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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION, et al., Plaintiffs, v. GURBIR GREWAL, in his official capacity as Attorney General of the State of New Jersey, et al., Defendants.	Civil Action No.: 3:20-cv-05762-MAS-TJB **PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS** ***(Filed Electronically)*** **Oral Argument Requested** ***Return Date: October 19, 2020***

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INTRODUCTION

This case requires the Court to resolve a direct conflict between federal and New Jersey law. The Federal Law Enforcement Officer Safety Act ("LEOSA") grants a right for retired law enforcement officers who are "qualified" under a defined standard ("QRLEOs") to carry a concealed firearm anywhere in the United States in order to protect themselves and their communities. New Jersey has set its own, more onerous, standards for how and when a retired law enforcement officer is "qualified" and permitted to carry a concealed firearm. When a conflict like this arises, the Constitution provides a clear rule: LEOSA is the "supreme Law of the Land," and New Jersey law is invalid.

The State's[1] motion frames the issue incorrectly. The issue is not whether Plaintiffs can compel New Jersey to issue LEOSA identifications. Rather, the issue is whether the State can redefine who is "qualified" to carry a concealed firearm under LEOSA. LEOSA's qualification standard is unambiguous and requires national uniformity. Thus, the State's so-called "emerging consensus" of cases finding that LEOSA creates no enforceable rights are distinguishable because those plaintiffs sought to compel a state to issue them identifications.

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[1] The "State" refers collectively to Defendants Gurbir Grewal and Patrick J. Callahan, in their official capacities.

This case is about New Jersey redefining the federal qualification standard; not commandeering New Jersey to issue identifications. Here, Plaintiffs meet the federal "qualification" standard, have photographic identification, and seek to compel New Jersey to recognize their right to carry under LEOSA in their home state. Under the Supreme Court's *Blessing* test and § 1983, as well as the doctrine of federal preemption, Plaintiffs have stated a claim for relief. Accordingly, for the reasons set forth in greater detail below, the State's motion to dismiss should be denied and Plaintiffs should be entitled to carry firearms in their home state of New Jersey consistent with LEOSA.

FACTUAL BACKGROUND

A. The Law Enforcement Officers Safety Act

The Law Enforcement Officers Safety Act ("LEOSA") states:

> Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified retired law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

18 U.S.C. 926C(a). A person is qualified to carry a concealed firearm if they meet seven objective, historical criteria. *See* 18 U.S.C. § 926C(c)(1)-(7).[2] A person can

[2] The qualification factors are: (1) whether the individual separated from service "in good standing"; (2) whether the individual had certain law enforcement powers before retirement; (3) whether the individual had an aggregate of 10 or more

obtain a LEOSA identification in two ways. First, they can obtain a "(d)(1) identification" from their former law enforcement agency. The (d)(1) identification must contain a photograph, must identify the person as a former law enforcement officer, and must state that they met their former law enforcement agency's active duty firearms training within the past year. *See* 18 U.S.C. § 926C(d)(1). Second, they can obtain a "(d)(2) identification," which is two separate documents. The first part of the (d)(2) identification is a photographic identification from their former law enforcement agency, which states they are a former law enforcement officer. The second part of the (d)(2) identification is a certification from the state or a state-certified firearms instructor, which states that the individual met the active duty firearms training for state officers within the past year. *See* 18 U.S.C. § 926C(d)(2).

LEOSA allows a QRLEO with the required identification to carry a "firearm." 18 U.S.C. § 926C(a). Under LEOSA, a "firearm" is defined to include ammunition that is "not expressly prohibited by Federal law or subject to the provisions of the National Firearms Act." 18 U.S.C. § 926C(e)(1)(B). Thus, LEOSA also grants a right for QRLEOs to carry hollow point ammunition because it is not prohibited by Federal law or subject to the provisions of the National Firearms Act.

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years of service before retirement; (4) whether the individual met active duty firearms training in the past year; (5) whether the individual is disqualified for mental health reasons; (6) whether the individual is currently under the influence of alcohol or drugs; and (7) whether the individual is "prohibited by federal law from receiving a firearm." 18 U.S.C. § 926C(c)(1)-(7).

Congress passed LEOSA in 2004 in the wake of the "9/11" tragedy with bipartisan support.[3] The legislative history explains that "[l]aw enforcement officers are never 'off-duty'" when it comes to upholding the law and are "target[s]" to "vindictive criminals" with "long and exacting memories." S. Rep. No. 108-29, 2003 WL 1609540, at *4 (2003). Thus, a key purpose of LEOSA is to allow "equipped, trained and certified law enforcement officers" to protect themselves and their families and respond to crimes "across state and other jurisdictional lines." *Id.*

Before Congress passed LEOSA, however, there was a "a complex patchwork of Federal, state and local laws govern[ing] the carrying of concealed firearms for current and retired law enforcement officers." *Id.* To achieve the dual goals of officer self-protection and community safety against this "patchwork" of local laws, Congress designed LEOSA to "override State laws" so "retired and active police officers could carry a concealed weapon anywhere within the United States." H.R. Rep. No. 108-560, 2004 WL 5702383, at *3 (2004). Congress likewise recognized that LEOSA would address the need for "national measures of uniformity and consistency" regarding concealed carry laws. S. Rep. No. 108-29, at *4 (2003). In fact, the House Judiciary Committee rejected a proposed amendment that would

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[3] These events dramatically altered the country's approach to domestic and international terrorism and undoubtedly weighed on Congress when it considered LEOSA. According to the legislative history, proponents of LEOSA argued that the law would help protect the country in the wake of September 11. H.R. Rep. No. 108-560, 2004 WL 5702383, at *4 (2004).

have given states discretion to "opt-out" of LEOSA's national standard. H.R. Rep. No. 108-560, at *46 (2004) (opposing proposed amendment because it would "give us the same inconsistent patchwork of coverage that exists today"). Thus, while Congress acknowledged LEOSA's preemptive effect and its impact on state's rights, it passed LEOSA with bipartisan support in order to create national uniformity.[4]

B. New Jersey Law

New Jersey criminalizes the possession of firearms except under certain conditions. *See* N.J.S.A. § 2C:39-5(b). As relevant here, the State will exempt a retired law enforcement officer from its criminal law if they obtain a state-specific Retired Police Officer ("RPO") permit. *See id.* § 2C:39-6(L). One way to obtain an RPO permit is for the individual to be a QRLEO as defined in LEOSA. *Id.* But, the individual must also establish that: (1) they are seventy-five or younger, and (2) they qualified semi-annually to use the firearm for which the RPO permit was sought. *Id.* Even if an individual meets these requirements, the Superintendent of

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[4] Congress amended LEOSA in 2010 and 2013. Each amendment expanded, not diminished, the rights under LEOSA, showing Congress's continuing commitment to empowering QRLEOs to protect themselves and their communities. *See* Law Enforcement Officers Safety Act Improvements Act of 2010, Pub. L. 111-272, 124 Stat. 2855 (2010) (expanding definition of "firearm"; reducing aggregate years of service from 15 to 10; extending privileges to additional categories of law enforcement officers); National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, 126 Stat. 1632 (2013) (expanding LEOSA privileges to members of the military).

State Police has broad discretion to delay or deny an RPO permit application.[5] And, even if a QRLEO overcomes these hurdles and obtains an RPO permit, they cannot carry hollow point ammunition. *Id.* § 2C:39-3f(1).

The Attorney General has made clear that a QRLEO domiciled in New Jersey who carries a concealed firearm without an RPO permit can be prosecuted under N.J.S.A. § 2C:39-5(b) for unlawful possession of a firearm. The Attorney General's guidance document states: "An RLEO must meet each of the requirements of N.J.S.A. 2C:39-6(L) in order to carry a firearm . . . ." (ECF No. 1, Complaint, Exhibit A, ¶ 3). Similarly, the Attorney General confirmed that even QRLEOs who obtain an RPO permit cannot carry hollow point ammunition. (ECF No. 1, Complaint, Exhibit A, ¶ 4).

LEGAL ARGUMENT

The case is straightforward and rests on uncontroverted legal principles. LEOSA creates an enforceable right for QRLEOs to carry a concealed firearm anywhere in the United States. The State has violated Plaintiffs' individual rights and the Supremacy Clause of the Constitution because its laws impose a more onerous qualification standard than federal law.

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[5] *See, e.g.*, N.J.S.A. § 2C:39-6(L)(3) ("If the superintendent approves a retired officer's application . . . ."); *id.* § 2C:39-6(L)(5) ("Any person aggrieved by the denial of the superintendent of approval for a permit to carry a handgun . . . .").

The State's arguments fail because they misconceive the right at issue. This is not, as the State contends, an action to compel it to issue an "identification." Instead, the right to carry a concealed firearm is enforceable under § 1983 and the Supreme Court's *Blessing* test. LEOSA empowers specific individuals—QRLEOs—to carry a concealed firearm. The statute uses objective standards to determine whether a QRLEO is "qualified," which courts can easily enforce. The standard to determine whether an individual is a QRLEO is binding on the states. A state cannot alter the national qualification standard or create its own standard. The nonprecedential cases relied on by the State, finding LEOSA does not create an enforceable right, are inapposite because they only address an asserted right to obtain identification; not the right to carry a concealed firearm.

The State's argument that LEOSA has no preemptive effect is also misguided, again, because it focuses on subsection (d) identification; not the federal qualification standard under subsection (c). There is express preemption because LEOSA applies "notwithstanding" any state law. There is also implied preemption because LEOSA provides a uniform qualification standard for a QRLEO to carry a concealed firearm. Congress passed LEOSA to simplify the right for QRLEOs to carry a concealed firearm anywhere in the country, without being subject to the vagaries of local law. New Jersey law creates this local variation, where Congress

intended to eliminate it, by imposing a more onerous qualification standard, thus violating a QRLEO's right to carry a concealed firearm.

A. Legal Standard

Under FED. R. CIV. P. 12(b)(6), the Court should dismiss a complaint that fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In the Third Circuit, district courts must engage in a two-step process when ruling on a motion to dismiss. First, the Court must accept well-pleaded facts as true and must disregard legal conclusions. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). Second, the Court must determine if the allegations show a "plausible claim for relief." *Id.* at 211. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. The Right to Carry a Concealed Firearm Is Enforceable Under Section 1983.

The State argues that Count I of the Complaint should be dismissed because LEOSA does not create a right enforceable under § 1983. (Brief in Support of Motion to Dismiss ("Def. Br.") at 11-21). Section 1983 provides a remedy for the deprivation of a federal right. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). The purpose of § 1983 is to "to interpose the Federal Courts between the states and the people, as guardians of the people's federal rights." *Mitchem v. Foster*, 407 U.S. 225, 242 (1972). To state a claim under § 1983, a plaintiff must show two elements: (1) a

person acting under color of state law, (2) deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *See Schneyder v. Smith*, 653 F.3d 313, 319 (3d Cir. 2011).

Defendants challenge only the second element of Plaintiffs' § 1983 claim. Under § 1983, a plaintiff "must assert the violation of a federal right, not merely a violation of federal law." *Blessing v. Freestone*, 520 U.S. 329 (1997). Under *Blessing*, courts must analyze three factors to determine if a federal law creates a federal right enforceable under § 1983:

> 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.

Id. at 340-41 (internal citations and quotation marks omitted). In *Gonzaga University v. Doe*, the Supreme Court explained that § 1983 requires the plaintiff to assert "an unambiguously conferred right." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002).

i. <u>Plaintiffs Are Seeking to Vindicate the Right for a QRLEO to Carry a Concealed Firearm.</u>

This case turns on the definition of the right Plaintiffs seek to enforce under § 1983. Under *Blessing*, district courts must "determine exactly what rights, considered in their most concrete, specific form, respondents are asserting."

Blessing, 520 U.S. at 346. A statute may create some rights that are enforceable under § 1983 and some rights that are not. *See id.* at 345-46 ("We do not foreclose the possibility that some provisions of Title IV–D give rise to individual rights . . . ."). Because of this, the definition of the right will determine if it is cognizable under § 1983. *See, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Port Auth'y of N.Y. & N.J.*, 730 F.3d 252 (3d Cir. 2013) (holding that 18 U.S.C. § 926A did not create an ambulatory right to carry firearms when the statute only addressed the right to carry inside a vehicle).[6]

Here, Plaintiffs are asserting a right for a QRLEO to carry a concealed firearm, while the State erroneously focuses only on a right to obtain subsection (d) identification. This distinction is dispositive. The three key cases—*Duberry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016), *Carey v. Throwe*, 957 F.3d 468, 474 (4th Cir. 2020), and *Burban v. City of Neptune Beach*, 920 F.3d 1274, 1276 (11th Cir. 2019)—can be harmonized based on the rights that the respective plaintiffs asserted.

In *Duberry*, the plaintiffs were former corrections officers for the District of Columbia ("the District"). 824 F.3d 1046, 1049-50 (D.C. Cir. 2016). They alleged

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[6] For example, a plaintiff cannot sue under § 1983 to enforce a section of a statute with an aggregate focus. *See Gonzaga Univ.*, 536 U.S. at 283. By contrast, a plaintiff can sue under § 1983 to enforce a statute with an individual focus. *See Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 182 (3d Cir. 2004).

they were qualified and possessed photographic identification required under LEOSA. *Id.* at 1050. But, the District refused to provide a firearms certification because corrections officers did not have law enforcement status, which is one of the qualification standards under 18 U.S.C. § 926C(c). *Id.* The district court held that the plaintiffs never acquired a right to carry because they never obtained qualified firearms training. *Id.* at 1050-51.[7]

The Court of Appeals reversed based on the district court's erroneous interpretation of the right at issue. The plaintiffs asserted they had the right to carry a concealed firearm if they met the qualifications under § 926C(c). *Id.* at 1051. The plaintiffs' theory of liability was that the District deprived them of their right because it erroneously refused to issue a firearms certification. *Id.* at 1053. The reason for the District's refusal to issue the firearms certification, in turn, was based on its interpretation of who was "qualified" under LEOSA. *Id.* at 1053-54. But the D.C. Circuit explained that LEOSA "does not afford discretion . . . to redefine either who are 'qualified law enforcement officers' or who is eligible for the LEOSA right." *Id.* at 1054. Accordingly, *Duberry* held there is an enforceable right under § 1983.

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[7] In other words, the district court in *Duberry* found the right to carry a concealed firearm only "attached" if the plaintiffs were "qualified" and had a (d)(1) or (d)(2) identification.

In *Carey*, the plaintiff alleged that the municipal defendants "interfered with his right to carry a concealed firearm under LEOSA by improperly rescinding his LEOSA card." 957 F.3d 468, 474 (4th Cir. 2020). The Fourth Circuit held that the plaintiff failed to state a claim under § 1983, concluding that "LEOSA cannot be read as unambiguously imposing a binding obligation on the States to issue concealed carry permits . . . ." *Id.* at 481 (internal quotation marks and modifications omitted). The court also explained that requiring a state to issue LEOSA identification would "present[] an inescapable and fatal anticommandeering problem," as it would "would force state law enforcement agencies to issue certain identification as part of a federal concealed carry scheme." *Id.*

In *Burban*, the plaintiff "sued the City . . . to have it issue her the type of identification card required by LEOSA." 920 F.3d 1274, 1276 (11th Cir. 2019). The Eleventh Circuit held that "no provision of § 926C compels a State to issue identification." *Id.* at 1280. The court also found that forcing a state to issue LEOSA identification would violate the anticommandeering doctrine. *Id.* at 1281. However, the court explicitly recognized that its decision did not conflict with *Duberry* because *Duberry* involved a different right under LEOSA. *Id.* at 1282-83 ("[T]he *Duberry* plaintiffs asserted a different right than the one Ms. Burban seeks to vindicate here. . . . [W]e do not read *Duberry* as reaching the question presented here.").

The different rights asserted in *Duberry*, on one hand, and *Carey* and *Burban*, on the other, are controlling. Under *Duberry*, a "qualified" retired law enforcement officer has a right to carry a concealed firearm anywhere in the country. A state cannot alter LEOSA's national qualification standard. *See Duberry*, 824 F.3d at 1055 (recognizing that "failure to classify an individual as a 'law enforcement officer' denies that individual his right to carry a concealed firearm"); *see also D'Aureli v. Harvey*, No. 1:17-cv-00363, 2018 WL 704733, at **5-6 (N.D.N.Y. Feb. 2, 2018) (recognizing that *Duberry* held that a state cannot revise the statutory definition of a QRLEO). While under *Carey* and *Burban*, a plaintiff cannot compel a state to issue a photographic identification, see *Carey*, 957 F.3d at 481 and *Burban*, 920 F.3d at 1280, those QRLEOs with the requisite identification have a right to carry. *See Cole v. Monroe Cnty.*, 359 F. Supp. 3d 526, 533 (E.D. Mich. 2019) ("[I]f a state issues subsection (d) identification to a qualified retired law enforcement officer, that officer has the right to carry a concealed weapon in any state. But no state is required to issue subsection (d) identification.").[8]

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[8] The district court cases the State cites also addressed a right to identification. *See, e.g.*, *Cole*, 359 F. Supp. 3d at 533; *D'Aureli*, No. 1:17-cv-00363, 2018 WL 704733, at **5-6; *Henrichs v. Ill. Law Enforcement Training & Standards Bd.*, 306 F. Supp. 3d 1049, 1055 (N.D. Ill. 2018) ("[T]he court . . . has found nothing, obligating States to issue subsection (d) identifications to anybody . . . ."); *Mpras v. District of Columbia*, 74 F. Supp. 3d 265, 270 (D.D.C. 2014) ("[N]othing in LEOSA bestows a federal right to the identification required by subsection (d)."); *Johnson v. N.Y. State Dept. of Corr. Servs.*, 709 F. Supp. 2d 178, 185 (N.D.N.Y. 2010) ("Nothing in the text or structure of the statute bestows . . . an explicit right to obtain

Because Plaintiffs seek to enforce the right for a QRLEO to carry a concealed firearm, *Duberry* controls and *Carey* and *Burban* are distinguishable. Contrary to the State's argument, Plaintiffs are not seeking to compel New Jersey to issue identifications. The individual Plaintiffs already have photographic identification from their former federal law enforcement agencies. (ECF No. 1, Complaint at ¶¶ 48, 55, 60). Rather, as in *Duberry*, Plaintiffs are seeking to vindicate the right for a QRLEO to carry a concealed firearm. (*Id.* at ¶ 70 (alleging the Associations' members include QRLEOs "who are entitled to carry a concealed firearm" in New Jersey); *id.* at ¶ 71 (same for Individual Plaintiffs); *id.* at ¶ 72 (alleging the State's intent to enforce its criminal law unless Plaintiffs obtain an RPO permit "denie[s] Plaintiffs their rights conferred by LEOSA")). Here, as in *Duberry*, the State's RPO permit imposes more onerous standards than LEOSA to determine who is "qualified" to carry a concealed firearm. *Compare* 18 U.S.C. § 926C(c), *with* N.J.S.A. § 2C:39-6(L).

i. LEOSA Benefits QRLEOs Who Seek to Carry a Concealed Firearm.

Plaintiffs can satisfy the first factor of the *Blessing* test, which requires showing Congress "intended that the provision in question benefit the plaintiff."

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the identification required under § 926C(d) . . . ."). Even though these cases are not controlling, they acknowledged there is a right to carry for QRLEOs under LEOSA. *See Hendricks*, 306 F. Supp. 3d at 1055; *D'Aureli*, 2018 WL 704733, at *2.

Blessing, 520 U.S. at 340-41. A cause of action under § 1983 requires "an unambiguously conferred right." *Gonzaga Univ.*, 536 U.S. at 283. The court should look for "rights-creating language." *Id.* at 287. "Rights-creating language," in turn, involves "individually focused terminology" and statutory language "phrased in terms of the persons to be benefitted." *Id.* at 284, 287. By contrast, a law about "institutional policy and practice," or with an "aggregate focus" does not create individual rights. *Id.* at 288 (internal quotation marks omitted).

This factor is easily met. First, LEOSA uses rights-creating language: a QRLEO "may carry" a concealed firearm. 18 U.S.C. § 926C(a). Second, LEOSA uses individually focused terminology because it confers the right on "an individual" who is "qualified." *Id.* LEOSA defines whether an individual is qualified, in turn, based on individualized factors, such as the individual's length of service before retirement. *Id.* § 926C(c).

LEOSA's legislative history underscores that Congress intended to create an individual right. For example, Congress amended LEOSA in 2010, in part, to avoid the "substantial difficulty" retired law enforcement officers experienced in "**gaining the benefits the law was intended to confer**." Law Enforcement Officers Safety Act Improvements Act of 2010, 156 Cong. Rec. S3762-01, 2010 WL 1924599 (Statement of Sen. Leahy) (emphasis added). The goal of the amendment was to "make the original law's operation more efficient while maintaining the rigorous

standards that apply to **those who seek its benefits**." *Id.* (emphasis added). The amendment would also allow flexibility for retired law enforcement officers to "achiev[e] the law's **benefits and privileges which Congress determined they deserve**." *Id.* (emphasis added). In short, both the text and legislative history show that LEOSA creates an individual right.

The State's argument that LEOSA does not benefit "all retired law enforcement officers" misses the point. (Def. Br. at 14). LEOSA is designed to benefit all "qualified" retired law enforcement officers inside and outside of New Jersey. 18 U.S.C. § 926C. Plaintiffs Bowen, Jakubiec, and Martinez, as well as the Associations'[9] members, are qualified under LEOSA. (ECF No. 1, Complaint at ¶¶ 48, 55, 60, 70). The State's focus on whether they have "New Jersey" RPO permit identification underscores the purpose of Plaintiffs' Complaint. In fact, the State concedes Bowen has identification, but simply ignores that Jakubiec and Martinez have photographic identification from their former agencies—which is what LEOSA requires. *See* 18 U.S.C. § 926C(d)(1), (d)(2)(A); (Def. Br. at 14); (ECF No. 1, Complaint at ¶¶ 55, 60).

The real point, however, is that the State cannot redefine whether these individuals are truly "qualified" to exercise the right to carry a concealed firearm

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[9] The "Associations" refers collectively to Plaintiffs Federal Law Enforcement Officers Association ("FLEOA") and the New Jersey Fraternal Order of Police ("NJFOP").

under LEOSA. *See Duberry*, 824 F.3d at 1055 ("Congress gave every signal that it contemplated no state reevaluation or redefinition of federal requirements."). Yet New Jersey criminalizes the possession of a firearm unless these QRLEOs obtain its separate RPO permit. (ECF No. 1, Complaint at ¶ 41 and Ex. 1). This RPO permit requires a QRLEO to meet more burdensome standards than LEOSA and exempts other classes of officers. *See* N.J.S.A. § 2C:39-6(L). Of course, LEOSA does not benefit all retired law enforcement officers. But, it unambiguously benefits those "qualified" retired law enforcement officers and protects them from state intrusion onto the federal qualification standard.

ii. Courts Can Enforce a QRLEO's Right to Carry a Concealed Firearm.

The second element of the *Blessing* test, which requires showing that the right "is not so vague and amorphous that its enforcement would strain judicial competence," is similarly satisfied. *Blessing*, 520 U.S. at 340-41 (internal quotation marks omitted). A statutory right must be "specific and enumerated," *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 189 (3d Cir. 2004), or "clearly delineated by the provisions at issue," *Grammer v. John J. Kane Reg. Centers-Glen Hazel*, 570 F.3d 520, 528 (3d Cir. 2009). The Supreme Court has found that rights can be enforceable under § 1983 even if they involve statutory "factors," *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 519 (1990), or a duty to act "reasonably," *Wright v. City of Roanoke Redevelopment & Hous. Auth'y*, 479 U.S. 418, 431 (1987).

The judiciary can competently enforce a QRLEO's right to carry a concealed firearm under LEOSA. The statute is straightforward: a QRLEO with the required identification may carry a concealed firearm. *See* 18 U.S.C. § 926C(a). An individual is "qualified" based on seven "historical and objective" factors. *Duberry*, 824 F.3d at 1053. A court can decide if an individual meets those factors by looking at "the officer's personnel records and the statutes in effect before the officer retired." *Id.* Likewise, an individual must have (d)(1) or (d)(2) identification and firearms certification, which a court can determine by reference to objective facts—an individual either has the identification and firearms certification, or not.

iii. The State Cannot Interfere with a QRLEO's Right to Carry a Concealed Firearm.

Plaintiffs also satisfy the third element of the *Blessing* test, which requires showing that LEOSA "impose[s] a binding obligation on the States." *Blessing*, 520 U.S. at 340-41. A statute imposes a binding obligation on the states if it is "cast in mandatory rather than precatory terms." *Wilder*, 496 U.S. at 512.

The State has a duty to respect a QRLEO's right to carry a concealed firearm. The existence of that duty is "evident from the categorical preemption of state and local law standing in the way of the LEOSA right to carry." *Duberry*, 824 F.3d at 1053. In LEOSA's legislative history, Congress repeatedly emphasized that LEOSA would preempt state law and thus intended the law to bind the states. *See, e.g.*, S. Rep. No. 108-29, at **9-10; H.R. Rep. No. 108-560, at *12. The text of LEOSA

memorializes Congress's intention—LEOSA's carry right applies "notwithstanding" state or local law. 18 U.S.C. § 926C(a).

Even courts that have held LEOSA does not create a right to compel an identification from the states have still concluded that the concealed carry right is binding on the states. *See Cole*, 359 F. Supp. 3d at 533 ("LEOSA does require states to permit a qualified retired law enforcement officer who 'is carrying the identification required by subsection (d)' to carry a concealed weapon . . . ."); *Heinrichs*, 306 F. Supp. 3d at 1055 ("LEOSA gives [a concealed carry right] to a [QRLEO] *only* if that individual has "the identification required by subsection (d).").

Here, the State concedes that LEOSA creates a binding rule of recognition as to out-of-state QRLEOs who carry a concealed firearm in New Jersey. (Def. Br. at 24); *see also Carey*, 957 F.3d at 480 ("[LEOSA] does generally prevent states from prosecuting out-of-state officers who choose to carry under a LEOSA-compliant permit already issued."). It also concedes that LEOSA is binding on other states if a New Jersey QRLEO travels outside the state with a concealed firearm. (Def. Br. at 27).

Nevertheless, the State asserts that LEOSA fails to create a binding obligation to issue identification because LEOSA affords the states discretion to set certain standards. (Def. Br. at 16-19 (citing *Carey*, 957 F.3d at 480-81). To be sure, LEOSA provides "a reservoir of powers" for the states under subsection (d). *Moore v. Trent*,

No. 09-C-1712, 2010 WL 5232727, at *4 (N.D. Ill. Dec. 16, 2010). Those powers include: (1) how to issue LEOSA identifications, and (2) the ability to set the proficiency standards for its active duty firearms training.[10] *See* 18 U.S.C. 926C(d)(1) (identification must confirm the individual met active duty firearms training "as established by the agency"); *id.* § 926C(d)(2)(B) (same for active duty firearms training "established by the State" or "any law enforcement agency within the State").[11]

Importantly, however, a state lacks discretion otherwise to redefine LEOSA's qualification standard in subsection (c). Congress foreclosed that result and no court has held otherwise. *See Duberry*, 824 F.3d at 1054 (LEOSA "does not afford discretion . . . to redefine either who are 'qualified law enforcement officers' or who is eligible for the LEOSA right"). To the extent the State reads *Carey* to authorize state discretion over subsection (c) qualifications, its reading is misguided because *Carey* merely acknowledged that LEOSA gives states some discretion under subsection (d) regarding the identification and firearms training requirements. (Def. Br. at 16); *Carey*, 957 F.3d at 480 (citing 18 U.S.C. § 926C(d)(1) and (d)(2)).

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[10] Whether a state issues LEOSA identification is a political decision. Whether a QRLEO meets active duty firearms standards is a ministerial decision—if a QRLEO meets the firearms standards, he or she must receive the certification.

[11] *See, e.g.*, *D'Aureli*, 2018 WL 704733, at *4 (finding evidence that "Congress intended to leave standards and procedures [under subsection (d)] to the states").

Accordingly, the State's argument that the LEOSA qualification standard is not binding is misplaced.

iv. LEOSA Does Not Foreclose Relief Under § 1983.

The final step under *Blessing* asks whether the State can rebut the presumption of a § 1983 remedy by showing Congress "intended to preclude individual suits." *Sabree ex rel. Sabree*, 367 F.3d at 193. The State has not argued this point. Therefore, it is waived. Also, there is no evidence that Congress intended to foreclose a § 1983 remedy, either through express language or by including a "comprehensive remedial scheme" in LEOSA. *Id.*

v. The State Has Deprived Plaintiffs of Their Rights Under LEOSA.

The State has and will continue to deprive Plaintiffs of their rights under LEOSA unless the Court enjoins the State from enforcing its RPO permit law. The State does not even address FLEOA and NJFOP's countless retired members who have been deprived of their LEOSA rights by way of New Jersey's revising the federal qualification standard. (ECF No. 1, Complaint at ¶¶ 4-5, 70, 72). The Individual Plaintiffs have a collective eighty-three (83) years of service in law enforcement. (*Id.* at ¶¶ 47, 53, 59). They all retired from service in good standing and obtained a LEOSA-compliant photographic identification from their former federal law enforcement agencies. (*Id.* at ¶¶ 47, 53, 59). They live in New Jersey

and, therefore, under existing New Jersey law must obtain an RPO permit to avoid being prosecuted for carrying a firearm.

An RPO permit is not the same as the right in LEOSA. For example, Bowen will "age out" of New Jersey's RPO permit scheme when he turns seventy-five in fifteen months. (*Id.* at ¶ 51). When that occurs, even if he remains a QRLEO under LEOSA and continues to obtain a firearms training certification, New Jersey law forever bars him from carrying a concealed firearm in the State. (*Id.* at ¶ 52); *see also* N.J.S.A. § 2C:39-6(L). This is contrary to the intent of LEOSA, which is to allow retired law enforcement officers to carry firearms to protect themselves and their communities based on meeting the federal qualification standard; not an arbitrary state standard.

Even if a QRLEO fails to obtain an RPO permit, New Jersey law still violates their rights under LEOSA. For example, Jakubiec and Martinez do not have RPO permits and therefore cannot carry a firearm under N.J.S.A. § 2C:39-6(L). (ECF No. 1, Complaint at ¶¶ 56-58, 62-63). As long as they maintain their firearms training certification, they could exercise their LEOSA right in other states, but not New Jersey. LEOSA, however, is intended to provide national uniformity for a QRLEO to carry a concealed firearm regardless of where they travel or reside. *See, e.g.*, S. Rep. No. 108-29, at *4 (explaining that LEOSA is designed to provide "national measures of uniformity and consistency").

In sum, LEOSA creates a right for a QRLEO to carry a concealed firearm. The right is individual, based on objective facts, and is binding on the states. New Jersey law impermissibly redefines who is qualified to exercise this right, in conflict with federal law. Accordingly, Plaintiffs have stated a claim under § 1983.

C. LEOSA Preempts New Jersey Law Criminalizing the Concealed Carry of Firearms.

The federal right to carry a concealed firearm under LEOSA preempts New Jersey law. "The Constitution limits state sovereignty in several ways." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . ." U.S. CONST. ART. VI, cl. 2. "It is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824)). When a conflict arises, "[t]he relative importance to the State of its own law is not material" because "any state law . . . which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). Thus, if federal and state law conflict, "[t]he Supremacy Clause provides a clear rule that . . . Congress has the power to preempt state law." *Arizona v. United States*, 567 U.S. 387, 399 (2012).

There are three forms of preemption: "(1) express preemption, (2) field preemption, and (3) conflict preemption." *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010). All forms of preemption "work in the same way":

> Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.

Murphy, 138 S. Ct. at 1480. For any preemption analysis, the "ultimate touchstone" is Congress's intent. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted). The Court must look to the "statute's language" or its "structure or purpose" to determine the presence and scope of preemption. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

i. The Court Has Jurisdiction to Enjoin Defendants from Violating Federal Law.

Count II of Plaintiffs' Complaint seeks to invalidate New Jersey law as applied to QRLEOs in two ways: (1) a declaration of its invalidity, and (2) an injunction against its enforcement. The State argues in a footnote that if Count I fails, then Count II necessarily fails because "the Declaratory Judgment Act does not provide an independent source of jurisdiction." (Def. Br. at 21 n.5). That argument misses the point of Count II, which is to prevent the State from enforcing its unconstitutional laws against Plaintiffs.

It is beyond dispute that this Court has jurisdiction in equity to enjoin an unlawful act by a public official. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) ("[F]ederal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." (citing *Ex Parte Young*, 209 U.S. 123, 150-51 (1908)). "[I]f an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." *Id.* at 326. A plaintiff may seek an injunction "preemptively to assert a defense that would be available to it in a state or local enforcement action." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 144 (2d Cir. 2016). In other words, Plaintiffs do not have to violate New Jersey law before they can allege that it is preempted and invalid. *Id.* ("A party is not required to pursue arguably illegal activity or expose itself to criminal liability before bringing suit to challenge a statute alleged to violate federal law." (internal quotation marks and modifications omitted)).

The Court has jurisdiction over Count II of the Complaint whether it finds a right under § 1983 or not. The Complaint alleges Plaintiffs are qualified to carry a concealed firearm under LEOSA. (ECF No. 1, Complaint at ¶¶ 48, 54, 60). Despite this, Plaintiffs are subject to prosecution under New Jersey law unless they obtain an RPO permit. (*Id.* at ¶ 83). But, LEOSA preempts New Jersey law, including its inconsistent RPO permit requirements. If the State prosecutes Plaintiffs, the

Supremacy Clause dictates that LEOSA would provide a complete defense. *See* Legal Argument Section C(ii)-(iii), *infra*. Accordingly, the Court has equitable jurisdiction to determine LEOSA's preemptive effect over New Jersey law.[12]

ii. LEOSA Expressly Preempts New Jersey Law.

"Express preemption applies where Congress, through a statute's express language, declares its intent to displace state law." *Farina*, 625 F.3d at 115 (citing *Hillsborough Cnty.*, 471 U.S. at 713 (1985)). The Court must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (internal quotation marks omitted). A statute must be enforced according to its plain meaning. *See Lawrence v. City of Phila, Pa.*, 527 F.3d 299, 317 (3d Cir. 2008).

LEOSA contains an express preemption provision because it applies "notwithstanding" state law. 18 U.S.C. § 926C(a); *see also* H.R. Rep. No. 108-560, at *12 ("This section would preempt State laws . . . ."). In *Duberry*, the court explained that "Congress used categorical language in the 'notwithstanding' clause of subsection (a), to preempt state and local law to grant qualified law enforcement

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[12] The State's argument elevates form over substance, as it takes issue with the heading of Count II. The State is well-aware that the Complaint seeks to enjoin a preempted State law that could be used to prosecute QRLEOs. (Def. Br. at 21-32). Nonetheless, if the Court directs, Plaintiffs will file an Amended Complaint to correct this non-substantive issue.

officers the right to carry a concealed weapon." 824 F.3d at 1052. Outside of LEOSA, the Third Circuit has held that a "notwithstanding" clause expressly preempts state law. *See In re Federal-Mogul Global Inc.*, 684 F.3d 355 (3d Cir. 2012) (explaining that section of bankruptcy code that applied "[n]otwithstanding any otherwise applicable nonbankruptcy law" preempted state law, including contractual anti-assignment clauses); *cf. Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (holding that a contract's "notwithstanding" clause "clearly signals the drafter's intention" to override conflicting provisions elsewhere in the contract).

There is additional evidence that LEOSA expressly preempts state law. First, LEOSA contains a preemption savings clause, which shows preemption is the general rule. *See* 18 U.S.C. § 926C(b). Second, when Congress amended LEOSA, the Congressional Budget Office recognized that the amendments contained an intergovernmental mandate because they "would expand an existing mandate that preempts state or local laws prohibiting the carrying of concealed weapons." S. Rep. No. 111-233, 2010 WL 2926506, at *6 (July 27, 2010).

Because LEOSA expressly preempts state law, the Court must "identify the domain expressly pre-empted" by the statute using two guiding principles. *Cipollone*, 505 U.S. at 517; *see In re Federal-Mogul Global Inc.*, 684 F.3d at 369. First, there is a "presumption against pre-emption of state police power regulations" unless Congress' intent to preempt is "clear and manifest." *Medtronic, Inc. v. Lohr*,

518 U.S. 470 485 (1996) (internal quotation marks omitted). Second, the scope of preemption must be determined "on a fair understanding of congressional purpose," determined based on the statute's text, structure, and overall regulatory scheme. *Id.* at 486 (internal quotation marks omitted).

Here, LEOSA preempts state laws that redefine who is "qualified" to exercise the right to carry a concealed firearm. Congress passed LEOSA against a patchwork of state laws regarding carrying concealed firearms. *See* S. Rep. No. 108-29, at **3-4 ("Today, a complex patchwork of Federal, state and local laws govern the carrying of concealed firearms for current and retired law enforcement officers."). The goal of LEOSA was to create a national standard. *Id.* at *4 ("This bill addresses this need by establishing national measures of uniformity and consistency . . . ."). The statute accomplishes this goal by preempting state statutes that govern how and when law enforcement officers are "qualified" to carry a concealed firearm. *See Duberry*, 824 F.3d at 1052 ("The LEOSA preempted [state concealed firearm statutes] with respect to active duty and retired 'qualified law enforcement officers.'"). In place of existing state qualification laws, LEOSA established seven objective criteria to determine whether an individual is qualified to carry a concealed firearm. 18 U.S.C. § 926C(c).

Contrary to this national standard in LEOSA, New Jersey seeks to redefine who is qualified to carry a concealed firearm. For example, it requires an individual to be seventy-five or younger, whereas LEOSA contains no age limit. *Compare* 18

U.S.C. § 926C(c), *with* N.J.S.A. § 2C:39-6(L). New Jersey law also requires an individual to qualify in active duty firearms training twice a year, whereas LEOSA only requires an individual to qualify once a year. *Compare* 18 U.S.C. § 926C(c)(4), *with* N.J.S.A. § 2C:39-6(L). Finally, while the standards in LEOSA's are based on seven "historical and objective" factors, *Duberry*, 824 F.3d at 1053, New Jersey law grants the Superintendent of State Police broad discretion to deny an RPO permit to an otherwise "qualified" retired law enforcement officer. *See* N.J.S.A. § 2C:39-6(L)(3); *id.* § 2C:39-6(L)(5).[13] There is no transparency into the RPO application process, as the Superintendent does not publish standards governing the exercise of his discretion. In fact, the Senate Report raised these and other differences between LEOSA and New Jersey law, showing Congress well-understood LEOSA's preemptive effect. *See* S. Rep. No. 108-29, at **12-13.

Similarly, LEOSA's express preemption provision applies to state laws redefining the ammunition that a QRLEO is entitled to carry. The State does not address this issue because the conflict is unavoidable. Under LEOSA, the definition

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[13] The RPO Permit Application form seeks information in numerous areas that are not disqualifying under LEOSA but are ostensibly grounds to deny an RPO permit. https://www.njsp.org/firearms/pdf/sp-232a.pdf. In addition, the New Jersey RPO permit statute disqualifies individuals under N.J.S.A. § 2C:58-3, who otherwise meet the qualification standard in LEOSA. *See, e.g.*, N.J.S.A. § 2C:58-3(c)(5) ("No handgun permit . . . shall be issued . . . [t]o any person where the issuance would not be in the interest of the public health, safety or welfare."), *incorporated by reference in* N.J.S.A. § 2C:39-6(L).

of a "firearm" includes hollow point ammunition.[14] *See* 18 U.S.C. § 926C(e)(1)(B). New Jersey law prohibits QRLEOs from carrying hollow point ammunition. *See* N.J.S.A. § 2C:39-3(f). Because LEOSA applies "notwithstanding" any state law, the right to carry hollow point ammunition preempts New Jersey law. Accordingly, New Jersey law is within the scope of LEOSA's express preemption provision.

iii. <u>LEOSA Impliedly Preempts New Jersey Law.</u>

For similar reasons, LEOSA preempts New Jersey law because New Jersey law frustrates Congress's objective in LEOSA to set a national standard for who is a QRLEO. Conflict preemption occurs when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). A federal law may set a floor or ceiling on an activity that a state law cannot alter. *See Lewis v. Alexander*, 685 F.3d 325, 344 (3d Cir. 2012) ("Congress has set the boundaries for what will be considered a special needs trust under federal law. Pennsylvania's Section 1414 adds requirements to this definition. . . . States are not free to rewrite congressional statutes in this way."); *see also Murphy,* 138 S. Ct. at 1480 (explaining that a federal law with preemptive effect may "confer[] on private entities . . . a federal right to

[14] From a law enforcement perspective, hollow point ammunition has several advantages, including an increased ability to incapacitate the target without over-penetrating and causing collateral damage to bystanders. *See, e.g.*, Special Agent Urey W. Patrick, HANDGUN WOUNDING FACTORS AND EFFECTIVENESS, Firearms Training Unit FBI Academy, Quantico, VA (July 14, 1989).

engage in certain conduct subject only to certain (federal) constraints"). In *Felder v. Casey*, for example, the Supreme Court held that § 1983 preempted a Wisconsin state law requiring a plaintiff to file a notice-of-claim 120 days before suing under § 1983. 487 U.S. 131, 153 (1988). The Court explained that the state statute "conflicts in both its purpose and effects with the remedial objectives" of § 1983. *Id.* at 138. According to the Court, the state statute interfered with federal law because it "predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court." *Id.* at 153.

Here, New Jersey law sets an obstacle for QRLEOs to exercise their right to carry a concealed firearm. As in *Felder*, where the state law required a plaintiff to do more than federal law required just to exercise a federal right, New Jersey law requires a QRLEO to do more than LEOSA requires to exercise a concealed carry right. When it passed LEOSA, Congress's goal was to create a national standard for active duty and retired law enforcement officers so they could protect themselves and the communities where they live. *See* S. Rep. No. 108-29, at *4; H.R. Rep. No. 108-560, at *3; *cf. In re Wheeler*, 433 N.J. Super. 560, 583 (App. Div. 2013) (recognizing LEOSA's laudable goals include officer safety and community protection). The corollary is that Congress intended to eliminate local standards that disrupt the statutory scheme. Thus, a law enforcement officer who is qualified under LEOSA is permitted to carry a concealed firearm, regardless of his or her residence.

See Felder, 487 U.S. at 153 (invalidating a state law that altered the exercise of a federal right depending on the forum in which the right was asserted). If New Jersey—or any other state—can maintain its own standards for who is qualified under LEOSA, then LEOSA means nothing. Accordingly, LEOSA preempts New Jersey laws that frustrate Congress's goal to implement a national standard for QRLEOs to carry a concealed firearm.

iv. LEOSA Is a Valid Exercise of Congress's Authority.

The State challenges the scope of LEOSA's preemption based on the Commerce Clause and the "anticommandeering" doctrine. First, it concedes that LEOSA preempts "state criminal laws," but asserts the scope of that preemption is limited only to QRLEOs traveling between states. (Def. Br. at 24-28). Second, it asserts that LEOSA violates the anticommandeering doctrine. (Def. Br. at 28-32). When addressing these arguments, the Court must "begin with the time-honored presumption that [LEOSA] is a constitutional exercise of legislative power." *Reno v. Condon*, 528 U.S. 141, 148 (2000).

a. *LEOSA Affects Firearms in Interstate Commerce.*

LEOSA allows a QRLEO to carry "a concealed firearm that has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 926C(a). Based on this language, the State argues that LEOSA only authorizes a QRLEO to travel with a concealed firearm interstate; not intrastate by New Jersey residents. But, the

State's argument relies on an incorrect reading of Congress's authority under the Commerce Clause.

There are "three broad categories of activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558 (1995). As the Supreme Court explained:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, ... i.e., those activities that substantially affect interstate commerce.

United States v. Morrison, 529 U.S. 598, 609 (2000) (internal citations and quotation marks omitted).

The phrase "in interstate commerce" is merely a jurisdictional element showing that Congress is legislating under its commerce power. *See Morrison*, 529 U.S. at 612. Under the commerce power, Congress may regulate a firearm that, at some point, traveled in interstate commerce. *See Scarborough v. United States*, 431 U.S. 563, 568 (1977). As long as a firearm traveled in interstate commerce, even wholly intrastate possession has a "sufficient nexus to interstate commerce" to allow Congress to regulate it. *See United States v. Singletary*, 268 F.3d 196, 205 (3d Cir. 2001) ("[W]e conclude that the proof in this case that the gun had traveled in

interstate commerce, at some time in the past, was sufficient to satisfy the interstate commerce element . . . ."). The Supreme Court has even recognized that the Commerce Clause allows Congress to regulate wholly intrastate activity with a substantial effect on interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 17-18 (2005) (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

Based on these principles, Congress legislated the type of firearms a QRLEO may carry, not the location in which a QRLEO may carry those firearms. LEOSA states that a QRLEO "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) (emphasis added). The interstate commerce clause language modifies "firearm." It does not modify, as the State implies, where a QRLEO "may carry" a firearm. As such, LEOSA's carry right is not limited solely to interstate travel.

LEOSA reflects that Congress used its commerce power without limiting LEOSA's carry right only to interstate travel. The legislative history shows that LEOSA would allow QRLEOs to travel "across state and **other jurisdictional lines**." *See* S. Rep. No. 108-29, at *4 (emphasis added). Other jurisdictional lines include lines between political subdivisions, such as counties and municipalities within a state. LEOSA thus preempts state law, as well as the laws of "any political

subdivision" within a state. 18 U.S.C. § 926C(a). The scope of this preemption necessarily includes wholly intrastate travel with a firearm by a QRLEO.

In addition, construing LEOSA as limited only to an interstate travel right would lead to absurd results. The State asserts that its RPO permit scheme "does not impinge on an out-of-state QRLEO's ability to carry," but limits an in-state QRLEO's ability to carry in New Jersey. (Def. Br. at 26). On the State's reading of LEOSA, two QRLEOs from the same agency would be treated differently based solely on where they live. For example, a seventy-five-year-old QRLEO from Pennsylvania could carry a concealed firearm into New Jersey, while a seventy-five-year-old QRLEO from New Jersey could not—even if the two individuals formerly worked for the same agency. By this reasoning, the State would concede that the Pennsylvania resident in this example could carry a concealed firearm if they spend summers every year at the New Jersey shore, while a full-time New Jersey QRLEO resident at the shore could not.[15] The State even goes so far as to say that an in-state QRLEO with proper identification cannot carry while traveling from their home to the border of a neighboring state, but can carry once they cross the border into the neighboring state. (Def. Br. at 27 ("[N]othing about New Jersey law would prohibit

[15] However, even the Pennsylvania resident in this example would be subject to arrest and prosecution for carrying hollow point ammunition in New Jersey.

Bowen, Jakubiec, and Martinez from traveling across state lines while carrying a concealed firearm . . . .")).

A consequence of this bizarre interpretation of LEOSA is that QRLEOs residing in New Jersey would be unable to protect themselves and their families from vindictive criminals and unable to help prevent crime in their own communities. On the other hand, out-of-state law enforcement officers, with no history of upholding New Jersey law and no proximate threat of encountering a vindictive criminal, could freely carry firearms in the State. This result turns LEOSA on its head, which was intended to provide a national standard for retired law enforcement officers to protect themselves and their families, as well as to protect the public even after their retirement. *See* S. Rep. No. 108-29, at *4; *In re Wheeler*, 433 N.J. Super. at 583 (explaining LEOSA's goals are crime prevention and self-defense against retaliatory violence that uniquely affects law enforcement officers).[16]

b. *LEOSA Does Not Commandeer the States.*

LEOSA's mandate for states to recognize federal standards to carry a concealed firearm is not unconstitutional commandeering. (Def. Br. at 28-32). A

[16] While a state can administer its own permit regime to identify which of its residents are QRLEOs that may carry a concealed firearm, the state permit regime must mirror the qualification standard in LEOSA; it cannot impose more onerous qualification standard on a QRLEO. Also, a state may require annual renewals of its LEOSA-compliant permits to ensure that a QRLEO remains "qualified" under LEOSA. For example, a state is entitled to know if a QRLEO is disqualified from the LEOSA right because of mental incapacitation. 18 U.S.C. § 926C(c)(5)(A).

statute commandeers a state if it "dictates what a state legislature may and may not do." *Murphy,* 138 S. Ct. at 1478 (finding that a federal law prohibiting state legislatures from passing laws that "authorize" sports gambling was unconstitutional commandeering); *see also Printz v. United States*, 521 U.S. 898 (1997) (finding federal law requiring states to perform background checks for a national firearms registry was unconstitutional commandeering); *New York v. United States*, 505 U.S. 144 (1992) (finding federal law requiring states to take title or regulate radioactive waste was unconstitutional commandeering).

By contrast, a statute preempts without commandeering if it "regulates the conduct of private actors." *Murphy,* 138 S. Ct. at 1481. A federal law that merely demands state compliance is not unconstitutional commandeering. *Del. Cnty., Pa. v. Fed. Hous. Fin. Auth'y*, 747 F.3d 215, 228 (3d Cir. 2014) ("A state official's compliance with federal law and non-enforcement of a preempted state law—as required by the Supremacy Clause—is not an unconstitutional commandeering."). In *Reno v. Condon*, a federal law "restrict[ed] the States' ability to disclose a driver's personal information without the driver's consent." 528 U.S. 141, 144 (2000). A state law conflicted with the federal law because it allowed the state DMV to disclose a driver's personal information upon request. *Id.* at 147. The Supreme Court concluded that the federal law preempted state law and was not unconstitutional commandeering. *Id.* at 150-51. The Court distinguished the situation from *Printz*

and *New York*, because the federal law "does not require the States in their sovereign capacity to regulate their own citizens." *Id.* at 150-51. The Court explained that the federal law did not require the state to enact any laws. Rather, the federal law applied only if the state kept a database of driver information. If a state chose to maintain such a database, the federal law controlled how the state could disclose that information. *Id.* at 151.

Similarly, the right to carry a concealed firearm under LEOSA preempts state laws regulating individuals, without commandeering state legislatures to implement a federal licensing program. In LEOSA, Congress defined who is "qualified" to carry a firearm, using seven objective factors. 18 U.S.C. § 926C(c). A state cannot alter that qualification standard. *See* Legal Argument, Section B(iii), *supra*; *Murphy*, 138 S. Ct. at 1480 (a preempting statute "confers on private entities . . . a federal right . . . subject only to certain (federal) constraints"). If an individual meets the federal standard, the State must recognize that individual's right to carry a concealed firearm—that is the point of the Supremacy Clause.

LEOSA is not commandeering merely because it demands state compliance with its qualification standard. In *Reno*, the Court held that a state must comply with federal standards when it attempts to regulate in an area Congress preempted and left no discretion to the states. As in *Reno*, if a state does issue a LEOSA identification, it cannot change the statute's qualification standard and impose a

more onerous standard than what LEOSA requires. Accordingly, Plaintiffs' construction of LEOSA does not violate the anticommandeering doctrine.

And yet, the State contends that LEOSA is commandeering because it requires states to issue LEOSA identification. (Def. Br. at 28-32). Not so. As explained, that is an issue not raised in Plaintiffs' Complaint. *See* Legal Argument, Section B(i), *supra*. Here, the individual Plaintiffs have LEOSA identification from their former federal agencies. A state may, if it chooses, decline to issue LEOSA identifications altogether. *Carey*, 957 F.3d at 481; *see also Moore v. Trent*, 2010 WL 5232727 * 3 (N.D. Ill. Dec. 16, 2010) ("The identification card required in Section 926(C)(d) constitutes a reservoir of power set aside for the states."). A state may, likewise, impose stringent firearms training standards for its active duty law enforcement officers, which QRLEOs seeking to carry under LEOSA must also meet. *See* 18 U.S.C. § 926C(d)(1), (d)(2)(B). While the State has some discretion to set standards in these two areas, nothing in the text, legislative history, or case law shows that a state is free to disregard the objective standards for who is "qualified" under LEOSA.

CONCLUSION

Plaintiffs seek to force New Jersey to recognize the qualification standard set by LEOSA. The Constitution commands that result. Accordingly, for the foregoing reasons, Plaintiffs respectfully request that Defendants' motion to dismiss be denied.

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