may take a number of different

forms, but must ultimately reflect two components: one must be issued "by the agency" at which the individual served and must contain photo identification and indicate that the individual was a "law enforcement officer"; the other may be issued by the agency or "by the State ***in which the individual resides***" and must certify that the individual has met "active duty standards for qualification in firearms training" or similar standards, as found by a competent examiner. § 926C(d) (emphasis added).

It is noteworthy that while other courts that have examined LEOSA have found that the requirement of agency-issued identification was an important legislative compromise intended to ameliorate the intrusion of the law on intrastate gun carry laws, *see, e.g.*, *Moore v. Trent*, No. 09-cv-1712, 2010 WL 5232727 *3 (N.D. Ill. Dec. 16, 2010) ("***the identification card*** required in § 926C(d) constitutes a reservoir of powers set aside for the States") (emphasis added), no court has found the same to be true of the firearms qualification certification component, which may be issued by a different authority and seems aimed more pragmatically at fulfilling the statutory requirement that LEOSA carriers keep current on their firearms qualification status. The district court in this case agreed with this analysis. A74 n.25.

The Officers do not need to contest in this case that the issuance or not of the requisite photo ID by the agency remains as a "reservoir" of power for the DOC

under LEOSA, which may or may not, presumably consistent with D.C. law, issue identification with the indications necessary for its active officers, or even its newly retiring officers, to carry under LEOSA, or not. Rather, the critical fact in this appeal is that Officers Duberry, Bennette, Curtis, and Smith already have sufficient DOC-issued photo identification. What remains for the Officers is to obtain a firearms qualification certificate from an appropriate authority in their residence: for Officers Duberry, Bennette, and Curtis, the Prince George's County Municipal Police Academy (which provides qualifications tests, training, and certificates through the Prince George's Community College), and for Officer Smith, any one of a number of qualified firearms qualifications instructors and examiners recognized and listed by the District. There is no question that the Officers are supremely capable of passing the necessary qualifications test: they carried weapons on the job and off-duty for decades; Officer Smith continues to carry a weapon as part of his post-retirement part-time employment with the U.S. Department of State; Officer Bennette even ***conducts*** firearms qualification training and examination as part of his post-retirement employment. The firearms qualification certification is an important but fundamentally ministerial and perfunctory requirement of the statutory scheme designed to ensure that LEOSA carriers meet certain technical requirement, and ***not*** designed to invest the DOC or any agency with any additional discretion over LEOSA eligibility.

Yet it is ***this*** exact requirement that the District and the DOC are using intentionally to block the Officers from exercising their LEOSA rights. They have discovered they can do so because the policies of the respective out-of-state and in-state private firearms qualifications examiners request a form to be filled out by the former agency employer ("Prior Employment Certification Form") indicating whether or not the person seeking firearms qualification certification was, during his or her tenure, and consistent with the federal definition, "authorized 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." A26. All that is incumbent of the DOC is to state the truth on the form: to acknowledge that, during their tenure, the Officers were indeed considered law enforcement officers and did indeed have the authority, under some circumstances, to make arrest.

Instead, on December 16, 2012, the DOC Human Resources Department returned to Plaintiff Duberry a signed version of the Prince George's form with "no" instead of "yes" checked in response to the § 926C(c)(2) definition above and "MR. DUBERRY WAS NOT A LAW ENFORCEMENT OFFICER" hand-written in below. A26. After Mr. Duberry and the other plaintiffs consulted with counsel and submitted additional Prior Enforcement Certification Forms for signature, counsel contacted the DOC as well as a representative of the D.C. Council and was

informed on June 5, 2014, that the District would continue with the same indications on any forms submitted by Mr. Duberry or any of the other plaintiffs, on account of a "legal position" being taken by the DOC, after internal "follow-up with [DOC] Director [Tom] Faust and DOC General Counsel," that correctional officers do not have "law enforcement status and arrest authority" under D.C. law. A34-36, A37-41.

The Officers pointed out that they routinely arrested re-offenders on prison grounds, arrested escapees after manhunts in which they participated side-by-side with U.S. Marshalls and state police, and served on a warrants squad that went into the community to find and arrest parole violators—and more importantly, that they did so pursuant to a statutory power that was even cited on their DOC identification cards as expressly authorizing them "to make arrest." A33, 34-41. The DOC and the District ignored these facts until this lawsuit commenced, and while they have since backed away from the claim that the Officers are not "law enforcement officers" generally speaking, they have maintained the position that they are not LEOSA eligible because they didn't exercise authority to make arrests "for the commission of a crime"—even though no such qualification is found in LEOSA. *See* 14-cv-01258, Dkt. 19 at 23-24 (District MTD); 14-cv-01258, Dkt. 23 at 21-22 (Officers' opposition). As noted, the district court refused to engage the issue, calling it a matter of the merits, though it emphasized that its decision "in no

way implies that DOC's determination of [the Officers'] status complied with subsection (c)(2)." A77.

SUMMARY OF THE ARGUMENT

This district court dismissed the Officers complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, on the grounds that the Officers failed to plead any federal right enforceable under § 1983 in light of the requirements of *Blessing* and *Gonzaga*. The court looked past the Officers' pleading of a violation of the "right to carry" conferred by LEOSA at § 926C(a) because it claimed, first, this right had not "attached" because Officers did not have the firearms qualification certificate they sought by way of the lawsuit itself, and second, that despite the Officers' assertions in their Complaint and briefing, what they really sought was vindication of "a procedural right to be classified correctly," not the LEOSA right to carry.

The district court's first conclusion fails to recognize that courts routinely and necessarily allow prospective rights-holders to challenge official conduct under § 1983 that interferes with conditions or prerequisites otherwise necessary for lawful exercise of a right, at a minimum where the conduct is unlawful or unwarranted, the interference with the prerequisite is *designed* to effect a deprivation of the parent right, and/or the prerequisite itself is perfunctory or ministerial in nature.

The district court's re-framing exercise was error because it effectively required the Officers to demonstrate that LEOSA supplies a private remedy, whereas the law is clear that in a § 1983 case a plaintiff does not have this burden. The re-framing was not, as the district court claimed, mandated by *Blessing*, at least to the extent the district court engaged it. Nonetheless, even framed as a "procedural right to be certified," a full analysis of the LEOSA eligibility framework in light of the requirements of both *Gonzaga* and *Blessing* reveals sufficient mandatory and individualized "rights- and duty-creating" language and structure to warrant a finding of an intent to confer a right to LEOSA status enforceable under § 1983.

The Officers are thus able to state a claim of deprivation of either the LEOSA right to carry or the LEOSA eligibility criteria and should be allowed to proceed with their suit under § 1983.

ARGUMENT

I. Standard of Review

The Court "review[s] a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) *de novo*." *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009). "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Id.* The Court may consider attachments to the complaint as well as the

allegations contained in the complaint itself. *See E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997).

II. The Officers State A Claim Because They Allege Deprivation Of The Unambiguous And Enforceable LEOSA Right To Carry A Concealed Weapon

This case begins with a double-take: the district court dismissed the Officers' case for lack of any federal right enforceable under § 1983, yet acknowledged that LEOSA is built around a concrete, mandatory, individualized, and thus seemingly enforceable right to carry a concealed firearm—and moreover, that it was ***this*** right that the Officers at least sought to vindicate this right in their Amended Complaint. A73, A76; A21 ("Defendants deprived Plaintiffs of their right to carry concealed firearms under LEOSA."). The district court reached its conclusion of unenforceability despite the LEOSA right to carry by maintaining, on two inter-related theories, that the right was out of the Officers' reach.

The first was the court's (lack of) "attachment" theory: because the Officers do not presently hold the certification for qualification in firearms training required by sub-section (d)(2)(B)(I) of § 926C, which is a prerequisite or precondition necessary for lawful exercise of the right, the district court claimed the LEOSA right to carry has not "attached" to the Officers and thus they may not seek to vindicate it under § 1983 even against alleged conduct directly (and unlawfully) aimed at preventing that attachment from taking place. A76. The district court

supported this conclusion with reference to dicta language in other LEOSA cases simply agreeing that the comparable LEOSA right to carry for active officers (18 U.S.C. § 926B) is indeed subject to "statutory prerequisites" and "exacting preconditions." A72-73 (citing *Torraco v. Port Authority of New York and New Jersey*, 615 F.3d 129, 132 (2d Cir. 2010), and *Association of New Jersey Rifle and Pistol Clubs Inc. v. Port Authority of New York and New Jersey*, 730 F.3d 252 (3d Cir. 2013)).

But the plain fact that sub-section (d)(2)(B)(I) acts as a prerequisite is unremarkable and uncontested. The Officers are not seeking to exercise their right to carry without satisfying prerequisite. Rather, they are seeking to exercise their right to carry and claiming that the ***means*** by which the District is blocking that exercise is by blocking, without lawful justification, their ability to satisfy the prerequisite through appropriate (and in the case of three Officers, out-of-state) channels. What the district court never explains or cites authority for is the proposition that a lack of "attachment" at the moment of suit acts as a categorical bar to enforceability of the right under § 1983, even in a situation where a plaintiff is capable and entitled to satisfy the missing prerequisite ***but for*** the complained-of state conduct. As noted below, the district court ultimately recognizes that a truly categorical bar is untenable; that some category of cases cannot be extinguished by pointing to an unfulfilled prerequisite. A75-76; *infra* at 28-32. But rather than

analyze and describe this category of cases, the district court simply asserts that "on the facts alleged here," the Officers' case is not one of them. While the Officers take issue with the district court's approach generally, they additionally maintain the facts of this case would put it squarely in the middle of any category of cases that would be excepted from a rule that generally bars § 1983 enforceability where a statutory prerequisite is lacking.

A. The LEOSA right is enforceable via § 1983 against unlawful state conduct aimed at blocking a prospective LEOSA rights-holder from satisfying a prerequisite necessary to exercise the right

While the notion that a person cannot litigate a right that has not yet "attached" may be appealing, especially as a limiting principle, it has not actually served as a bar to rights-based litigation, as least as against conduct ***aimed at*** depriving the right by depriving a necessary precondition for attachment. Indeed, it is important to recognize the work being done here by semantics alone. A simpler way to see sub-section (d)(2)(B)(I) is simply as a prerequisite to the lawful ***exercise*** of the LEOSA right, not dissimilar from the various requirements that qualify how, when, and where any right may properly be exercised. We all have the right to freedom of speech—there is no metaphysical moment of attachment, perhaps other than birth—but we must exercise the right that within lawful time, place, and manner constraints. Where a state authority acts as to those constraints or qualifications—for example, a city refuses a public demonstration permit to a

particular group of protesters—the protestors are not barred from challenging the decision on the grounds that their right to free speech has not attached because they have not yet satisfied the city's otherwise lawful demonstration permitting process.

In briefing before the district court, the Officers offered an analogy involving the right to vote, observing that state conduct blocking a person from entering a polling station (a prerequisite to voting) would obviously amount to a violation of the right to vote. The district court stuck with its attachment approach, responding in a footnote that the Officers "are not like the voters in their analogy who, presumably, are fully eligible to vote." A77 n.30. This response fails to grasp the point. The blocked voters may be "eligible to vote" under the terms of the law (just like the Officers here are eligible "qualified retired law enforcement officers" under the LEOSA definition) but they are not able to lawfully exercise the fruits of their eligibility unless they follow the necessary voting procedures: show up at the polling station, stand in line, present identification if required, operate the voting machine, and so on. Some of these "prerequisites" to casting a vote are implied in the process, others may be spelled out in law. It would be absurd to say that a would-be voter blocked from entering a polling station (by an official acting under color of law without lawful justification) cannot vindicate a right to vote under § 1983 because he or she did satisfy the entering-a-polling-station prerequisite of the right.

Indeed, this analogy has actually played out on somewhat closer facts in the context of the statutory right to cast a provisional ballot, which was conferred by Congress as part of the Help America Vote Act (HAVA). Pub. L. 107–252, Title III, § 302, 116 Stat. 1706, *codified at* 52 U.S.C. § 21082 (formerly § 15482). Like the LEOSA right to carry, the HAVA provisional ballot right is subject to a number of preconditions, including that the would-be provisional voter "execut[e] a written affirmation . . . before an election official at the polling place." 52 U.S.C.A. § 21082(a)(2). In *Sandusky County Democratic Party v. Blackwell*, plaintiff organizations on behalf of their members sought injunctive relief under § 1983, alleging that Ohio's voting regulations allowed poll workers excessive discretion to refuse to provide provisional ballots, contrary to the right as guaranteed. 387 F.3d 565, 570-71 (6th Cir. 2004). The district court and the Sixth Circuit on appeal both expressly considered and rejected the argument that the HAVA provisional ballot right was not enforceable under § 1983, without any concern for the fact that the would-be provisional voter plaintiffs had not yet executed the prerequisite affirmations necessary for the right to "attach." *Id.* at 572. Had the allegations in that case been that the regulations allowed poll workers to ***block*** voters from making the necessary affirmation (or, were it an as-applied challenge where poll workers had actually so blocked would-be voters), it is impossible to imagine that the courts' response would have been to find the HAVA

right unenforceable because the voters had not, despite their desires and efforts, made the affirmations necessary for the rights to attach.[1]

This is not to say that it is unimportant whether or not a plaintiff is eligible to exercise a right, nor that the scope of a right cannot be limited by prerequisites or qualifications, by statute or otherwise. But ***how*** alleged state conduct interacts or interferes with such prerequisites or other eligibility factors matters for § 1983 purposes. Thus, the statutory prerequisites of § 926B at issue in *Torraco* and *New Jersey Rifle and Pistol Clubs* (namely, the "prerequisite" of vehicular and compartmentalized transport) played very different roles, because the plaintiffs in those cases conceded that their failure to satisfy those prerequisites was on account of their own actual or intended conduct (*i.e.*, taking firearms to airports and elsewhere not in a vehicle), and not caused by the state conduct attacked in the § 1983 case. Plaintiffs in those cases essentially sought to exercise the LEOSA right in 926B free of the prerequisite, or pursuant to their particular interpretation of it.

The district court below sought to push this case into the same posture by emphasizing the "concession" by the Officers that they do not currently have the

[1] Indeed, part of the injunctive relief issued by the district court (and upheld on appeal) in *Sandusky County* required that any voter advised that he or she was not eligible to vote also be advised of his or her right to cast a provisional ballot and be given a form affirmation to execute if desired. *Id.* at 571, 576. Again, under the strict attachment theory applied by the district court here, would-be provisional voters would have no right to an affirmation form because no right would have attached.

firearms qualification certification required by sub-section (d)(2)(B)(I). A74. If the Officers were arguing that they did not need the certification, and the district court disagreed, perhaps the case could properly proceed as did *New Jersey Rifle and Pistol Clubs*. But that is not this case. The Officers strongly desire to satisfy the firearms qualification prerequisite, and are clearly eligible to, *supra* at 9-11, 19, and capable of, *supra* at 17, satisfying the prerequisite, but for the very state conduct which the Officers seek to challenge under § 1983. Though it sounds extreme, a closer analogy between the facts in this case and those in *Torraco* or *New Jersey Rifle and Pistol Clubs* would be if officials in those cases had placed those plaintiffs in violation of 926B's prerequisites by, for example, moving a firearm properly stored in the trunk of a plaintiff's vehicle into the passenger compartment and then claiming that the plaintiff could not sue under § 1983 because he or she was not in full satisfaction of the preconditions of the transport right.

B. As the district court recognized, § 1983 must be available in "some cases" where officials effect a deprivation of LEOSA rights by conduct affecting or interpreting LEOSA eligibility—and this case is one of them

The district court seemed to recognize that the lack of a statutory prerequisite could not so dogmatically bar § 1983 scrutiny as to close the door on some category of cases that the district court seemed to feel would justify allowing

plaintiffs to plead a violation of the right to carry. "[T]here might be some cases in which a failure to classify an individual as a 'law enforcement officer' [and thus blocking the ability to satisfy a prerequisite] denies that individual his right to carry a concealed firearm." A75-76. Unfortunately, the district court declined entirely to describe the nature or contours of this category of cases. All the district court offered was that "on the facts alleged here," the Officers' case was not one of them. A76. The court then cited two facts: "Plaintiffs do not possess the requisite firearm certification and aver that they have no plans to carry a concealed firearm without first obtaining" the necessary papers." *Id.*

The Officers submit that neither "fact" does any work in distinguishing this case from some other category of cases where denying certification (or other interference with obtaining a prerequisite) effects a deprivation for § 1983 purposes. The first simply restates the premise of the entire problem, as addressed above. The second appears to be a nod to the theory of the LEOSA right to carry that animated the concurrence of Judge Wesley in *Torraco*—namely, that the LEOSA right only attaches upon a criminal conviction under state gun laws, in order to serve as a grounds to attack that conviction on direct appeal or in *habeas* proceedings). *See* A74 n.26. But the district court otherwise did not embrace that very particular theory of LEOSA, and it has not controlled in any LEOSA-related decision. *Id.* Its appearance in the district court's reasoning on this point is

bewildering and, to the extent it suggests that the Officers case fails in the district court's mind because they were not willing break the law (and break their own lifetime ethic of upholding the law) in order to "vindicate" their rights on an appeal from a criminal conviction, it is deeply unfair.[2]

The district court's failure to elucidate its category of "some cases," A75, is particularly unfortunate because there are a number of categorizing factors that jump out as potentially useful. First among them, of course, would be whether or not the challenged state conduct was itself designed to prevent the plaintiff from satisfying the prerequisite for the express purpose to preventing her from exercising the right. Ensuring § 1983 review would also seem to be more compelling where the state has allegedly acted in an unlawful, unjustified, or arbitrary manner. It would also seem to be more compelling where the missing prerequisite is perfunctory or ministerial in nature, as this speaks both to the individual's entitlement to the prerequisite and to causation—the fact that the individual would indeed satisfy the prerequisite but for the alleged state interference.

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[2] The Officers also note that Judge Wesley's theory would render the relief or benefit conferred by the substantive LEOSA right so minimal it would be effectively worthless. Indeed, if LEOSA rights-holder did carry a weapon, endure a criminal conviction, and then vindicate his or her finally-attached right on direct appeal or in *habeas* proceedings, there would be nothing to stop the whole oppressive process from happening all over again the next time the individual sought to carry in exercise of LEOSA. This can hardly be what Congress intended.

All these factors are powerfully present in the facts here. The Officers are challenging precisely that District conduct which has blocked their ability to obtain the firearms qualification required by sub-section (d)(2)(B)(I). The Officers allege (and the prima facie evidence from communications with District officials appears to confirm) that the intent of District officials in engaging in that conduct is to block the Officers from realizing full LEOSA compliance and exercising their LEOSA rights. With respect to the lawful or unlawful nature of the District's conduct, the Officers are not formally arguing the merits of the lawfulness of the District's "legal position" out of recognition that the district court did not reach the merits, but nonetheless submit that it is clear that the statements made on Mr. Duberry's prior employment certification form were incorrect in light of the § 24-405 of the D.C. Code and the Officers' actual experience, or at least that a serious question exists as to their accuracy, *supra* at 19, weighing in favor of not letting the consequences of those same statements foreclose relief under § 1983.

It is also noteworthy here that the firearms qualification requirement, while certainly important to the LEOSA statutory scheme, is perfunctory or ministerial in the sense that it is meant to apply mechanically without any suggestion of a margin of discretion beyond the technical requirements of the firearms qualification test itself. There is certainly no suggestion that the test is properly subject to the whims of the District's "legal position" on LEOSA eligibility. In this sense it is ***unlike*** the

photographic identification requirement, which, courts have observed, was expressly designed by Congress to serve as a "reservoir" of power or discretion to the states that would soften or mediate the intrusion into the realm of state firearms regulation that LEOSA undeniably represents. As noted above, *supra* at 16-17, and as recognized by the district court, A74 n.25, the photographic identification requirement is not at issue in this case and the "reservoir" of state power is not at play. Even if were possible to read a similar grant of discretion into the firearms qualification requirement of sub-section (d)(2)(B)(I), it would not come into play for a majority of the Officers here who are required to their qualifications certificates from their state of residence of Maryland. The District cannot legitimately assert its preferences via a statutory provision directed at an entirely different jurisdiction.

III. The District Court Erred In "Framing" The Right At Issue As A "Procedural Right To Be Certified Correctly"

The second theory the district court used to keep the LEOSA right to carry out of reach Officers' reach for § 1983 enforceability purposes was predicated on reframing the right at issue as a narrower "procedural right to be classified correctly" under the LEOSA eligibility criteria, and then asking whether ***this*** right was "unambiguously conferred" by the Statute. But while it purported to ground

this approach in the three-prong inquiry for the existence of a federal right set forth in *Blessing*,[3] the district court went astray in several critical respects.

A. The district court's "framing" of the right inappropriately required the Officers to demonstrate that LEOSA confers a private *remedy*

First, at least in the context of a federal right or benefit conferred but subject to eligibility requirements, a "procedural right to be classified correctly" is essentially a *remedy*, and the question of whether there is such a right or remedy is the same as whether there is an implied right of action to enforce the eligibility determinations of the statute. But as the district court acknowledged, in the § 1983 context, the Court may "not ask whether LEOSA provides Plaintiffs with an express or implied remedy," because § 1983 itself "generally supplies a remedy," and "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." A68 (quoting *Gonzaga*, 536 U.S. at 284); *Langlois v. Abington Housing Auth.*, 234 F. Supp. 2d 33, 47-48 (D. Mass.

[3] In *Blessing*, the Supreme Court noted that it had "traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right":

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. at 340-41 (internal citations and quotations omitted).

2002) ("the inquiry [is] whether the statute create[s] a federal right . . . not whether Congress intended to create a right *enforceable through § 1983*") (emphasis original); *Furtick v. Medford Housing Auth.*, 963 F. Supp. 64 (D. Mass. 1997) ("Congress is presumed to legislate against the background of section 1983 and thus to contemplate private enforcement of the relevant statute against state and municipal actors absent fairly discernible congressional intent to the contrary.")

Using the language of the district court (which claimed the Officers were attempting to "bootstrap" their narrow claim of a "procedural right to be classified correctly" up to the broader LEOSA right to carry), what the district court did, by requiring the Officers to show that Congress intended to supply "a procedural right to be classified correctly," was bootstrap an analysis of whether Congress supplied a remedy (which is unnecessary in a § 1983 case) into an analysis of whether Congress supplied a right under *Blessing*/*Gonzaga*. In ultimately holding that "even if DOC misclassified Plaintiffs and violated the 'law,' Congress did not intend through LEOSA to confer a 'right' to have this mistake corrected," A77, the court called what it was demanding of the Officers a right, but it was in fact a remedy. The Officers did not need to show this particular right—framed and interposed by the district court, not by them—and dismissal of their case for failure to show it was error.

B. The district court inappropriately (and unnecessarily) reframed the right at issue despite the fact that the Officers alleged injury to a specific, well-defined, and analytically "manageable" statutory right

The district court maintained that it was required to focus on the narrower "procedural right to be classified correctly" because of the Supreme Court's instruction in *Blessing* to consider potentially enforceable rights "in their most concrete, specific terms." A65 (quoting *Blessing*, 520 U.S. at 346). But *Blessing* does not require courts to pulverize a complaint in search of some perfectly irreducible expression of right (which, like its molecular analogs, would probably continue to be reducible with more study and effort). It is important to recall that the plaintiffs in *Blessing* "argued that federal law granted them 'individual rights to ***all*** mandated services delivered in substantial compliance with Title IV–D and its implementing regulations,'" *viz.* a collection of dozens of statutes and countless more regulations governing child support and paternity establishment procedures in the Social Security Act. *Blessing*, 520 U.S. at 341 (emphasis added). In *Blessing*, the Court observed:

> Without distinguishing among the numerous rights that might have been created by this federally funded welfare program, the Court of Appeals agreed in sweeping terms that "Title IV–D creates enforceable rights in families in need of Title IV–D services." The Court of Appeals ***did not specify exactly which "rights" it was purporting to recognize***, but it apparently believed that federal law gave respondents the right to have the State substantially comply with Title IV–D ***in all respects***.

Id. at 342 (internal citation omitted) (emphasis added). The Court found that this approach "paint[ed] with too broad a brush" and erred "in taking a blanket approach." *Id.* at 342, 344.

> It was incumbent upon respondents to identify with particularity the rights they claimed, since it is impossible to determine whether Title IV–D, as an undifferentiated whole, gives rise to undefined "rights." Only when the complaint is broken down into ***manageable analytic bites*** can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights. In prior cases, we have been able to determine whether or not a statute created a given right because the plaintiffs articulated, and lower courts evaluated, ***well-defined claims***. . . . We did not simply ask whether [a complex statutory program] created unspecified 'rights.'

Id. at 342-43 (emphasis added). This is not a call for endless pulverization. It is a rejection of an extreme "blanket approach" that could entertain litigation of "undefined" and "unspecified" rights, but that specter is not present in this case. The LEOSA right to carry is defined and specified and certainly analytically manageable. Where 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.

In practice, there is little difference between an allegation that conduct effects an injury to a broader right or ***is*** an injury of a narrower right (such as the

right to be free of the specific conduct).[4] As just one of many possible examples, one can read the Second Circuit's statutory § 1983 case of *Kapps v. Wing* as affirming either that the agency's conduct in precluding a hearing on a denial of assistance if not requested within 105 days as effecting a deprivation of the more general statutory right to "a fair administrative hearing" or as directly violating a more specific right to a hearing after 105 days. 404 F.3d 105, 126 (2d Cir. 2005). The significance of the "framing" only comes into play when the resulting right is then fed into an analysis of whether Congress "unambiguously conferred" that exact right, as the district court did here. While any right can be re-framed into a form that it becomes unrecognizable in a congressional intent analysis, a full, multidimensional analysis under *Blessing* and *Gonzaga* framework avoids this problem. Unfortunately, this kind of analysis was not conducted by the district court.

[4] Certainly this is clear in the context of constitutional § 1983 claims, which by their nature proceed on more generally constitutional language. Thus, for example, one can read the Supreme Court's recent decision in *Lane v. Franks* as affirming either that the firing in that case effected a deprivation of the public employee plaintiff's more general right to free speech, or was a violation of a more specific right to speak on matters of public concern, or to give truthful testimony pursuant to a subpoena in a criminal case. 134 S. Ct. 2369, 2375 (2014).

IV. Even Under The District Court's Framing, The Officers State A Claim Because A Full Analysis Under *Gonzaga* And *Blessing* Reveals An Enforceable Right In LEOSA's Mandatory And Individualized Eligibility Criteria

After framing the right at issue as a "procedural right to be classified correctly," the district court acted as if the inquiry into whether the right was enforceable under § 1983 was over. "Section 3 of LEOSA confers a singular individual right—the right to carry a concealed firearm, as articulated in subsection (a)," the court asserted. "Any right created by section 3 of LEOSA extends no further than this." A73 (internal citations omitted). The court briefly considered the notion of an enforceable right arising from LEOSA's eligibility requirements at §926C(c), and "recognize[d] that subsection (c)(2)'s definition of 'law enforcement officer' applies to the plainly rights-creating subsection (a) and thus should not be read strictly standing 'alone,'" but quickly dismissed the notion at least in this case, citing, again, the Officers' lack of the firearms qualification certificate. A75. Putting aside the argument just made (that this lack cannot by itself bar relief under § 1983 because it is a result of the conduct challenged in the suit, *supra* at 24-32), what the district court failed to do was engage in the sort of textual and structural analysis of the LEOSA eligibility criteria that *Gonzaga* and *Blessing* require. Rather, the district court held it could quickly "begin[] (and end[]) [its enforceability analysis] with the first *Blessing* factor," because that factor alone "requires an 'unambiguously conferred right' borne out in the 'text

and structure' of the statute." A73 (quoting *Gonzaga*, 536 U.S. at 282, 285). The district court clearly read "unambiguous" strongly, akin to flagrantly obvious: because a right to be certified correctly (*i.e.*, a remedial mechanism, *supra* at 33-34) was not stated directly in the text, the district court ended the inquiry, and the case.

But the proper inquiry is more involved and multidimensional that the one the district court conducted; while the conferred right must indeed be "unambiguous," it need not be immediately facially apparent, as numerous post-*Gonzaga* cases demonstrate. *See, e.g., Salazar v. District of Columbia*, 729 F. Supp. 2d 257 (D.D.C. 2010). The result of a careful, multidimensional analysis per *Gonzaga* and *Blessing*[5] can be definite and conclusive, and therefore

[5] Part of the problem with the district court's analysis is that it "ends with the first *Blessing* factor," because it reads *Gonzaga*'s requirement of an "unambiguously conferred right" to essentially be a sub-part of that factor rather than a product of the *Blessing* test as a whole. A better reading is that while *Gonzaga* begins with a discussion of the first factor, its ultimate conclusion that "[w]e now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983," *Gonzaga*, 536 U.S. at 283, describes the overall required finding. In particular, *Gonzaga*'s requirement of "explicit 'right- or duty-creating language,'" *id.* at 284 n.3, is of a piece with the third *Blessing* factor requirement of "mandatory, rather than precatory" language. *Blessing*, 520 U.S. at 340. It also to a lesser degree engages in inquiry corresponding to the second factor. *See, e.g., Gonzaga*, 536 U.S. at 290 (noting Congress' concern that piecemeal enforcement of FERPA could "lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions," *i.e.* a judicial competency issue). Additionally, the *Gonzaga* Court writes that "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is

"unambiguous," even if the right not articulately stated. Indeed, the anti-discrimination provisions that *Gonzaga* cites as "exemplary" statutory language show that a full description of the right and how it operates is not required. The language *Gonzaga* examines is:

> Title VI provides: "No ***person*** in the United States ***shall*** . . . be subjected to discrimination under any program or activity receiving Federal financial assistance" on the basis of race, color, or national origin. 78 Stat. 252, 42 U.S.C. § 2000d (1994 ed.) (emphasis added). Title IX provides: "No ***person*** in the United States ***shall***, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 86 Stat. 373, 20 U.S.C. § 1681(a) (emphasis added).

Gonzaga, 536 U.S. at 284 n.3 (emphasis original). *Gonzaga* contrasts this language with that found in the relevant statute in that case (FERPA):

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization.

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presumptively enforceable by § 1983," *id.* at 284—a formulation that only works if "confers an individual right" connotes the result of the entire *Blessing* test, not just the first factor. *See also Blessing*, 520 U.S. at 340 ("We have traditionally looked at three factors ***when determining whether a particular statutory provision gives rise to a federal right***."). The difference may seem academic, but it reinforces the notion that the *Blessing* test still exists to structure the inquiry into the existence or not of an enforceable right, and that the second and third factors also speak to the question of Congressional intent and the nature of the right.

Id. at 278-79 (quoting 20 U.S.C. § 1232g(b)(1)). There are multiple dimensions of contrast at play here, each of which, when applied to the LEOSA eligibility criteria, lean in favor of enforceability.

Language. The language of the of federally-provided definition of "law enforcement officer" § 926C(c)(2), and indeed of all of the LEOSA eligibility criteria in § 926C(c), is unquestionably individually-focused. "[T]he term 'qualified retired law enforcement officer' means ***an individual*** who . . ." § 926C(c). Like *Wright* and *Wilder*, the eligibility criteria "explicitly confer a specific benefit" on specific individuals. *Gonzaga*, 536 U.S. at 280; *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 430 (1987); *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 522-23 (1990); *cf. Sabree v. Richman*, 367 F.3d 180, 184 (3d Cir. 2004) (the Supreme Court in *Gonzaga* "carefully avoided disturbing, much less overruling, *Wright* and *Wilder*"); *Westside Mothers v. Olszewski*, 454 F.3d 532, 541 (6th Cir. 2006) (*Gonzaga* "clarified" *Blessing*). *See also Price v. City of Stockton*, 390 F.3d 1105, 1111 (9th Cir. 2004) (spending clause legislation mandating the provision of "reasonable benefits to ***any person***" found to be sufficiently individually-focused to be enforceable under the *Gonzaga* analysis) (emphasis added); *Salazar*, 729 F. Supp. at 270 (spending clause legislation conferring a benefit directed at "***all persons***" found sufficiently individually-focused) (emphasis added); *Langlois*, 234 F. Supp. 2d at 54

(enforceable right arising from federal "75% rule" requiring "not less than 75 percent [of families in a Section 8 public housing unit] shall be families whose incomes do not exceed 30 percent of the area median income, as determined by the Secretary"). *Gonzaga* and *Blessing* also look for "right- or duty-creating," or "mandatory, rather than precatory, terms." *Gonzaga*, 536 U.S. at 284 n.3, *Blessing*, 520 U.S. at 341. Again, the LEOSA language is clear: "the term 'qualified retired law enforcement officer' ***means*** an individual who . . ." § 926C(c). The term "means" what it means; the statute nowhere allows the states to modify or adapt the definition or the eligibility criteria to their preference. Section 926C(c) is not meant to "encourage, rather than mandate," a particular understanding, *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 20 (1981), nor represent a "yardstick" by which varying state understandings or compliance efforts are to be gauged, *Blessing*, 520 U.S. at 343.

Specificity. With regards to the second *Blessing* factor and the fact that there is nothing "vague [or] amorphous" about the LEOSA eligibility criteria—quite the opposite—and nothing about enforcing state compliance with such well-defined federal statutory criteria that would threaten to "strain judicial competence." *Blessing*, 520 U.S. at 340-41. *Cf. Suter v. Artist M.*, 503 U.S. 347, 359 (1992) (noting that where a statute "set[s] forth in some detail the factors to be considered" in determining the nature and scope of the right, as was the case in

Wilder, as opposed to requiring some vague like "reasonable efforts," the detail weighs in favor of enforceability). The LEOSA eligibility criteria provide considerable more specificity to assist judicial enforcement than do, for example, the provisions of Title VI and IX cited by *Gonzaga*.

Structure/operation. The Supreme Court in Gonzaga looked to the provisions of Titles VI and IX because of their illustration of a structural dimension beyond the language itself. The directions of those statutes "speak only to the Secretary of Education," who is directed in regards to her funding of education agencies or institutions, meaning that the statutory direction "is two steps removed from the interests of individual students and parents and [thus] does not confer the sort of 'individual entitlement' that is enforceable under § 1983." *Gonzaga*, 536 U.S. at 287. While LEOSA is partially meant to apply to state officials in enforcing the law, it also operates and may be relied on by individuals independent of any state programmatic work; as noted above, the statute does not mandate a LEOSA licensing regime, but rather allows any individual who satisfies the criteria in subsections (a), (c), and (d) to carry a concealed weapon without prior authorization. While various public agencies and other actors/services are referenced in the criteria, it is the acts of the individual which drive the criteria and earn the entitlement: the individual who "serve[s] for 10 years or more, who "separate[s] in good standing," who qualifies in firearms training, who satisfies the

mental health and alcohol/drug abstinence provisions, and so forth. In this sense, the LEOSA eligibility criteria are ***no*** steps removed from the individuals entitled thereunder. *Cf. Salazar*, 729 F. Supp. 2d at 270 (holding that statutory language directing requirements of "a State [Medicaid] plan" nonetheless acts directly enough as to individuals as to be individually enforceable); *Nat'l Law Ctr. on Homelessness & Poverty v. New York*, 224 F.R.D. 314, 319-20 (E.D.N.Y. 2004) (spending clause legislation directing that grant of funds "shall be used" for various purposes found to give rise to enforceable rights, in part because it directed "local educational agencies" only one step removed from beneficiaries).

Purpose. Limits on enforceability under § 1983 aim to prevent the individualized demands of litigation from unduly swaying federal laws that aim at "aggregate or systemwide policies and practices of a regulated entity," *Watson v. Weeks*, 436 F.3d 1152, 1157-59 (9th Cir. 2006), which often work by "encourag[ing], rather than mandat[ing], the provision of better services," *Pennhurst*, 451 U.S. at 20. *See also Suter*, 503 U.S. at 363 (relevant statute required only "reasonable efforts" and imposed only "a rather generalized duty"); *Blessing* at 343 (noting that the standard looked to by the plaintiffs was "simply a yardstick for the Secretary to measure the *systemwide* performance"). The Supreme Court has noted that these sorts of statutes are often enacted under Congress' spending power, *see Gonzaga*, 536 U.S. at 280, and indeed the Court itself has

only found § 1983 unenforceability in the context of spending clause statutes. As the district court recognized, LEOSA is not a spending clause statute. A76 n.29; A76 ("Further cutting in [the Officers'] favor, status as a 'law enforcement officer' is not a 'broader or vaguer 'benefi[t]' or 'interes[t]'' flowing from a regulatory scheme or federal funding conditions.") (quoting *Gonzaga*, 536 U.S. at 283). Indeed, its whole purpose is to establish rights, and thereby protect individuals.

Alternative remedy. One implication of the fact that LEOSA is not a spending clause statute and in fact "does not provide federal funding to any entity," A76 n.29, is that there are no alternatives avenues to enforcement as there is in most spending power statutes. *See Pennhurst* at 28 ("In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but ***rather*** action by the Federal Government to terminate funds to the State.") (emphasis added); *Nat'l Law Ctr. on Homelessness & Poverty*, 224 F.R.D. at 318 ("a significant part of a court's inquiry is whether the federal agency charged with administering the funds has procedures by which individuals can complain about alleged failures by the state entrusted with those funds"). *Gonzaga* itself confirms that where a statute provides "no sufficient administrative means of enforcing [a statutory] requirement against States that fail[] to comply," a legitimate inference arises that Congress intended for private enforcement. *Gonzaga*, 536 U.S. at 280-

81 (analyzing *Wilder*, 496 U.S. at 522–523). The district court recognized that "the absence of a 'federal review mechanism' favors judicial recognition of 'individually enforceable private rights,'" A67 (quoting *Gonzaga*, 536 U.S. at 289-90), but its only response was to state in a footnote "the lack of such a review mechanism, while relevant, does not undercut the Court's conclusion"—without any further explanation.

Intent. While intent is to be inferred from all of the foregoing, it is also appropriate to look directly at legislative source materials. *See, e.g.*, *Langlois*, 234 F. Supp. 2d at 52 ("the lodestar under *Blessing* is congressional intent to confer rights). Here, although some members of Congress about the wisdom of the approach represented by LEOSA, Congress "could not be clearer," *Wright*, 479 U.S. at 432, about the fact that the intent of the approach was to confer rights in an attempt to protect individuals. *Supra* at 13-15; H.R. Rep. 108-560 at *4 ("retired officers need to be able to protect themselves and their families"); *id.* at *22 ([Rep. COBLE] the law "contains a fairly broad definition of 'law enforcement officers'"); S. Rep. 108-29 at *4 (LEOSA "is designed to protect officers and their families from vindictive criminals"); *id.* ("A law enforcement officer is a target in uniform and out; active or retired; on duty or off."). To leave the individuals Congress so obviously sought to protect without the rights it sought to confer and

without any avenue to remedy the situation is hardly consistent congressional intent.

In sum, to the extent a "right to be classified correctly" is the only right the Officers may pursue on their facts, a full multidimensional analysis leads to the conclusion that Congress did, in LEOSA's mandatory and individualized eligibility definition, unambiguously confer a right for eligible individuals to proceed to exercise their right to carry, free from state interference with their eligibility beyond the limited discretion allowed in issuance of the necessary identification. The Officers should be allowed to pursue relief for a violation of that right under § 1983.

CONCLUSION

For the foregoing reasons, the District Court's May 28, 2015 Memorandum Opinion and Final Order should be reversed and the case remanded to the United States District Court for the District of Columbia for further proceedings.

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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 2010 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 11,520 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 2010 in preparing this certificate.

Dated: November 6, 2015

/s/ *Aaron Marr Page*
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CERTIFICATE OF SERVICE

I hereby certify that on this day of November 6, 2015, I electronically filed the foregoing Brief and Statutory Addendum, together with the concurrently-filed Appendix, 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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