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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON VICINAGE

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION, NEW JERSEY FRATERNAL ORDER OF POLICE, RICHARD BOWEN, JOSEPH JAKUBIEC, and CHRISTOPHER MARTINEZ, Plaintiffs, v. GURBIR GREWAL, in his official capacity as Attorney General of the State of New Jersey, and PATRICK J. CALLAHAN, in his official capacity as Superintendent of the New Jersey State Police, Defendants.	Hon. Michael A. Shipp, U.S.D.J. Hon. Tonianne J. Bongiovanni, U.S.M.J. Docket No. 3:20-cv-05762-MAS-TJB **CIVIL ACTION** **NOTICE OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)** **(ELECTRONICALLY FILED)**

To: United States District Court
District of NJ – Trenton Vicinage
Clarkson S. Fisher Building & U.S. Courthouse
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Trenton, NJ 08608

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PLEASE TAKE NOTICE that on **September 8, 2020,** or as soon thereafter as counsel may be heard, the undersigned attorney for the Defendants, Gurbir S. Grewal and Patrick J. Callahan, will move before the Honorable Michael A. Shipp, U.S.D.J., for an Order dismissing all claims against these Defendants pursuant to Fed. R. Civ. P. 12(b)(6);

PLEASE TAKE FURTHER NOTICE that the undersigned shall rely upon the attached brief in support of the motion.

PLEASE TAKE FURTHER NOTICE that pursuant to Fed. R. Civ. P. 78, oral argument is not requested.

A proposed form of Order is attached.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Bryan Edward Lucas
Bryan Edward Lucas
Deputy Attorney General

DATE: July 27, 2020

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UNITED STATES DISTRICT COURT
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FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION, NEW JERSEY FRATERNAL ORDER OF POLICE, RICHARD BOWEN, JOSEPH JAKUBIEC, and CHRISTOPHER MARTINEZ, Plaintiffs, v. GURBIR GREWAL, in his official capacity as Attorney General of the State of New Jersey, and PATRICK J. CALLAHAN, in his official capacity as Superintendent of the New Jersey State Police, Defendants.	Hon. Michael A. Shipp, U.S.D.J. Hon. Tonianne J. Bongiovanni, U.S.M.J. Docket No. 3:20-cv-05762-MAS-TJB **CIVIL ACTION** **CERTIFICATE OF SERVICE** **(ELECTRONICALLY FILED)**

I hereby certify that on July 27, 2020, I electronically filed a Notice of Motion, Brief in Support of Defendants' Motion to Dismiss in Lieu of Answer, Proposed Form of Order, and this Certificate of Service with the Clerk of the United States District Court for the District of New Jersey. I further certify that counsel of record will receive a copy of these documents via CM/ECF. I declare under penalty of perjury that the foregoing is true and correct.

/s/ Bryan Edward Lucas
Bryan Edward Lucas
Deputy Attorney General

Dated: July 27, 2020

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
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FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION, NEW JERSEY FRATERNAL ORDER OF POLICE, RICHARD BOWEN, JOSEPH JAKUBIEC, and CHRISTOPHER MARTINEZ, Plaintiffs, v. GURBIR GREWAL, in his official capacity as Attorney General of the State of New Jersey, and PATRICK J. CALLAHAN, in his official capacity as Superintendent of the New Jersey State Police, Defendants.	Hon. Michael A. Shipp, U.S.D.J. Hon. Tonianne J. Bongiovanni, U.S.M.J. Docket No. 3:20-cv-05762-MAS-TJB **ORDER**

This matter having come before the Court on a motion pursuant to Fed. R. Civ. P. 12(b)(6) of Gurbir S. Grewal, Attorney General of New Jersey, by Bryan Edward

Lucas, Deputy Attorney General, appearing on behalf of the Defendants, Gurbir S. Grewal and Patrick J. Callahan; and the Court having considered the papers submitted herein, and for good cause shown;

It is on this _____ day of _____, 2020;

ORDERED that the motion to dismiss all claims against the Defendants, Gurbir S. Grewal and Patrick J. Callahan, in Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6) is **GRANTED**, and it is further

ORDERED that all claims against Defendants, Gurbir S. Grewal and Patrick J. Callahan, are hereby **DISMISSED WITH PREJUDICE.**

_____
HON. MICHAEL A. SHIPP, U.S.D.J.

____ Opposed

____ Unopposed

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON VICINAGE

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION, NEW JERSEY FRATERNAL ORDER OF POLICE, RICHARD BOWEN, JOSEPH JAKUBIEC, and CHRISTOPHER MARTINEZ, Plaintiffs, v. GURBIR GREWAL, in his official capacity as Attorney General of the State of New Jersey, and PATRICK J. CALLAHAN, in his official capacity as Superintendent of the New Jersey State Police, Defendants.	Hon. Michael A. Shipp, U.S.D.J. Hon. Tonianne J. Bongiovanni, U.S.M.J. Docket No. 3:20-cv-05762-MAS-TJB **CIVIL ACTION** **(ELECTRONICALLY FILED)** Motion Return Date: September 8, 2020

BRIEF IN SUPPORT OF DEFENDANTS GURBIR GREWAL AND PATRICK J. CALLAHAN'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT IN LIEU OF ANSWER

Joseph C. Fanaroff
Assistant Attorney General
Of Counsel and On the Brief

Bryan Edward Lucas
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On the Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

PRELIMINARY STATEMENT

This case asks a simple question: whether states are permitted to adopt rules that govern when the retired law enforcement officers who live within their borders can carry a concealed firearm in public, or whether the federal government has conscripted the states into implementing a federal standard instead. In Plaintiffs' telling, a federal law called the Law Enforcement Officers Safety Act ("LEOSA") supplants longstanding state licensing regimes for retired law enforcement officers who wish to carry weapons in public, and it leaves states with no discretion before requiring them to issue forms enabling retired officers to carry.

There are two fatal defects in Plaintiffs' case. The first is procedural, and it precludes this Court from even addressing the aforementioned question. As the vast majority of courts have held, whatever the meaning of LEOSA, it does not confer a substantive right enforceable under 42 U.S.C. § 1983 ("§ 1983"), and therefore Plaintiffs fail to state a claim upon which relief can be granted. As the Supreme Court has repeatedly made clear, the mere presence of a federal statute is not enough to support a § 1983 claim; rather, there must be an underlying federal *substantive right* that the plaintiffs seek to enforce. And as Judge Wilkinson noted just this year, there is an "emerging consensus" among federal courts that Congress did not create such a remedy when it passed LEOSA, a conclusion that finds ample support in the text of that statute. *Carey v. Throwe*, 957 F.3d 468, 480 (4th Cir. 2020). Indeed,

unanimous panels of the Fourth Circuit and the Eleventh Circuit just reached that conclusion in the past two years, and with one exception, every other judicial decision is in accord. This Court should take that same view. In other words, there is no reason for this Court to resolve the competing interpretations of LEOSA because that law does not offer Plaintiffs an enforceable remedy under § 1983 to begin with.

Even if this Court turns to the question Plaintiffs present, however, it should reject their assertions as a matter of law. Relying on the plain text of LEOSA itself, recent decisions by the courts of appeals have provided significant guidance on what the law does, and most importantly, what it does not do. Plaintiffs read LEOSA to establish a federal licensing system for all retired officers, and to command the states to grant retired officers the right to carry a concealed firearm so long as the officers satisfy the federal standards. And more than that, Plaintiffs read LEOSA to require the States to issue retired officers photo identifications confirming that eligibility. But that is wrong as a matter of plain text and constitutional avoidance. Regarding the former, as the Fourth Circuit and Eleventh Circuit recently recognized, LEOSA was a response to a very specific context: the fact that states need not (and often do not) recognize concealed carry permits issued by other states. The point of LEOSA was to change that rule for retired officers, such that *if* an officer is issued a permit to carry in one state, that permit must be respected in other states. But as these courts

have held, the purpose of LEOSA was not to order states to provide such permits to their own residents, and the text does not require them to do so. Were it otherwise, the statute would raise constitutional problems by distorting the traditional balance between federal and state authority and commandeering state regulatory officers to implement a federal scheme established by Congress. No court has interpreted the LEOSA in this manner, and this Court should not be the first.

For either or both of these reasons, this Court should dismiss the Complaint. New Jersey, rather than LEOSA, must be permitted to continue setting the licensing standards for retired officers who live in the state and wish to carry weapons.

STATEMENT OF THE CASE

A. The Law Enforcement Officers Safety Act

In 2004, Congress passed LEOSA. *See* 18 U.S.C. §§ 926A-C. By its terms, LEOSA applies to certain retired law enforcement officers who meet two separate and distinct qualifications. First, a retired officer must be deemed a "qualified retired law enforcement officer" ("QRLEO") as that term is defined in LEOSA. 18 U.S.C. § 926C(a). Second, the retired officer must obtain a photo identification issued by the officer's former law enforcement agency confirming the officer was employed there and has, within the past year, met the active duty firearms qualifications for that agency or obtain the photo identification and a state-issued certification that the individual meets the state's active duty firearms qualifications. *Id.* Provided a retired

officer meets these two requirements, "an individual who is a qualified retired law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b)." 18 U.S.C. § 926C(a).

In order to be deemed a QRLEO, a person must meet seven requirements.[1] In addition to meeting the QRLEO requirements, in order to come under the protection afforded by LEOSA, a retired officer must also "carry[] the identification required by subsection (d)." 18 U.S.C. § 926C(a). The identification requirement can be met in one of two ways. A person can obtain a photo ID "issued by the agency from which the individual separated from service ... that identifies the person as having been employed as a police officer or law enforcement officer and indicates that the individual has, not less than one year before the date the individual is carrying the concealed firearm, been tested and 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." 18 U.S.C. § 926C(d)(1). Alternatively, a person can obtain the ID by obtaining a photo ID "issued by the agency from which the individual separated from service . . . that identifies the

[1] The named Plaintiffs each allege they meet the QRLEO requirements. *See* ECF 1 at ¶¶ 48, 54, and 60. On a motion to dismiss, the Court must accept as true the allegations in the Complaint. Defendants do not concede the Plaintiffs are QRLEOs, and reserve the right to seek discovery on this question should the Court deny Defendants' motion to dismiss.

person as having been employed as a police officer or law enforcement officer" and

> 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 and otherwise found by the State or a certified firearms instructor . . . to have met 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 if the State has not established such standards, standards set by any law enforcement agency within that State to carry a firearm of the same type as the concealed firearm.

18 U.S.C. § 926C(d)(2).

B. New Jersey's Firearms Licensing Regime

New Jersey's firearm safety and licensing regime reflects a "'careful grid' of regulatory provisions." *In re Preis*, 573 A.2d 148, 150 (N.J. 1990) (citation omitted). These laws "draw careful lines between permission to possess a gun in one's home or place of business . . . and permission to carry a gun," in light of the well-documented safety implications of carrying firearms in public. *Id.* at 150.

For individuals who want to carry a gun in public, some form of a "need" requirement has been in effect for nearly 90 years. *Drake v. Filko*, 724 F.3d 426, 432 (3d Cir. 2013); *see also Siccardi v. State*, 284 A.2d 533, 538 (N.J. 1971) ("Beginning in 1924, New Jersey 'directed that no persons (other than those specifically exempted such as police officers and the like) shall carry [concealed] handguns except pursuant to permits issuable only on a showing of 'need.'"). While some

changes to the statute have been made over time, "the requirement that need must be shown for the issuance of a permit to authorize the carrying of a handgun" remained intact. *Siccardi*, 284 A.2d at 554. The present standard of "justifiable need" was incorporated in 1978. *See* N.J. Stat. Ann. § 2C:58-4(d).

New Jersey's process establishes an "objective standard for issuance of a public carry permit." *Drake*, 724 F.3d at 434 n.9. The law reflects the Legislature's deep concern about the carrying of handguns in public and limits the issuance of permits to judges, once an applicant has received approval from a local police chief or the Superintendent of the New Jersey State Police. *In re Preis*, 573 A.2d at 571 (citing *Siccardi*, 284 A.2d at 533).

The permit procedure conditions the approval of an application for a permit to carry upon the applicant demonstrating that "he is not subject to any of the disabilities set forth in [N.J. Stat. Ann.] § 2C:58-3c, that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun." N.J. Stat. Ann. §§ 2C:58-4(c), (d). Also, "[t]he court may at its discretion issue a limited-type permit which would restrict the applicant as to the types of handguns he may carry and where and for what purposes such handguns may be carried." N.J. Stat. Ann. § 2C:58-4(d).

The implementing regulations state that an applicant's written certification of justifiable need to carry a handgun "shall specify in detail the urgent necessity for

self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." N.J. Admin. Code § 13:54-2.4(d)(1). "Upon being satisfied of the sufficiency of the application and the fulfillment of the provisions of [N.J. Stat. Ann. § 2C:58-4], the judge *shall* issue a permit." N.J. Admin. Code § 13:54-2.7(a) (emphasis added).

New Jersey's carefully conceived and long-standing regulatory scheme is rooted in an appreciation that a permit to carry would instead the risk of the applicant being involved in "the known and serious dangers of misuse and accidental use." *Siccardi*, 284 A.2d at 540. When a handgun is carried in public, the serious risks of misuse and accidental use are borne by the public. "New Jersey's legislature 'has continually made the reasonable inference that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State's interests in public safety.'" *Drake*, 724 F.3d at 438 (quoting *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 835 (D.N.J. 2012)); *see also Siccardi*, 284 A.2d at 540 ("Surely such widespread handgun possession in the streets … would not be at all in the public interest.").

New Jersey courts remain available to make a record on each application and provide informed and reasoned decisions on whether an applicant has shown a justifiable need for the issuance of a permit to carry a handgun in public. *See, e.g.*,

In Re Preis, 573 A.2d at 154; *Reilly v. State*, 284 A.2d 541, 542 (N.J. 1971); *In Re Application of "X"*, 284 A.2d 530, 531 (N.J. 1971); *see also* N.J. Stat. Ann. § 2C:58-4(e) (providing appeal to New Jersey Superior Court from denial by police chief or Superintendent and providing appeal from determination of judge of Superior Court); N.J. Admin. Code § 13:54-2.8 (same); N.J. Court R. 2:2-3 (providing right of appeal to the state's Appellate Division from determination of trial judge).

Until 1997, retired law enforcement officers were treated no differently than other individuals who wished to obtain a concealed carry permit. *See* Assembly Law & Public Safety Committee Statement to Assembly Committee Substitute for A. 1762, A. 1834, A. 949 (May 13, 1996) (noting that under then-existing law, "[i]n order to carry a handgun after retirement, a retired officer, just like any other citizen, must establish a 'justifiable need' to carry a handgun pursuant to 2C:58-4."). The 1997 law relaxed the "justifiable need" standard for retired law enforcement officers, permitting them to carry a firearm ("retired officer permit to carry" permits or "RPO permits") provided they met certain criteria, including falling within one of the ten designated categories of law enforcement officers who exercised specific forms of policing powers, completing twice yearly firearms qualification, having retired in good standing, and submitting an application to the Superintendent of the State Police for approval. *See* P.L. 1997, c. 67, codified at N.J. Stat. Ann. § 2C:39-6(l).

In 2007, § 2C:39-6(l) was amended. There are two amendments relevant to

the instant case. First, the 2007 amendment raised the eligibility age for retired law enforcement officers to apply for a carry permit from 70 to 75. *See* Assembly Law & Pub. Safety Cmte. Statement to A. 2158 (February 23, 2006) ("Currently, retired law enforcement officers are entitled to carry a firearm until the age of 70 without having to establish 'justifiable need.' This bill increases the age limitation to 75 years of age or younger."). Second, "the bill would permit retired law enforcement officers from other states who are 'qualified retired law enforcement officers' under the provisions of [LEOSA] and who are domiciled in New Jersey to carry a firearm, *provided they meet the same training and qualification standards that New Jersey retirees must meet under the law*." *Id.* (emphasis added).

On October 12, 2018, the New Jersey Department of Law and Public Safety issued a document entitled "Frequently Asked Questions Concerning Retired Law Enforcement Officer Permits to Carry Firearms and the Federal Law Enforcement Officers Safety Act of 2004 (LEOSA)." *See* ECF 1, Ex. 1 ("FAQ"). The FAQ provided guidance to law enforcement officers seeking RPO permits and explained, among other things, that regardless of whether a retired law enforcement officer met the LEOSA definition of a "qualified retired law enforcement officer," the officer must still "meet each of the requirements of [N.J. Stat. Ann. § 2C:39-6(l)] in order to carry a firearm, even if they only intend to do so for personal protection." *See* FAQ at 2. The FAQ also confirmed that regardless of whether retired officers

qualified for a permit, they were not permitted to carry hollow point bullets. *Id.*

C. Plaintiff's Challenge

On May 11, 2020, Plaintiffs filed a two count complaint seeking injunctive and declaratory relief against Defendants. The first count was brought under § 1983 and asks this court for a judgment enjoining defendants from "arresting and prosecuting" any retired law enforcement officer who meets the definition of a "qualified retired law enforcement officer" under 18 U.S.C. § 926C, from requiring any retired law enforcement officer who meets that definition from meeting any other qualification for the issuance of an RPO permit, and enjoining the defendants from imposing any qualifications for the issuance of an RPO permit not required by 18 U.S.C. § 926C. *See* ECF 1 at 15. Count II seeks a declaratory judgment that N.J. Stat. Ann. § 2C:39-6(l) is preempted by federal law and repeats the requests for injunctive relief in Count I. *Id.* at 20.

STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) may be granted if the complaint fails to state a claim upon which relief can be granted. In the context of a Rule 12(b)(6) motion, courts must accept as true the factual allegations in the complaint. *See, e.g.*, *Philips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). But the complaint must nevertheless contain "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp.*

v. Twombly, 550 U.S. 544, 570 (2007)).

POINT I

LEOSA DOES NOT GIVE RISE TO A RIGHT ENFORCEABLE UNDER§ 1983.

This Complaint must be dismissed because LEOSA does not afford Plaintiffs any right enforceable under § 1983. Courts have long recognized that the mere allegation of a violation of federal law is not enough to support a § 1983 claim; to the contrary, § 1983 only comes into play when there is a violation of an enforceable federal right. As the overwhelming majority of courts have recognized, LEOSA does not include the necessary textual indicia to support such a right.

Begin with the standard applicable to this threshold procedural question. It is well-established, of course, that "Section 1983 imposes liability on anyone who, under color of state law, deprives a person of any rights, privileges, or immunities secured by the Constitution and laws." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). But the inquiry does not end there: instead, "in order to seek redress through § 1983, a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Id.* (emphasis in original). The Supreme Court has laid out the three factors to consider in evaluating whether such a right exists:

> 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.

Id. at 340-41.

In order to advance a claim under *Blessing*, all "three requirements must be met." *Ass'n of N.J. Rifle & Pistol Clubs v. Port Auth. of N.Y. & N.J.*, 730 F.3d 252, 254 (3d Cir. 2013); *see also Burban v. City of Neptune*, 920 F.3d 1274, 1279 (11th Cir. 2019) ("If a provision fails to meet any one of the three *Blessing* factors, it does not provide a person with a federal right enforceable under § 1983."). And perhaps most importantly, "[t]he Supreme Court has also clarified that the *Blessing* factors collectively amount to a high bar, and that 'anything short of an unambiguously conferred right' cannot sustain a private remedy under § 1983." *Carey*, 957 F.3d at 479 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)); *see also id.* (noting that "when Congress wants to create a private cause of action, it knows how to do so expressly" (citing *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)). If Plaintiffs cannot meet this high bar, then their suit cannot proceed in this Article III court.

As federal courts have repeatedly recognized, "LEOSA does not satisfy this purposefully demanding inquiry." *Carey*, 957 F.3d at 479; *see also Burban*, 920 F.3d at 1280 (holding "that LEOSA does not give rise to a federal right enforceable under 42 U.S.C. § 1983"). In other words, Plaintiffs cannot surmount their burden to show that in enacting LEOSA, Congress granted an "unambiguously conferred right" to

bring a private cause of action. "For starters," courts have held, "the Act lacks any express rights-creating language." *Carey*, 957 F.3d at 479 (citing *Gonzaga*, 536 U.S. at 287). Instead, the statute includes two precatory clauses that delimit the universe of individuals to whom it applies. First, LEOSA states that certain retired officers "may" carry concealed firearms, but only if they meet the dual requirements of being a QRLEO and obtaining the state-issued photo ID. *See* 18 U.S.C. § 926C(a). Second, LEOSA "commit[s] entirely to the discretion of the states the decision of whether to issue identification and, should they choose to do so, *what* they may require of individuals seeking such a credential." *Carey*, 957 F.3d at 480. As courts have put the point, "[t]he use of precatory rather than mandatory language is important" to this analysis, because "when Congress intends to create private rights, it often speaks in clearer and more compulsory terms." *Id.* at 479; *see id.* (quoting *United States v. Rogers*, 461 U.S. 677, 706 (1983), for the proposition that "the word 'may,' when used in a statute, usually implies some degree of discretion."). Further, as courts have recognized in rebuffing Plaintiffs' legal theory, "LEOSA lacks any express remedial provision, either directly under the statute or indirectly by cross-reference to § 1983. This omission too is telling because Congress passed LEOSA after the *Blessing* and *Gonzaga* Courts made apparent that a statute would need to be unambiguous for it to be enforceable under § 1983." *Id.* at 479. At a bare minimum, LEOSA does not "unambiguously" affords Plaintiffs the right to initiate suit under

§ 1983.

Indeed, a straightforward analysis of the traditional *Blessing* factors confirms what *Carey* and other courts have found. With respect to the first factor (whether Congress must have intended that the provision in question benefit the plaintiff), the simple truth is that LEOSA does not confer a right on all retired law enforcement officers. Instead, as one district court recently pointed out, "LEOSA grants a person concealed carry rights only if that person (1) is a 'qualified retired law enforcement officer' as defined by LEOSA *and* (2) 'is carrying the identification required by subsection (d)." *Henrichs v. Ill. Law Enforcement Training and Standards Board*, 306 F. Supp. 3d 1049, 1055 (N.D. Ill. 2018) (emphasis in original). The language of LEOSA bears this out, as "LEOSA gives [carry] rights to a 'qualified retired law enforcement officer' *only* if that individual has 'the identification required by subsection (d).'" *Id.* (quoting 18 U.S.C. § 926C(a)) (emphasis in original). Plaintiffs Jakubiec and Martinez, by their own admission, do not fall within the ambit of individuals covered by the law because they do not possess the photographic identification issued by the State of New Jersey. *See* ECF 1 ¶¶ 56-57, 62.[2] In other words, Jakubiec and Martinez "are not presently a member of the class of individuals

[2] Plaintiff Bowen represents that he does possess New Jersey photo identification, *see* ECF 1 ¶ 49; however, because LEOSA does not meet all three *Blessing* factors, his ability to bring an action under § 1983 is still foreclosed.

. . . whom LEOSA was intended to benefit because they concede that they do not possess the requisite identification." *Johnson v. N.Y. State Dept. of Corr. Servs.*, 709 F. Supp. 2d 178, 185 (N.D.N.Y. 2010); *see also Henrichs*, 306 F. Supp. 3d at 1055 ("Although Congress may have intended that LEOSA benefit *some* retired law enforcement officers, it did not intend that LEOSA benefit *our* Plaintiffs, for while they may be 'qualified retired law enforcement officers' under LEOSA, they do not have the required agency-issued identification.") (emphasis in original).

With respect to the second factor, LEOSA is "vague and amorphous," and it lies "beyond the competency of the judiciary to enforce." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). To be sure, the Supreme Court has found that statues that are enforceable involve Congress "set[ting] out factors which a State must consider in adopting," such as Medicaid rates. *See Wilder v. Va. Host. Ass'n*, 496 U.S. 498, 519 (1990); *see also Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987) (same, in case challenging the utility allowances set by a local housing authority).

But this is not a case where states merely have the option of choosing among a variety of federally-defined standards; rather, LEOSA does not require the states to issue photographic identification *at all*. *See, e.g.*, *Henrichs*, 306 F. Supp. 3d at 1055 ("Plaintiffs point to nothing in LEOSA, and the court on its own has found nothing *obligating* States to issue subsection (d) identifications to anybody, even to

individuals meeting the federal definition of 'qualified retired law enforcement officer.'") (emphasis in original); *see also Burban*, 920 F.3d at 1280 ("Subsection (a) indicates that a retired officer may only carry a concealed weapon pursuant to LEOSA if he or she is also 'carrying the identification required by subsection (d).' This provision does not obligate States to create—much less issue—LEOSA-compliant identification."). That fact notwithstanding, if a state does decide to adopt standards, it is under no obligation to comply with any federal guidance or mirror the federal definition of QRLEOs. *See, e.g.*, *Carey*, 957 F.3d at 480 ("LEOSA lays bare that states have total discretion over setting the standards and procedures, if they wish, for qualifying to carry a concealed firearm under the Act."); *D'Aureli v. Harvey*, No. 1:17-cv-00363-MAD-DJS, 2018 WL 704733, at *4 (N.D.N.Y. Feb. 2, 2018) ("These repeated references to actions taken by the state suggest that Congress intended to leave the standards and procedures for issuing the required photographic identification required by subsection (d) to the states."). Accordingly, the LEOSA is too vague and amorphous to satisfy the second *Blessing* factor.

As the Fourth Circuit recently found, however, it is the third *Blessing* factor where "LEOSA most directly falters." *Carey*, 957 F.3d at 479-80. Recall that under this requirement, "the statute must unambiguously impose a binding obligation on the States." *Blessing*, 520 U.S. at 340; *see also BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 820 (7th Cir. 2017) (holding that in order to meet the third

Blessing factor, "the statute cannot leave any room for discretion on the part of the state"). As laid out in detail above, not only does "LEOSA contain[s] no language—none—obligating states to issue any identification at all," but its text "conveys the exact opposite, committing entirely to the discretion of the states the decision of *whether* to issue identification and, should they choose to do so, *what* they may require of individuals seeking such a credential." *Carey*, 957 F.3d at 480 (emphasis in original); *see also, e.g.*, *Henrichs*, 306 F. Supp. 3d at 1056 (confirming "LEOSA expressly allows States to adopt their own standards in deciding to whom subsection (d) identifications will be issued"); 18 U.S.C. § 926C(a) (relevant statutory provision).

Indeed, there is "no provision of § 926C, read individually or together [that] 'unambiguously impose[s] a binding obligation on the States' to give agency-issued, LEOSA-compliant identification to retired law enforcement officers." *Burban*, 920 F.3d at 1279 (quoting *Blessing*, 520 U.S. at 341); *Mpras v. D.C.*, 74 F. Supp. 3d 265, 270 (D.D.C. 2014) ("Indeed, nothing in LEOSA bestows a federal right to the identification required by subsection (d)."); *Cole v. Monroe County*, 359 F. Supp. 3d 526, 533 (E.D. Mich. 2019) ("[T]he fact remains that LEOSA simply does not 'unambiguously impose a binding obligation on States,' as required by *Blessing*, 520 U.S. at 341, to issue the identification or the firearms certification.").

In fact, the 2010 Congressional amendments of LEOSA "empowered the state

agencies, even more conspicuously than before, with the authority to implement [LEOSA's] provisions establishing the eligibility requirements for retired law enforcement officers and identification card receipts." *Moore v. Trent*, No. 1:09-cv-01712, 2010 WL 5232727, at *3 (N.D. Ill. Dec. 16, 2010). In particular, the 2010 amendment added the option for meeting the firearms certification requirement by being tested by a firearms instructor, but only if that instructor "is qualified to conduct a firearms qualification test for active duty officers within that State," 18 U.S.C. § 926C(d)(2)(B). The amendment also allows for retired officers in states that do not have a statewide active duty standard to meet the standard "set by any law enforcement agency within that State." *Id.* at § 926(d)(2)(B)(ii).

At bottom, "[t]he text of the Act reveals Congress' decision to preserve the States' authority in establishing eligibility requirements for qualified retired law enforcement officers. Recognition by the courts of a federal private remedy would be inconsistent with Congress' statutory scheme." *Moore*, 2010 WL 5232727, at *4; *see also Mpras*, 74 F. Supp. 3d at 270 ("Subsection (d) contains numerous references to actions that must be performed and qualifications that must be determined '*by the agency* from which the individual retired' or '*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 the State* or 'by any law enforcement agency *within the State* or 'by any law enforcement agency *within that state*.")

(citing 18 U.S.C. § 926C(d) (emphasis in original)); *Lambert v. Fiorentini*, 949 F.3d 22, 26 (1st Cir. 2020) ("LEOSA leaves to state and local agencies the issuance of identification cards to their retired officers.");[3] *Carey*, 957 F.3d at 480 ("LEOSA lays bare that states have total discretion over setting the standards and procedures, if they wish, for qualifying to carry a concealed firearm under the Act."). Simply put, as these many federal courts have held, "absent an obligation on the States to issue subsection (d) identifications, there is no enforceable right to such identification under § 1983." *Henrichs*, 306 F. Supp. 3d at 1056.

To be sure, the D.C. Circuit has held that § 1983 provides for a private cause of action to enforce LEOSA. But the case in which it reached its decision, *Duberry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016), is easily distinguishable. In *Duberry*, the Plaintiffs sued because their former employer, the D.C. Department of Corrections, refused to issue any certifications confirming their status as prior law enforcement officers, a prerequisite for obtaining firearms training where the plaintiffs lived (District of Columbia and Maryland), and the question the D.C. Circuit confronted turned largely on whether the plaintiffs met the federal definition of a QRLEO, rather than on what additional criteria states could impose. *See id.* at

[3] While the argument in *Lambert* did not turn on whether the plaintiff had "a LEOSA § 1983 cause of action," the First Circuit did still "note that the Eleventh Circuit has held that there is no such cause of action." *Id.* at 27 n.4.

1050. Indeed, the *Duberry* Court explicitly did not pass on the question of whether a state would have authority to establish more robust standards and procedures for meeting firearms qualification for those who live within its borders because those plaintiffs were not even trying to meet the respective standards of their jurisdictions. *See D'Aureli*, 2018 WL 704733 *4 (distinguishing *Duberry* and noting that the panel majority "explicitly stated there was 'no occasion to consider' the implications of whether LEOSA would require states 'to issue the photographic identification in subsection (d)(1) & (2)(A).'" (quoting *Duberry*, 824 F.3d at 1057)). In fact, the *Duberry* Court noted in its decision that "a state may retain some discretion, for example, to the extent it concludes that a retired law enforcement officer seeking to exercise a LEOSA concealed-carry right is currently either not physically or mentally capable of being in responsible possession of a firearm," 824 F.3d at 1054, but the court went no further because that question was "not before this Court." *Id.*[4]

In any event, although the D.C. Circuit was the first circuit to consider whether LEOSA provides for a private right of action under § 1983, every court of appeals

[4] Moreover, as *Duberry* itself recognized, the District of Columbia sits in a different position than the States under our Constitution. While this distinction applies more directly to the question whether Congress can commandeer the states to implement a federal scheme, *see* Point II, *infra*, the D.C. and Eleventh Circuits both highlighted this difference as central to the former's holding, and consequently, to distinguishing it. *Compare* 824 F.3d at 1057 (rejecting the District's anti-commandeering argument as inapplicable to the District), *with Burban*, 920 F.3d at 1282 (relying on anti-commandeering grounds in interpreting LEOSA, and thus distinguishing *Duberry* because "that suit was not against a State or a political division within a State.").

that has examined the same issue after *Duberry* has rejected its reasoning, and no district court either before or after *Duberry* has agreed with it. *See Carey*, 957 F.3d at 481 (noting that every court but *Duberry* had rejected the idea a private remedy is available under LEOSA and "readily join[ing] this emerging consensus"); *Burban*, 920 F.3d at 1282 ("To begin, *Duberry* is not binding authority in this Circuit ... [a]nd we decline to follow it here."); *Cole*, 359 F. Supp. 3d at 531 (similarly finding "the Court respectfully disagrees with" *Duberry*). If this Court does not think *Duberry* can be distinguished, then this Court should reject it for the same reasons.

Because LEOSA does not afford Plaintiffs a substantive right enforceable under § 1983, the Complaint must be dismissed on that basis.[5]

POINT II

LEOSA DOES NOT PREEMPT NEW JERSEY'S ABILITY TO DETERMINE WHO IS QUALIFIED TO RECEIVE THE IDENTIFICATION REQUIRED BY 42 U.S.C. § 926C(d).

Even if this Court believes that LEOSA grants Plaintiffs an enforceable right under § 1983, the Complaint must still be dismissed in its entirety for a separate and

[5] Although the above discussion deals with the request for injunctive relief contained in Count I, Count II must be dismissed because the Declaratory Judgment Act does not provide an independent source of jurisdiction. *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). Instead, it "'presupposes the existence of a judicially remediable right.' It creates a remedy, not rights." *Malian v. Sec'y United States Dep't of State*, 938 F.3d 453, 457, n.3 (3d Cir. 2019) (quoting *Schilling*, 363 U.S. at 677). Because Plaintiffs have failed to state a claim upon which relief can be granted as to Count I, their request for declaratory relief (Count II) must thus also be dismissed.

independently sufficient reason—that statute does not preempt New Jersey's laws regarding the issuance of photo identification to QRLEOs.

The doctrine of preemption "is derived from the Supremacy Clause of Article IV of the Constitution, which provides that 'the Laws of the United States . . . shall be the supreme Law of the Land.'" *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 (3d Cir. 2018) (quoting U.S. Const. art. VI). Under that clause, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 395 (3d Cir. 2010) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). The central question when analyzing a claim of preemption is Congress' intent in enacting the law in question. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996). And in considering that query, courts will look to "three distinct types of federal preemption: express preemption, implied conflict preemption, and field preemption." *Id.* (citing *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 238-39 (3d Cir. 2009)). Here, Plaintiffs incorrectly assert that 18 U.S.C. § 926C preempts N.J. Stat. Ann. § 2C:39-6(l)—the State's law regarding issuance of LEOSA identification—even though the former expressly leaves it to the states to determine how to issue that identification, if a state chooses to do so at all. *See* ECF 1 at ¶¶ 75-76.

Plaintiffs first incorrectly claim that LEOSA expressly preempts New Jersey's

law for issuing LEOSA compliant identification. *Id.* But express preemption only "arises when there is an explicit statutory command that state law be displaced." *St. Thomas-St. John Hotel & Tourism Ass'n v. Gov't of the V.I.*, 218 F.3d 232, 238 (3d Cir. 2000). Here, LEOSA is silent on any intent to preempt state laws for the issuance of QRLEO identification. As discussed in Point I, LEOSA provides a right to carry concealed firearms across state lines only to QRLEOs who have "the identification required by subsection (d)." *Henrichs*, 306 F. Supp. 3d at 1055 (quoting 18 U.S.C. § 926C(a)). But LEOSA does not require states to issue photographic identification under any circumstances, nor does it proscribe any states from adopting standards to determine to whom identification will be issued—rather, those decisions are left to state discretion. *See id.*; *see also Burban*, 920 F.3d at 1280 ("There is no provision of § 926C that compels the States to provide LEOSA-compliant identification. Two of the five subsections of § 926C do not so much as mention identification … [a]nd those provisions that do … do not impose any obligation on the States to provide it."); *Cole*, 359 F. Supp. 3d at 533 (noting, based on the plain statutory text, that "if a state issues subsection (d) identification to a [QRLEO], that officer has the right to carry a concealed weapon in any state. But no state is required to issue subsection (d) identification."); *Friedman v. Las Vegas Metro. Police Dept.*, No. 2:14-cv-00821-GMN-GWF, 2014 WL 5472604, at *5 (D. Nev. Oct. 24, 2014) ("Rather than affirmatively requiring states to issue concealed carry licenses to retired police

officers, LEOSA merely permits retired officers who already possess a concealed-carry permit to bring a concealed firearm across state lines.").

There is no dispute that Congress intended LEOSA to preempt "state criminal laws so as to allow qualified retired law enforcement officers to carry concealed firearms" across state lines. *Johnson*, 709 F. Supp. 2d at 188. That is of no moment, however, because Congress at the same time also limited "the class of retired law enforcement officers to those in possession of the requisite identification, and rather than enlist the assistance of federal officers to apply federally created standards for carrying concealed firearms, Congress asked state agencies to certify that retired law enforcement officers meet their respective state's firearm standards." *Id.* (citing 18 U.S.C. § 926C(d)). New Jersey concededly could not—and does not—prosecute a QRLEO from another state who possesses a valid identification card issued by that state; rather, it requires its *own* QRLEOs to satisfy certain standards before obtaining a New Jersey identification card. That is what the plain text of LEOSA contemplates. Plaintiffs' suggestion that LEOSA somehow prohibits state laws regarding issuance of identification that it allows by its express terms thus makes little sense.

Indeed, the plaintiff in *Carey* advanced the same argument, and the Fourth Circuit rejected it, concluding that such a reading "gives LEOSA a sweeping scope that Congress never intended." *Carey*, 957 F.3d at 480. To the contrary, "LEOSA is instead best read as accomplishing a far simpler object. As it stands today, and as it

stood when Congress passed LEOSA, states do not have to recognize concealed carry permits issued by other states." *Id.* (citing *Henrichs*, 306 F. Supp. 3d at 1058). LEOSA's "small exception to that norm" is merely that it "preempts most state and local laws that could be used to criminally prosecute a LEOSA-qualified officer for carrying a concealed firearm across state lines." *Id.* (citing *Henrichs*, 306 F. Supp. 3d at 1057-58). But, as *Carey* explained, LEOSA does not obligate any state to issue its own concealed carry permits—instead, it prevents "states from prosecuting out-of-state officers who choose to carry under a LEOSA-compliant permit already issued." *Id.* As in *Carey*, then, Plaintiffs' theory of preemption in this case must be rejected because it radically overstates LEOSA's plain meaning.

In the absence of express preemption, Plaintiffs' only remaining argument is to point to implied preemption.[6] *See* ECF 1 at ¶ 75. But conflict preemption does not

[6] Any field preemption theory is noticeably absent from the Complaint. Such a claim would fail because regulation of concealed firearm carrying is clearly not a "'field reserved for federal regulation,' leaving no room for state regulation." *Holk v. Snapple Bev. Corp.*, 575 F.3d 329, 336 (3d Cir. 2009) (quoting *United States v. Locke*, 529 U.S. 89, 111 (2000)). Nor can it be said that LEOSA is an "Act of Congress 'touch[ing] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). To the contrary, the "regulation of firearms has been at the heart of the states' police power since the Founding." *Carey*, 957 F.3d at 482. That is equally true in New Jersey, where such laws have been on the books for well over a century. *Drake*, 724 F.3d at 447; *see also* 1905 N.J. Laws, ch. 172 at 324. And those laws have repeatedly been found constitutional. *See Drake*, 724 F.3d at 440, *cert. denied sub nom.*, *Drake v. Jerejian*, 134 S. Ct. 2134 (2014).

apply here either because this is not a case in which a state law "stand[s] as an obstacle to the accomplishment and execution" of a federal law. *Arizona v. United States*, 567 U.S. 387, 399 (2012). The purpose of LEOSA is to preempt "a state's ability to preclude, or change the requirements for, carrying [a] firearm interstate, if the state of former employment permits licensing of the retired officer." *In re Carry Permit of Andros*, 958 A.2d 78, 84 (N.J. App. Div. 2008), *cert. denied*, 963 A.2d 845 (N.J. 2009). But New Jersey's refusal to issue identification cards to New Jersey residents who do not meet its own requirements does not impinge on an *out-of-state* QRLEO's ability to carry in this state, and instead it simply reflects New Jersey's traditional authority over those who live in its borders. In other words, it speaks to a different issue than LEOSA and does not obstruct LEOSA's execution.

Above and beyond New Jersey's permitting requirements, Plaintiffs assert that various other provisions of New Jersey law, *see* ECF 1 at ¶ 80a-g, including New Jersey's requirement of a $50.00 annual fee, semi-annual firearms training, age restrictions, and ammunition restrictions, are preempted by LEOSA. But all of these precursor requirements to the issuance of a New Jersey permit, or limitations on

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Indeed, Congress went out of its way to make clear that LEOSA should not be "construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together." 18 U.S.C. § 927.

what a New Jersey permit holder may do—*in New Jersey*—are within the "reservoir of powers set aside for the States" by LEOSA, which reflects "Congress' decision to preserve the States' authority in establishing eligibility requirements for qualified retired law enforcement officers." *Moore*, 2010 WL 5232727, at *10. And nothing about New Jersey law would prohibit Plaintiffs Bowen, Jakubiec, or Martinez from traveling across state lines while carrying a concealed firearm—assuming they are, as they allege, QRLEOs who possess LEOSA-compliant identification cards from federal law enforcement agencies. ECF 1 at ¶¶ 47-48, 53-55, 59-60. They are only prohibited from carrying their concealed firearms within New Jersey's borders—the state in which they actually live—unless and until they come into compliance with New Jersey's permitting requirements for retired law enforcement officers. Thus, because LEOSA neither expressly nor impliedly preempts state law regarding carry permits, Plaintiff's claim fails as a matter of law.

There is a second reason that Plaintiffs' interpretation of LEOSA cannot be the right one: it runs afoul of the well-established "working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004); *see also, e.g.*, *Carey*, 957 F.3d at 481 ("It is a cardinal rule of statutory interpretation that Congress does not ordinarily intend to upset the

Constitution's 'healthy balance of power between the States and the Federal Government.'" (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). "Indeed, the Supreme Court has emphasized time and again that a statute should not be read as fundamentally altering the traditional balance of state and federal power without a clear statement or indication to the contrary." *Carey*, 957 F.3d at 482-83 (listing cases). This approach makes eminent sense because, "[a]fter all, the touchstone for statutory interpretation is congressional intent, and we do not readily presume that Congress intended to materially undercut the Constitution's federalist design." *Id.* at 483; *see also Bond v. United States*, 572 U.S. 844, 858 (2014) (noting courts have to "be certain of Congress's intent before finding that federal law overrides the usual constitutional balance of federal and state powers"). So this Court must decline to accept Plaintiffs' interpretation of LEOSA if that reading raises concerns under the Tenth Amendment and under core principles of federalism.[7]

As the Supreme Court has explained, under the Tenth Amendment, the United States "may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). The

[7] The requirement to read laws to preserve the traditional federal-state balance flows naturally from the canon of constitutional avoidance, which is the "cardinal principle of statutory interpretation that when an Act of Congress raises a serious doubt as to its constitutionality, courts will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018).

anti-commandeering rule plays a central role in the structure of the Constitution, which "'confers upon Congress the power to regulate individuals, not States,'" and makes clear that Congress lacks "the power to issue direct orders to governments of the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018) (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). To that end, federal law cannot require state officials to "enact" a certain statute or take a specific action, or to "refrain" from enacting certain laws. *Id.* at 1478. States therefore may "decline to administer [a] federal program." *New York*, 505 U.S. at 177; *see also Printz*, 521 U.S. at 909-10 (noting States may "refuse[] to comply with [a] request" to administer federal law). And federal laws should not be read to the contrary.

In *Printz*, the Court considered the Brady Handgun Violence Prevention Act's regulation requiring local law enforcement to perform background checks on gun buyers. 521 U.S. at 935. The Court invalidated the federal law on the basis that it "command[ed] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* Instead, the Court explained, States retain the "prerogative" to refuse a role in implementing "Congress's desired policy, 'not merely in theory but in fact.'" *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) (citation omitted).[8]

[8] Of course, Congress could give States the option of helping administer federal law. *See Murphy*, 138 S. Ct. at 1479. Congress can even offer funds to incentivize States

The States' ability both to opt out of any federal programs and to be free of unconstitutional federal government commands "serves as 'one of the Constitution's structural protections of liberty'" by stopping Congress from conscripting thousands of state officers into its regulatory machinery. *Murphy*, 138 S. Ct. at 1461 (quoting *Printz*, 521 U.S. at 921). The rule "promotes political accountability" by enabling residents to know "who to credit or blame" for any particular governmental action. *Id.* at 1477; *see also New York*, 505 U.S. at 169 (same). And it "prevents Congress from shifting the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1461; *see also Printz*, 521 U.S. at 922 (noting that Congress cannot "impress into its service—and at no cost to itself—the police officers of the 50 States").

The presents an insurmountable problem for Plaintiffs because, if their view of federal law is correct, it requires state officers to issue carry permit identification cards based on compliance with *federal* requirements and regardless of whether the state believes such permits are appropriate. The problem under *Printz* could not be clearer: Congress may not require New Jersey to certify that any retired officers met its standards for concealed carry and provide them IDs on that basis. *Id.* Indeed, as Judge Wilkinson noted in *Carey*, Plaintiffs' reading of LEOSA would "force state law enforcement agencies to issue certain identification as part of a federal concealed

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to implement its federal policy. *See New York*, 505 U.S. at 167. Such approaches all comply with the Tenth Amendment because "the residents of the State retain the ultimate decision" as to whether they will participate. *Id.* at 168.

carry scheme. But this is the exact sort of dragooning that the anticommandeering doctrine forbids." *Id.* (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). And since the language in LEOSA is not "unmistakably clear" that Congress actually did intend to alter the balance between states and the federal government in this manner, this Court should find that such a dramatic step is not what Congress intended. *See Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293, 303 (3d Cir. 2009)) (citing *Gregory*, 501 U.S. at 460); *Carey*, 957 F.3d at 482 (noting this anti-federalist interpretation of LEOSA is made worse still by the fact that the Act "lacks any clear indication that Congress intended such a result—something [courts] ordinarily require when a statute would alter the usual balance of state and federal power").

Said another way, to force the states and their officers to issue carry permits to QRLEOs without regard their own policies and requirements would require this Court to "turn the doctrine of constitutional avoidance on its head, and strain to adopt a reading of LEOSA that would render the Act unconstitutional, even though giving the statute its most natural interpretation would not." *Carey*, 957 F.3d at 482. After all, this view would "bring about a stark intrusion by the federal government into the traditional police power of the states over firearms regulation." *Id.* It is beyond dispute that the regulation of firearms has long been a central aspect of the states' police power—indeed, "there is perhaps 'no better example of the police power,

which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims.'" *Id.* Plaintiffs' interpretation of LEOSA would thus "amount to a marked assault on the traditional authority of the states over firearm regulations" by requiring the states to issue concealed carry permits to certain individuals "based upon criteria set solely by the federal government." *Carey*, 957 F.3d at 482. There is no reason for this Court to take such a bold step, in contrast to every other court to consider the question.

Because Plaintiffs have failed to state a claim for preemption, their Complaint must be dismissed on the merits, even assuming they have a right to sue.

CONCLUSION

This Court should dismiss Plaintiffs' Complaint with prejudice.

Dated: July 27, 2020

Respectfully Submitted,

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