

No. 18-7102

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

RONALD DUBERRY, *et al.*,
Plaintiffs-Appellees,

v.

DISTRICT OF COLUMBIA,
Defendant-Appellant.

**On Appeal from the United States District Court
for the District of Columbia
Case No. 14-cv-01258-RC**

**BRIEF *AMICI CURIAE* OF WESTERN STATES SHERIFFS'
ASSOCIATION, CALIFORNIA CORRECTIONAL PEACE OFFICERS'
ASSOCIATION, INTERNATIONAL LAW ENFORCEMENT EDUCATORS
AND TRAINERS ASSOCIATION, CALIFORNIA RESERVE PEACE
OFFICERS ASSOCIATION, LAW ENFORCEMENT LEGAL DEFENSE
FUND, AND NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS
IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE**

Dan M. Peterson
Dan M. Peterson PLLC
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
(703) 352-7276
dan@danpetersonlaw.com
Counsel for Amici Curiae

Date: January 18, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Amici adopt the Certificate presented in the Brief of Appellees, with the addition that *amici* in this Court include the six *amici* joining this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* certifies that none of the *amici* has a parent corporation and no publicly held corporation owns 10% or more of the stock of any of the *amici*.

/s/ Dan M. Peterson

Dan M. Peterson

Counsel for Amici Curiae

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
STATEMENT PURSUANT TO FED. R. APP. P. 26.1.....	i
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THIS APPEAL IS LARGELY AN ATTEMPT TO REARGUE ISSUES THAT WERE CLEARLY AND CORRECTLY DECIDED <i>IN DUBERRY I</i>	6
II. CONGRESS INTENDED TO CREATE A ROBUST, UNIFORM RIGHT	13
III. ARMED OFF-DUTY AND RETIRED LAW ENFORCEMENT OFFICERS HAVE SAVED LIVES, APPREHENDED CRIMINALS, AND OTHERWISE CONTRIBUTED TO THE SAFETY OF THE PUBLIC	15
IV. OFF-DUTY AND RETIRED LAW ENFORCEMENT OFFICERS FACE THREATS AND VIOLENCE, SOMETIMES FATAL, FROM CRIMINALS WHO TARGET THEM.....	20
CONCLUSION	28
CERTIFICATE OF COMPLIANCE	29
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

CASES	Page
<i>Blessing v. Freestone</i> , 520 U.S. 329 (1997)	9
<i>Christianson v. Colt Indus. Operating Corp.</i> , 486 U.S. 800 (1988)	12
<i>Crocker v. Piedmont Aviation, Inc.</i> , 49 F.3d 735 (D.C. Cir. 1995).....	12
<i>Duberry v. District of Columbia</i> , 824 F.3d 1046 (D.C. Cir. 2016).....	3, 4, 6, 7, 8, 10, 12, 13, 14
<i>Golden State Transit Corp. v. City of Los Angeles</i> , 493 U.S. 103 (1989).....	9
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	11
STATUTES	
18 U.S.C. § 922(g)	11
18 U.S.C. § 926B	6
18 U.S.C. § 926C	4, 6, 13
18 U.S.C. § 926C(a).....	10
18 U.S.C. § 926C(c)(6).....	11
18 U.S.C. § 926C(c)(7).....	11
18 U.S.C. § 926C(d).....	8, 10
18 U.S.C. § 926C(d)(2)(B)	7, 10

18 U.S.C. § 92712

42 U.S.C. § 19833, 4, 5, 9, 10, 11

OTHER AUTHORITIES

Beckford, Checkey, *Retired Police Officer Shot in Westchester County; Son Helps Nab Suspects*, NBC 4 (Jul. 13, 2015)27

Bush, Rico, *Off-duty police officer catches murder suspect minutes after deadly shooting*, KSDK (Dec. 23, 2018)16

Fraternal Order of Police, *H.R. 218/S. 253: Off-Duty or Retired, A Police Officer Is Always On Call*15

H.R. 218 (2004)14

H.R. Rep. 108-56014

Law Enforcement Officers Safety Act: Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, 108th Cong., 2d Sess. 29 (2004)14, 15, 22, 23

Muchanic, Nora, *Retired officer killed saving someone else*, WPVI-TV (Dec. 1, 2007)26

Murray, Gary V., *Suspect shot by Worcester homeowner, a retired officer, is held on \$10K cash bail*, WORCESTER TELEGRAM & GAZETTE (May 1, 2018)18

Ovalle, David, *Jurors convict Jersey man in murder of ex-Miami police captain*, MIAMI HERALD (Mar. 23, 2016)25, 26

Prince, Chelsea, <i>UPDATE: Men ID'd after deadly shootout with off-duty officer outside DeKalb restaurant, The Atlanta Journal-Constitution</i> (Jan. 10, 2019).....	17
Regnier, Chris, <i>Off-duty officer chases down suspect in southside homicide, FOX 2 NEWS</i> (Dec. 23, 2018).....	16
Sylte, Allison, <i>Retired officer used 2 AR-15s to stop man accused of firing at random people, KUSA</i> (Jul. 9 2018).....	20
WATE 6, <i>Accused Sevierville shoplifter arrested after police chase, retired officer firing shots</i> (Mar. 26, 2018).....	19
WNCN, <i>Off-duty NC police officer was shot in the face, sheriff's office says</i> (Oct. 17, 2018).....	17

INTEREST OF *AMICI CURIAE*¹**Western States Sheriffs' Association**

The Western States Sheriffs' Association was established in 1993, and consists of more than three hundred members from sixteen member states throughout the Western United States. Its mission is to assist sheriffs and their offices with federal and state legislative issues, address policy and procedural matters, and work together to keep the office of sheriff strong.

California Correctional Peace Officers' Association

The California Correctional Peace Officers' Association is the exclusive bargaining representative for approximately 29,253 correctional peace officers employed by the California Department of Corrections and Rehabilitation in their labor relations with the State and represents its members on all matters relating to wage, hours, and other terms and conditions of their employment.

International Law Enforcement Educators and Trainers Association

The International Law Enforcement Educators and Trainers Association is a professional association of 4,000 persons committed to the reduction of law

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief, except for funding expected to be provided by the NRA Freedom Action Foundation. All parties have

enforcement risk and to saving lives of police officers and the general citizenry through the provision of training enhancements for criminal justice practitioners.

California Reserve Police Officers Association

The California Reserve Peace Officers Association (“CRPOA”) was founded in 1974 for the purpose of raising the professional, educational and employment standards of California reserve peace officers. CRPOA members dedicate their time to community service by working as part-time employees with law enforcement agencies both on a compensated and non-compensated basis. These officers work with full-time regular officers to provide law enforcement services at the city, county, district, and State levels, including uniformed patrol, investigations, undercover and vice operations, and search and rescue. Approximately 600 law enforcement agencies currently employ more than 5,000 reserve law enforcement officers in California.

Law Enforcement Legal Defense Fund

The Law Enforcement Legal Defense Fund is a non-profit organization headquartered in Alexandria, Virginia, that provides legal assistance to law enforcement officers. It has aided nearly one hundred officers, many of whom have been acquitted, mostly in cases where officers have faced legal action for otherwise authorized and legal activity in the line of duty.

consented to the filing of this brief.

National Association of Police Organizations

The National Association of Police Organizations (“NAPO”) is a coalition of police unions and associations from across the United States. NAPO advances the interests of America’s law enforcement officers. Founded in 1978, it is the strongest unified voice supporting law enforcement in the country. It represents over 1,000 police units and associations, over 241,000 sworn law enforcement officers, and more than 100,000 citizens who share a common dedication to fair and effective law enforcement. NAPO often appears as *amicus curiae* in cases of special importance on behalf of law enforcement officers to protect officers’ legal and constitutional rights.

SUMMARY OF ARGUMENT

Appellant District of Columbia argues on this appeal that plaintiffs failed to establish that they have the government-issued identifications required under LEOSA and that without those identifications they have no right to carry under LEOSA that is enforceable under 42 U.S.C. § 1983.

That argument is erroneous because this issue was essentially decided by the Court in *Duberry I*. That opinion held that LEOSA was intended to benefit individuals such as the plaintiffs, and that under prevailing Supreme Court authority regarding § 1983 plaintiffs had a substantive right to carry as qualified retired law enforcement officers. LEOSA imposes a mandatory duty on the States to recognize that right, and

preempts all state and local laws to the contrary. It does not afford discretion to the District of Columbia to redefine who is a qualified law enforcement officer or who is eligible for the LEOSA right.

In *Duberry I*, the Court distinguished sharply between an enforceable LEOSA right under 42 U.S.C. § 1983, and mere preconditions to the exercise of the right. It specifically held that the firearms certification requirement in 18 U.S.C. § 926C is merely a precondition to exercise of the LEOSA right to carry and does not affect the underlying LEOSA right itself. The photo identification requirement must be treated the same way as the firearms certification requirement, both logically and based on the structure of the statute. The LEOSA right is based on historical facts about the law enforcement officer's service and powers of arrest, and not on the content of a particular piece of paper.

Congress intended to create a robust, uniform right under LEOSA. It resoundingly defeated attempts to water down the bill by allowing states to opt out, or by allowing states or localities to elevate their local policies and procedures over the rights defined in LEOSA. Instead, LEOSA preempts any State or local laws to the contrary. In that form, it passed by large bipartisan majorities in both the House and Senate.

As law enforcement officers and groups representing law enforcement, *amici*

know that armed, off-duty and retired law enforcement officers save lives, apprehend criminals, and otherwise contribute to the safety of the public. Numerous instances of such actions are recounted in Part III of this brief.

Similarly, off-duty and retired law enforcement officers face threats and violence, sometimes fatal, from criminals who target them. All three of the plaintiffs have faced such threats, and one was shot at repeatedly in back of his home. Testimony during hearings on LEOSA's adoption shows that Congress was well aware of such threats. The dangers faced by both off-duty and retired officers are documented in Part IV of this brief.

ARGUMENT

In its opening brief, the District states that the issue on this appeal is whether the trial court should have granted summary judgment to it rather than to plaintiffs because the plaintiffs allegedly “failed to establish that they have the requisite government-issued identifications required under LEOSA and, without those identifications, they (1) have no right to carry under LEOSA that is enforceable in a Section 1983 action; and, in any event, (2) failed to establish a causal connection between the District’s denial of the employment certification and their inability to qualify to carry a firearm under LEOSA.” District’s Opening Brief 1-2.

The short answers to these two contentions are: (1) that this Court already

essentially addressed the first part of the issue in the prior appeal in this matter, *Duberry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016) (“*Duberry I*”); and (2) that the second part of the issue was not properly raised in the District Court and is therefore waived on appeal, but even if it were to be considered, it is incorrect.² In fact, the District has done everything its power to try to prevent plaintiffs from exercising their LEOSA rights recognized by this Court in *Duberry I*. In addition to compromising plaintiffs’ own safety, the District’s actions and arguments defy the clear intent of Congress. *Amici*, as groups composed of or representing law enforcement officers, therefore additionally demonstrate in this brief that the potential inability for law enforcement officers to carry concealed nationwide will diminish public safety, endanger off-duty and retired officers, and cost lives.

I. THIS APPEAL IS LARGELY AN ATTEMPT TO REARGUE ISSUES THAT WERE CLEARLY AND CORRECTLY DECIDED IN *DUBERRY I*.

The *Duberry I* decision by this Court correctly, clearly, and straightforwardly applied the terms of LEOSA, 18 U.S.C. §§ 926B, 926C, to the legal challenge brought by plaintiffs against the District. JA 34-44. The D.C. Department of Corrections, as

² *Amici* do not address the causation issue, except to note the irony of the District’s position. The District argues that the identification cards issued by the District itself are insufficient to satisfy LEOSA standards, and then argues that the District has not caused the deprivation of LEOSA rights of which plaintiffs complain.

plaintiffs' former employer, had refused to accurately fill out certain forms certifying the historical fact that plaintiffs had been employed by the Department of Corrections as law enforcement officers. The grounds for denial were that “[c]orrectional officers do not meet the full criteria and definition required by LEOSA because D.C. law gave correctional officers neither law enforcement status nor arrest authority.” JA 36. (internal quotation marks omitted). Because of the District’s refusal to include accurate information in those forms, plaintiffs could not obtain a firearms certification, described in 18 U.S.C. § 926C(d)(2)(B), necessary for them to actually carry firearms concealed.

On this Court’s *de novo* review of the District Court’s dismissal of the complaint, *Duberry I* held, among other things, that:

The “LEOSA right is not limited to former police officers” but, contrary to the District’s contentions, includes correctional officers who “engage[d] in ... the incarceration of any person for [] any violation of law.” JA 38. Consequently, that obstacle thrown up by the District has been resolved and is no longer present as an issue on this appeal.

Contrary to the District’s arguments, *Duberry I* held that plaintiffs as correctional officers possessed “statutory powers of arrest,” thus meeting that portion of the test to be qualified retired law enforcement officers under LEOSA. JA 38. As the

opinion noted, “Only when appellants, as retirees, sought to exercise their concealed carry right under the LEOSA did the District of Columbia change its position.” JA 40. But Congress defined who is a qualified law enforcement officer, and “[a]s Congress deemed the federal right to be of preeminent importance, notwithstanding state laws prohibiting the concealed carry of firearms, it left no discretion for a state to revise the historical record of an individual qualified law enforcement officer.” JA 40. Thus, whether plaintiffs had the power of arrest is not an issue in this appeal.

Further, *Duberry I* held that there is no requirement under LEOSA, as the District asserted, that prior to retiring a law enforcement officer’s job required carrying a firearm in order to be a “qualified retired law enforcement officer.”³ JA 38. That, too, is no longer an issue.

Instead, the District’s principal argument is that plaintiffs’ photo identification cards allegedly do not meet the standards set forth in 18 U.S.C. § 926C(d). But, as the trial court determined on remand, and as plaintiffs argue here, that argument is irrelevant.⁴

³ Much less is there a requirement, as the District contended in the District Court on remand, that only those days on which the officer actually carried a firearm count towards LEOSA’s ten years of service requirement; *i.e.*, that the officer must have actually carried for 3650 individual days. That argument was rejected by the District Court, JA 456, and has not been appealed.

⁴ Plaintiffs also argue that the cards they possess are sufficient under LEOSA. *See* Brief

Under the three-part test of *Blessing v. Freestone*, 520 U.S. 329 (1997), this Court found that plaintiffs satisfied the first part of the test, that “Congress...intended that the provision in question benefit the plaintiff.” JA 37. The Court determined that “the text supports appellants’ claim that Congress intended the LEOSA to benefit individuals like them directly.” JA 38. After finding that plaintiffs met all three *Blessing* factors, the opinion concluded that “Taken together, the LEOSA’s plain text, purpose, and context show that Congress intended to create a concrete, individual right to benefit individuals like appellants and that is within “the competence of the judiciary to enforce.” (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)). JA 39.

Thus, LEOSA “provides a substantive right” to carry, as evident from LEOSA’s “categorical preemption of state and local law standing in the way of the LEOSA right to carry.” JA 38. LEOSA “imposes a mandatory duty on the states to recognize the right it establishes.” JA 38. The meaning of the statutory words used by Congress “does not afford discretion to the District of Columbia...to redefine either who are ‘qualified law enforcement officers’ or who is eligible for the LEOSA right.” JA 39.

of Appellees at 7. Various cards were issued at different times with different language. *Amici* will not address these detailed facts because, as noted, they are irrelevant to whether plaintiffs possess an enforceable LEOSA right under 42 U.S.C. § 1983, and thus summary judgment for plaintiffs was proper.

Accordingly, plaintiffs may enforce under 42 U.S.C. § 1983 their LEOSA right to carry concealed. JA 39.

The precise language of the photo identification cards does not determine whether plaintiffs have an enforceable LEOSA right. This Court expressly rejected the theory that Congress intended an “attachment theory” to apply; where appellants would lack the LEOSA right “until they obtain the subsection (d)(2)(B) firearms certification...” JA 39. Instead, there is “no textual indication that Congress contemplated the concealed carry right to be other than as defined in the straightforward text.” *Id. Duberry I* therefore drew a sharp distinction:

In enacting the requirements for “qualified law enforcement officers” to claim this right, Congress gave every signal that it contemplated no state reevaluation or redefinition of federal requirements. ***Consequently, the firearms certification requirement does not define the right itself but is rather a precondition to the exercise of that right.***

Id. (emphasis added).

The photo identification requirement stands exactly on a par with the firearms certification requirement. The structure of the statute reinforces that conclusion. Both are referenced in § 926C(a), and both are defined in § 926C(d). Neither of them defines the LEOSA right, but both are preconditions to its exercise. Indeed, in *Duberry I* this Court treated the photo identification requirement as being on the same level as the firearms certification requirement when it discussed the anti-commandeering doctrine

of *Printz v. United States*, 521 U.S. 898 (1997). JA 41.

Furthermore, the firearms certification requirement and the photo identification requirement are *mutable* factors, just like the requirements in § 926C(c)(6) and (7). Those sections provide that the individual “(6) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and (7) is not prohibited by Federal law from receiving a firearm.” Both of those can change.⁵ Similarly, whether or not a law enforcement agency issues identification cards satisfactory under LEOSA can change as well. *Amici* represent many hundreds of jurisdictions. They know from experience that identification cards may take different formats; the formats may change over time; procedures and standards for their issuance may change; individuals in authority within a given department will definitely change, and so may their directives regarding LEOSA. But it would be odd to suggest that the underlying LEOSA right of qualified retired law enforcement officers—that can be vindicated by a § 1983 suit—flickers in and out of existence depending on such changeable factors. And, of course, it doesn’t. As this Court made clear, the essential inquiry under LEOSA is historical: separation from service in good standing after ten years of service as a law enforcement officer with power of arrest. That does not vary and is the essence of the right. The

⁵ The disqualifiers for receiving a firearm under federal law are set forth in 18 U.S.C. § 922(g). A brief look at those nine disqualifiers reveals that several of them can change.

contents of photo identification cards and certifications of firearms training may affect whether an individual can actually exercise his or her right to carry at a given time, but those mutable things do not affect the existence of the underlying LEOSA right itself.

In any event, the *Duberry I* opinion concluded that the District has no authority “to revise the statutory definition of ‘qualified retired law enforcement officers’ in a manner to deprive appellants of the right to which they are entitled.” JA 41. Instead, “In preempting state and local law that would interfere with its purpose and intent, 18 U.S.C. § 927..., Congress set the requirements for LEOSA officers in terms of historical facts about the officer’s service and powers of arrest.” *Id.* The District’s attempt to revise the statutory definition of the LEOSA right, by substituting pieces of paper for “the historical facts about the officer’s service and powers of arrest” must necessarily fail.

It goes without saying that these holdings should not be revisited on this appeal under the law of the case doctrine. As the District Court noted on remand:

Under the law-of-the-case doctrine, “a court involved in later phases of a lawsuit should not re-open questions decided . . . by that court or a higher one in earlier phases.” *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16 (1988) (explaining that the law-of-the-case doctrine “posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case”).

JA 451.

II. CONGRESS INTENDED TO CREATE A ROBUST, UNIFORM RIGHT.

In passing LEOSA, Congress intended to create a uniform national standard by which qualified law enforcement officers and qualified retired law enforcement officers could carry concealed firearms in any state. Not only are they permitted to carry concealed firearms, but LEOSA states that they may do so “Notwithstanding any other provision of the law of any State or any political subdivision thereof....” 18 U.S.C. § 926C. The intent of Congress, as expressed in LEOSA’s plain text, must therefore be given effect. It is literally true that the ability of retired and off-duty law enforcement officers to carry concealed can determine whether officers and innocent civilians live or die.

The influence of this Court on developing judicial standards for the implementation of LEOSA is likely to be consequential. As law enforcement officers and organizations, *amici* know that the faithful interpretation of LEOSA’s text and history in *Duberry I*, which should be followed on this appeal, will save lives, prevent injury to law enforcement officers and other law-abiding citizens, and thwart criminal activity. Attempts by any state or local jurisdiction to undermine or eliminate the right, contrary to the intent of Congress, should not be countenanced.

Congress in fact provided a strong and uniform right. In the House Judiciary

Committee, attempts were made to water down the legislation by amendments. One would have allowed States to opt out of LEOSA. H.R. Rep. 108-560, at 6-7. It was heavily defeated in committee by a vote of 11 to 21. Another amendment would have effectively given a veto to all State and local law enforcement agencies, by providing that “the exemption under this law shall not be construed to supersede or limit the rules, regulations, policies, or practices of any State or local law enforcement agency.” *Id.* at 7-8. It, too, was defeated by a vote of 11-21.

This Court in *Duberry I* found that “Congress’s purpose and context of its enactment” provided additional support for the conclusion that LEOSA creates an individual right. JA 39. While the testimony before Congress and other materials it considered will not be reproduced here, this Court stated that “Taken together, the LEOSA’s plain text, purpose, and context show that Congress intended to create a concrete, individual right to benefit individuals like appellants....” JA 39.

As the Executive Director of *amicus* National Association of Police Organizations, William J. Johnson, described in his testimony, “H.R. 218 [LEOSA] currently enjoys strong, strong bipartisan support, as of this morning, I believe 296 cosponsors. Its Senate companion, S. 253, was accepted by the Senate Judiciary 18 to one, and the full Senate considered it as an amendment to other legislation in March of this year. That same language as the House bill contained was overwhelmingly

approved by the Senate 91 to eight.” Law Enforcement Officers Safety Act: Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, 108th Cong., 2d Sess. 29 (2004) (“LEOSA House Hearing”). Although this Court interprets statutes according to their texts, not popularity, this strong bipartisan support does show the importance that Congress placed on the LEOSA rights of law enforcement officers across the nation.

III. ARMED OFF-DUTY AND RETIRED LAW ENFORCEMENT OFFICERS HAVE SAVED LIVES, APPREHENDED CRIMINALS, AND OTHERWISE CONTRIBUTED TO THE SAFETY OF THE PUBLIC.

Off-duty and retired officers frequently save lives and help protect public safety. Such officers themselves are often targeted for criminal attack. Around the time LEOSA was passed, one law enforcement group compiled sixteen such documented incidents, out of the much greater number that occur continually. Fraternal Order of Police, *H.R. 218/S. 253: Off-Duty or Retired, A Police Officer Is Always On Call*.⁶

Following are some recent media reports in which off-duty law enforcement officers intervened to protect public safety:

After a weekend that saw several homicides in St. Louis, Missouri, one of the suspected murderers was arrested and cuffed “within minutes of pulling the trigger all

⁶ <https://www.fop.net/legislative/issues/hr218/retired.pdf>

because an off-duty officer happened to be attending a child's birthday party.” While those attending the party were eating, multiple shots rang out within feet of the house where the party was occurring. Off-duty police officer Ricardo Amezcua, an officer with the nearby city of Northwoods, saw a man with a gun running away. According to police the man, later identified as Romello Thomas, 24, had just shot and killed Kourtney Steed, 27. Off-duty officer Amezcua chased after Thomas, who raised his handgun. Amezcua drew his own handgun and ordered Thomas to drop it. Thomas did, and Amezcua was waiting with the handcuffed Thomas when St. Louis police arrived. Thomas was charged with first-degree murder, armed criminal action, unlawful use and possession of a firearm, theft of a firearm and resisting arrest. Rico Bush, *Off-duty police officer catches murder suspect minutes after deadly shooting*, KSDK (Dec. 23, 2018);⁷ Chris Regnier, *Off-duty officer chases down suspect in southside homicide*, FOX 2 NEWS (Dec. 23, 2018)⁸

In North Carolina, armed, off-duty police officer Justin Ryan Matthews of the Fayetteville Police Department intervened in the aftermath of a road rage incident in which a suspect had run another man off the road. In the ensuing altercation, the police

⁷ <https://www.ksdk.com/article/news/off-duty-police-officer-catches-murder-suspect-minutes-after-deadly-shooting/63-aaa3dfff-6b27-4efc-969c-9d51a9baf346>.

⁸ <https://fox2now.com/2018/12/23/off-duty-officer-chases-down-suspect-in-southside-homicide/>.

officer was seriously wounded by being shot in the face by the suspect, but returned fire despite his wounds. After the suspect tried to ram his truck into the vehicles of other law enforcement officers who had by then arrived, the wounded suspect was arrested. WNCN, *Off-duty NC police officer was shot in the face, sheriff's office says* (Oct. 17, 2018).

On January 7, 2019, an off-duty officer of the Clarkston, Georgia, police force, while working a part-time security job, saw a robbery victim in the parking lot of a Red Lobster restaurant. While he was assisting the victim, four people got into a silver Mercedes, opened fire on the officer and victim, and sped off. The off-duty officer returned fire and hit two of the assailants inside the car. When their vehicle crashed, two of the occupants ran off, while the two who were wounded were taken into custody. Chelsea Prince, *UPDATE: Men ID'd after deadly shootout with off-duty officer outside DeKalb restaurant, The Atlanta Journal-Constitution* (Jan. 10, 2019).⁹

Retired officers also intervene to protect public safety, as the following reports show. Again, such instances are too numerous to count, but these examples are illustrative.

At 12:45 a.m. in Worcester, Massachusetts, a 56-year-old retired police officer,

⁹ <https://www.ajc.com/news/crime--law/killed-shootout-with-off-duty-officer-outside-dekalb-restaurant/jvgBP1VpEepKobinBGiDVP/>

Charles Jackson, observed a man dressed entirely in black attempting to break into a car. The retired officer called police, went outside carrying his gun, and approached the man, later identified as 29-year-old Zachary Bailey. Retired officer Jackson told Bailey to get out of his yard. As stated by Jackson and confirmed by a neighbor's eyewitness report, Bailey then assaulted Jackson. Moments later, he produced a handgun from his waistband and fired a shot at Jackson. The retired officer fired back, and Bailey ran off. He was found about 45 minutes later with two gunshot wounds and was treated at a hospital. At arraignment, the prosecutor stated that Bailey had a criminal record ten pages long, with convictions for violent crimes, thefts, and defaults. Gary V. Murray, *Suspect shot by Worcester homeowner, a retired officer, is held on \$10K cash bail*, WORCESTER TELEGRAM & GAZETTE (May 1, 2018).¹⁰

A retired police officer helped capture Jeffrey Todd, 34, who recklessly ran from Sevierville, Tennessee police, to avoid arrest after he was caught shoplifting at the local Wal-Mart. When Todd sped away from the parking lot in his Chevy Malibu, the retired officer gave chase in his private vehicle. The Sevierville police also followed, and after Todd crashed his car into a ditch but then got it going again, both the on-duty officer and the retired officer arrived separately at the front of a house that Todd had

¹⁰ <https://www.telegram.com/news/20180501/suspect-shot-by-worcester-homeowner-retired-officer-is-held-on-10k-cash-bail>.

pulled behind. Ignoring commands to stop, Todd drove his car across the front lawn at the retired officer, who fired his handgun three times at the Malibu because he was in fear of being killed by Todd. Todd drove off, ran his car into a camper, drove over several sidewalks and grassy areas, and eventually crashed into a steel gate. He ran away on foot, was captured a short distance away, and was charged with several crimes, including one felony. WATE 6, *Accused Sevierville shoplifter arrested after police chase, retired officer firing shots* (Mar. 26, 2018).¹¹

In a multi-county Colorado crime spree, 29-year-old Austin Benson drove around randomly firing a handgun at people and vehicles with people in them. Among others, he shot at a man who had been camping in the area with his wife and grandchildren. He also shot at a car with a family in it. Fortunately, no one was hit. A retired officer from Alabama was camping in the area with his wife when he heard a man yelling. He went to take a look, and encountered Benson who pointed a rifle at the retired officer, telling him to go get water and that the law was after him. The retired officer went into his camper, gave his wife a handgun, and retrieved an AR-15 rifle.¹² Exiting his camper he ordered Benson to drop his weapon, but Benson began to drive

¹¹ <https://www.wate.com/news/local-news/accused-sevierville-shoplifter-arrested-after-police-chase-retired-officer-firing-shots/1080398397>.

¹² Although this incident involved the use of a long gun, not a concealed handgun, by a retired officer, it illustrates the valuable role played by trained, armed, retired law

away and started shooting at the retired officer and the camper. The officer returned fire, and Benson crashed into a tree. At that point, local law enforcement arrived. Benson had been wounded in the face and arm by the retired officer. He was arrested and charged with six counts of attempted first-degree murder as well as one count of attempted aggravated robbery. Allison Sylte, *Retired officer used 2 AR-15s to stop man accused of firing at random people*, KUSA (Jul. 9 2018).¹³

Amici are aware that off-duty and retired officers frequently assist active, on-duty law enforcement. For them to do so effectively, and with less risk to their own lives, they often need to be carrying concealed, as a proper interpretation of LEOSA permits them to do.

IV. OFF-DUTY AND RETIRED LAW ENFORCEMENT OFFICERS FACE THREATS AND VIOLENCE, SOMETIMES FATAL, FROM CRIMINALS WHO TARGET THEM.

In addition to protecting public safety, off-duty and retired law enforcement officers may also need to be able to carry under LEOSA for their own personal protection. All three plaintiffs testified to threats and/or attacks against them due to their work as correctional officers. Plaintiff Curtis testified in his deposition:

enforcement officers in protecting innocent human life.

¹³ <https://www.9news.com/article/news/crime/retired-officer-used-2-ar-15s-to-stop-man-accused-of-firing-at-random-people/73-572102809>.

Inmates were constantly threatening me verbally during my time working at the Department. Mostly it didn't bother me, but sometimes inmates would get very detailed, talking about how exactly they were going to kill and torture me, and how they were going to track me down when they got out of the institutions and kill me and my family. A group of inmates at Central facility maintained a "hit list" of officers they wanted to exact revenge on, that we found during one shakedown. I was on the list, with several stars by my name. Thankfully during my time as an active DCDC officer I was able to carry a gun so that I could protect myself and my family.

JA 160. Officer Curtis testified to further threats by prisoners who had been released, including one whom he identified by name as Thomas Edwards. JA 161. While an inmate, Edwards had assaulted Officer Curtis. After Edwards' release, Officer Curtis encountered Edwards and several other ex-convicts at an Exxon station. JA 161, 312. Edwards "became enraged and threatened to kill me." JA 161. "He made a move and I went for my weapon, and the guys took him out of there." JA 313.

Officer Duberry also testified in his deposition that he was:

the recipient of countless verbal threats from inmates over the years. Sometimes the inmates would use graphic descriptions of the kind of violence they intended to or wished to use against me. A common threat was hearing from an inmate that once he was released, he was going to track me down, find out where I lived, and kill me and my family.... It was comforting that at least during my time as a full-time employee, I knew I was authorized under the law to carry a weapon to protect myself and my family, and that's what I did.

JA 167. Officer Duberry further described threats and menacing behavior directed toward him by inmates after their release. *Id.*

Being a corrections officer can be dangerous both on and off the job, and before and after retirement. Officer Smith described an incident “when I was shaking down an inmate and had liquid PCP thrown in my eyes. I had to go to the hospital and stay for several days because both my eyes were bandaged up.” JA 174. Officer Smith stated that he:

was threatened verbally by inmates almost every day. Some of the threats were really gruesome, and inmates often told me they were going to hire somebody on the outside to knock me off, or that they would kill me themselves when they were finally released.

Id.

In one instance, Officer Smith was shot at multiple times in the alley behind his house while taking out trash one night:

I was watching football and I went outside. And I was going to the trash dumpster. And some individual came up the alley. It was dark. And they indicated shouting, “Yeah, you'd better have your damn vest on.” The next thing you know it was just gunfire.

JA 264. Officer Smith stated that the shout about the vest proved “to me that he knew who I was.” JA 175. He called the police, and officers from Precinct 7D responded, but the individual was never identified. JA 264-65, 266-67.

Testimony during hearings on LEOSA amply demonstrated the threats faced daily by law enforcement officers from criminals. In his testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, the Executive

Director of *amicus* National Association of Police Organizations described how organized criminal gangs openly plot revenge against individual officers:

A typical example of this comes from the Hempstead, New York Police Department. Officers assigned to the Gang Task Force, comprised of DEA, FBI, ATF and state and local law enforcement, are constantly subjected to stalkings by gangs seeking retribution. Personal car license plate information and the movements of officers and their families are unabashedly observed and recorded by gang members. Threats against officer's lives are constant and do not end when the shift concludes.

LEOSA House Hearing at 30 (Statement of William J. Johnson).

In that hearing, Chuck Canterbury, President of the Fraternal Order of Police, provided a number of examples of officers who had been attacked and killed. LEOSA House Hearing at 36-37. A substantial proportion were cases in which off-duty officers were specifically targeted by criminals for revenge, to prevent them from testifying, or simply because they were law enforcement officers. The following quotes from that testimony provide examples of off-duty officers targeted and killed by criminal attackers:

Detective Charles Edward Harris, a twenty-year veteran with the Southern Pines Police Department in North Carolina... was targeted after drug dealers spotted him attending a "crime watch" meeting at an apartment complex. His killers waited until he was at home and off-duty, then rang his doorbell. Detective Harris was shot and killed. His wife, who was also home at the time, was also hit....

Detective Thomas G. Newman, a twelve-year veteran of the Baltimore City Police Department in Maryland had been shot and wounded while

off-duty in 2001. He testified against his assailant, who was sentenced to thirty years in prison. On 23 November 2002, Detective Newman was shot to death by three suspects—friends and relatives of the criminal that Detective Newman had sent to jail—in an act of criminal retaliation....

Officer Shynelle Marie Mason, a two-year veteran with the Detroit, Michigan Police Department was shot and killed on 14 July 2000 by a man she had previously arrested for carrying a concealed weapon. She encountered the man while off-duty; he confronted her and shot her several times in the chest.

Correctional Officer Leslie John Besci, a sixteen-year veteran with the North Carolina Department of Corrections was beaten to death with a baseball bat in an unprovoked attack. The officer had just returned from work when he was attacked by two former inmates of the prison where he worked....

Officer Ralph Dols, a three-year veteran of the New York City Police Department was off-duty when he was ambushed in front of his home. He was attacked by three men, who shot him a total of six times. The investigation into the officer's murder suggests that the killing was in retaliation for the officer's identification of suspects in a robbery who may have had some connection to organized crime....

Officer Ronald Levert Richardson served nine years with the District of Columbia Department of Corrections. He was shot and killed outside his home by suspects seeking to prevent him from testifying at a drug trial.

Officer Oliver Wendell Smith, Jr., of the Metropolitan Police Department in Washington, D.C. was off-duty when he was robbed at gunpoint. Upon discovering the victim was a police officer, the robbers shot and killed him.

The problem, of course, persists, though law enforcement officers—when they are not denied their right to carry under LEOSA—are better able to resist criminal attacks.

Retired law enforcement officers, and not just off-duty officers, also have a need to carry to protect themselves. A few examples will illustrate.

In July 2009, retired Miami police captain Robert Yee, a decorated officer, was executed assassination-style at the Miami River marina where he worked. Although investigators may never know who ordered his killing, in 2016 a jury convicted Rafael Toirac-Aguilera of New Jersey of pulling the trigger. Toirac-Aguilera's girlfriend testified she rode with him to Florida from New Jersey in a rented silver Toyota Corolla, where he was to do some unspecified "work." Evidence showed that the killer drove a silver car up near Yee, who often rode around the marina grounds on a golf cart, and shot him. An orange juice bottle that had been used as a makeshift silencer was found near his body, and had fingerprints and DNA on it that matched Toirac-Aguilera's. Prosecutors believed that someone sent the killer because Yee may have been providing authorities with information about illegal activities at the marina. Yee was a 25-year police department veteran who retired in the mid-1990s. David Ovalle,

Jurors convict Jersey man in murder of ex-Miami police captain, MIAMI HERALD (Mar. 23, 2016).¹⁴

Often, retired law enforcement officers will have a greater need to be armed because they have been trained, generally for decades, to prevent or stop crime, and to save innocent life. They frequently will intervene in dangerous situations from which ordinary citizens might back away. For example, in New Jersey, fifty-one-year-old retired Millville Police Officer Carmen DeGregorio was killed after he intervened in a domestic dispute at a local Wawa. According to a press report:

Police said 30 year-old Christopher Robinson was forcing his girlfriend into the trunk of his car. DeGregorio scuffled with Robinson and got the [woman] out.

Robinson then allegedly got back into the car, hit the gas and plowed into DeGregorio, causing the devastating injuries that resulted in his death.

Nora Muchanic, *Retired officer killed saving someone else*, WPVI-TV (Dec. 1, 2007).¹⁵

Had retired officer DeGregorio been armed, he might have been able to take control of the situation without fatal risk to himself.

Similarly, in New York, retired Greenburgh police officer Peter Schmidt was out walking when he saw two people exiting a house that he knew to be unoccupied. “The

¹⁴<https://www.miamiherald.com/news/local/community/miami-dade/article67745502.html>.

¹⁵ <https://6abc.com/archive/5805187/>.

officer, who retired 10 years ago, confronted the apparent burglars and one of the suspects shot the officer in the arm and torso after a brief conversation.” Checkey Beckford, *Retired Police Officer Shot in Westchester County; Son Helps Nab Suspects*, NBC 4 (Jul. 13, 2015).¹⁶ Schmidt’s son, a police officer who was not working at the time, managed to get the license plate number of the suspects’ vehicle as it departed. The suspects were apprehended shortly thereafter, and Schmidt was expected to recover. *Id.* Again, had Schmidt been carrying concealed, he might have avoided being shot twice.

Attacks on off-duty or retired law enforcement officers will generally make the news only when the attacks are fatal or result in serious injuries to the officer. Threats, no matter how serious, will virtually never be reported. But law enforcement officers know from experience that they function in a hostile environment in which they encounter many violent individuals who wish them ill, and who will harm them or their loved ones if given the opportunity. Allowing all qualified off-duty and retired law enforcement officers to avail themselves of the right to effectively protect themselves and the public, without artificial barriers being thrown up by local jurisdictions, will surely save lives.

¹⁶ <https://www.nbcnewyork.com/news/local/greenburgh-police-shooting-cop-shot-westchester-police-314686691.html>

CONCLUSION

For the reasons stated above, the District Court's judgment should be affirmed.

Respectfully submitted,

/s/ Dan M. Peterson

Dan M. Peterson

Dan M. Peterson PLLC

3925 Chain Bridge Road, Suite 403

Fairfax, Virginia 22030

(703) 352-7276

dan@danpetersonlaw.com

Counsel for *Amici Curiae*

Date: January 18, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief *Amici Curiae* of the Western States Sheriffs' Association *et al.* complies with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure. According to the word count feature of the word-processing system used to prepare the brief, it contains 6,357 words, exclusive of those matters that may be omitted under Rule 32(a)(7)(B)(iii).

I further certify that the attached brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). It was prepared in a proportionately spaced typeface using 14-point Times New Roman font in Microsoft Word.

/s/ Dan M. Peterson
Dan M. Peterson

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2019, an electronic PDF of the foregoing Brief *Amici Curiae* of the Western States Sheriffs' Association *et al.* was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

/s/ Dan M. Peterson
Dan M. Peterson