No. 20-

IN THE

Supreme Court of the United States

NORRIS PAUL CAREY, JR.,

Petitioner,

v.

DEPUTY SECRETARY JOANNE THROWE, CAPTAIN EDWARD JOHNSON, CAPTAIN CHARLES VERNON AND SUPERINTENDENT ROBERT K. ZIEGLER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a reported opinion, the Fourth Circuit affirmed the district court's dismissal of claims brought by Norris Paul Carey, Jr., a retired twenty-six-year veteran with the Maryland Natural Resources Police ("MNRP"). Mr. Carey filed suit against state officials to vindicate his rights to carry a concealed weapon as a qualified retired law enforcement officer pursuant the Law Enforcement Officer's Safety Act, 18 U.S.C. § 926C ("LEOSA"), and to free speech on First Amendment grounds.

The Fourth Circuit's holding on Mr. Carey's LEOSA claim directly conflicts with *DuBerry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016), a decision joined by then Judge Brett M. Kavanaugh, and effectively denies Mr. Carey his statutorily granted right to carry a concealed weapon. The appellate court's decision on Mr. Carey's First Amendment claim runs contrary to established precedent that a public employee who uses social media to comment on a fellow police officer's character inconsistent with public service is a matter of public concern.

Two questions are presented:

1. Does a qualified retired law enforcement officer who meets the statutory requirements to carry a weapon under LEOSA have an enforceable right under Section 1983?

2. Do social media posts "outing" a police officer's misogynistic behavior and his making light of gun violence and gun control, raise an issue of public concern as a matter of law?

PARTIES TO THE PROCEEDING

The parties to the proceeding below included Mr. Carey, and Respondents Maryland Department of Natural Resources ("MDNR") Deputy Secretary Joanne Throwe; MNRP Captain Edward Johnson; MNRP Captain Charles Vernon; and MNRP Superintendent Robert K. Ziegler.

RELATED PROCEEDINGS

Norris Paul Carey, Jr. v. Deputy Secretary Joanne Throwe, et al., U.S. Court of Appeals for the Fourth Circuit, No. 19-1194. Judgment entered April 30, 2020.

Norris Paul Carey, Jr. v. Joanne Throwe, et al., U.S. District Court for the District of Maryland, Case No. 1:18-cv-00162-GLR. Judgment entered Jan. 31, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Carey petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The reported opinion of the Fourth Circuit, styled *Norris Paul Carey, Jr. v. Deputy Secretary Joanne Throwe, et al*, 957 F.3d 468 (4th Cir. 2020), affirms the United States District Court for the District of Maryland's dismissal in favor of Respondents in *Carey v. Throwe*, No. GLR-18-162, 2019 WL 414873 (D. Md. Jan. 31, 2019). Both of the opinions are reproduced in the Appendix.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fourth Circuit's opinion was issued April 30, 2020. Pursuant to this Court's March 19, 2020 Order, the deadline to file any petition for writ of certiorari due on or after the date of the Order was extended to 150 days from the date of the Fourth Circuit's decision and, consequently, the filing of this petition is timely.

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254 – Courts of appeals; certiorari; certified questions

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

42 U.S.C. § 1983 – Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

18 U.S.C. § 926C – Carrying of concealed firearms by qualified retired law enforcement officers.

(a) 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).

(b) This section shall not be construed to supersede or limit the laws of any State that--

(1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or

(2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

(c) As used in this section, the term "qualified retired law enforcement officer" means an individual who--

(1) separated from service in good standing from service with a public agency as a law enforcement officer;

(2) before such separation, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest or apprehension under section 807(b) of title 10, United States Code (article 7(b) of the Uniform Code of Military Justice);

(3)(A) before such separation, served as a law enforcement officer for an aggregate of 10 years or more; or

(B) separated from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency;

(4) during the most recent 12-month period, has met, at the expense of the individual, the standards for qualification in firearms training for active law enforcement officers, as determined by the former agency of the individual, the State in which the individual resides or, if the State has not established such standards, either a law enforcement agency within the State in which the individual resides or the standards used by a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State;

(5)(A) has not been officially found by a qualified medical professional employed by the agency to be unqualified for reasons relating to mental health and as a result of this finding will not be issued the photographic identification as described in subsection (d)(1); or

(B) has not entered into an agreement with the agency from which the individual is separating from service in which that individual acknowledges he or she is not qualified under this section for reasons relating to mental health and for those reasons will not receive or accept the photographic identification as described in subsection (d)(1);

(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.

(d) The identification required by this subsection is--

(1) a photographic identification issued by the agency from which the individual separated from service as a law enforcement officer that identifies the person as having been employed as a police officer or law enforcement officer and indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the active duty standards for qualification in firearms training as established by the agency to carry a firearm of the same type as the concealed firearm; or

(2)(A) a photographic identification issued by the agency from which the individual separated from service as a law enforcement officer that identifies the person as having been employed as a police officer or law enforcement officer; and

(B) a certification issued by the State in which the individual resides or by a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State that indicates that the individual has, not less than 1 year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the State or a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State to have met--

(I) the active duty standards for qualification in firearms training, as established by the State, to carry a firearm of the same type as the concealed firearm; or

(II) if the State has not established such standards, standards set by any law enforcement agency within that State to carry a firearm of the same type as the concealed firearm.

(e) As used in this section--

(1) the term "firearm"--

(A) except as provided in this paragraph, has the same meaning as in section 921 of this title;

(B) includes ammunition not expressly prohibited by Federal law or subject to the provisions of the National Firearms Act; and

(C) does not include--

(i) any machinegun (as defined in section 5845 of the National Firearms Act);

(ii) any firearm silencer (as defined in section 921 of this title); and

(iii) any destructive device (as defined in section 921 of this title); and

(2) the term "service with a public agency as a law enforcement officer" includes service as a law enforcement officer of the Amtrak Police Department, service as a law enforcement officer of the Federal Reserve, or service as a law enforcement or police officer of the executive branch of the Federal Government.

STATEMENT OF THE CASE

Mr. Carey served twenty-six years as an officer with MNRP, a position wherein he had arrest powers. According to the Maryland Police Training Commission, he retired in good standing, and he received appropriate fire arm training. Two years after retiring from MNRP, Mr. Carey was rehired in a civilian position by MDNR, the same agency under which MNRP operates. He was fired from MDNR two years later; just prior to his termination, Mr. Carey applied to MNRP to carry a firearm under LEOSA. MNRP approved Mr. Carey's application and issued him a card ("LEOSA card") showing he was qualified to carry a semi-automatic weapon.

Shortly after Mr. Carey received his LEOSA card, Captain Vernon contacted Mr. Carey and his superiors at MDNR falsely claiming Mr. Carey had not retired in good standing and was committing a "fraud" by continuing to carry a LEOSA card and concealed weapon. Captain Vernon's demands Mr. Carey surrender his LEOSA card ultimately culminated in Mr. Carey's termination from MDNR, which was communicated to Mr. Carey by the Deputy Secretary herself.

Mr. Carey promptly brought suit under 42 U.S.C. §1983 contending Captain Vernon and Superintendent Ziegler, acting under color of state law, had obstructed and ultimately deprived him of his right to carry a concealed weapon pursuant to LEOSA. Mr. Carey further alleged his LEOSA card had been revoked in retaliation for two posts believed to have been made by Mr. Carey on a local blog popular with first responders about Captain Johnson. Mr. Carey did in fact make the posts hoping to alert MNRP that one of their own was engaging in behavior contrary to its Code of Conduct and Agency Values.

Mr. Carey timely filed his Complaint with the United States District Court for the District of Maryland. Relevant to this petition, Mr. Carey sued Superintendent Ziegler and Captain Vernon for the violation of his rights granted by LEOSA and sued Deputy Secretary Throwe; Captain Johnson; and Captain Vernon for First Amendment retaliation. Respondents moved to dismiss Mr. Carey's claims, or, in the alternative, moved for summary judgment. The district court declined to treat Respondents' dispositive motion as a motion for summary judgment, and dismissed Mr. Carey's claims.

The Fourth Circuit affirmed the decision of the district court. In doing so, the appellate court misread the pertinent provision of LEOSA, which states "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 …" 18 U.S.C. § 926C (emphasis added). The Court interpreted the statutory language as conferring discretion upon the government to permit a qualified individual to carry a firearm, which is contrary to the plain meaning of the statute and, therefore, contrary to fundamental principles of statutory construction, which require, in the first instance, statutory language be given its plain meaning. The Fourth Circuit's conclusion that

§ 1983 is not an available private remedy for purported violations of LEOSA directly conflicts with *DuBerry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016), a decision joined by then-Judge Kavanaugh. The Fourth Circuit dismissed Mr. Carey's First Amendment claim holding Mr. Carey's speech "calling out" a MNRP officer's conduct contrary to the Agency' Code of Conduct and Agency's Value on a popular blog was not a matter of public concern. This petition followed because the Fourth Circuit's decision is in conflict with decisions of other federal courts on the same important matters.

REASONS FOR ALLOWANCE OF THE WRIT

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT BETWEEN CIRCUITS CONCERNING WHETHER LEOSA CREATES AN ENFORCEABLE RIGHT UNDER § 1983 AS A MATTER OF LAW

A. The Fourth Circuit Holding Conflicts With The D.C. Circuit Holding That LEOSA Does Not Create An Enforceable Right Under § 1983.

Before the case *sub judice*, the Fourth Circuit had not addressed whether LEOSA creates a federal right that is enforceable under § 1983. However, the Court of Appeals for the District of Columbia in *DuBerry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016) had addressed the issue and held LEOSA creates a federal right enforceable under § 1983. By holding LEOSA does not create an enforceable right under § 1983, the Fourth Circuit's decision is squarely in conflict with that of the Court of Appeals for the District of Columbia.

The importance of Supreme Court resolution of this conflict is not limited to Mr. Carey's case. Whether § 1983 is an available private remedy for violations of LEOSA is also at issue in *Burban v. City of Neptune Beach, Fla.*, 920 F.3d 1274 (11th Cir. 2019). There, the Court held LEOSA did not create a right to the issuance of LEOSA-compliant identification that could be enforced under § 1983. Supreme Court review is necessary to reconcile these conflicting holdings.

B. The Plain Text And Legislative History Of LEOSA Unambiguously Imposes A Binding Obligation On The States Using Mandatory, Rather Than Precatory Terms.

To state a claim under § 1983, a plaintiff "must assert the violation of a federal right, not merely a violation of federal law." *Tankersley v. Almand*, 837 F.3d 390, 404 (4th Cir. 2016). Courts consider the following three factors when determining whether a statutory provision creates a federal right. *Id.* at 340. "First, Congress must have intended that the provision in question benefit the plaintiff." *Id.* "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." *Id*. "Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Id*.

The dispute arises from the Fourth Circuit's interpretation of the third factor, namely, whether Congress unambiguously conferred a private right of action under LEOSA.[1] The Fourth Circuit's conclusion that it did not cannot be reconciled with either the plain text of the statute nor its legislative history.

"LEOSA imposes a mandatory duty on the states to recognize the right it establishes." *DuBerry,* 824 F.3d at 1053. The statute provides more than a mere "congressional preference for a certain kind of conduct" but rather "provides a substantive right." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509-10 (1990) (internal quotations omitted). This is made clear by the categorical preemption of state and local law standing in the way of the LEOSA right to carry concealed, and the nature of the ministerial inquiries into the historical facts in the officer's employment records and statutory powers of arrest, and into the objective firearms standard for active duty officers. *DuBerry*, 824 F.3d at 1053.

In dismissing Mr. Carey's LEOSA claim, both the district court and the Fourth Circuit misread the provision of statute that reads "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…" 18 U.S.C. §926C (emphasis added). The Fourth Circuit rests its decision almost entirely upon the word "may," which it claims to confer discretion upon the government to permit a qualified law enforcement officer to carry a firearm.

The Fourth Circuit's strained interpretation of the statutory language is contrary to the plain meaning of LEOSA and is therefore contrary to fundamental principles of statutory construction, which require, in the first instance, that the statutory language be given its plain meaning. The Fourth Circuit's emphasis on the word "may" is fundamentally misplaced because the discretion to carry a firearm is left to the qualified retired law enforcement officer, ***not*** the state. So long as the individual is a "qualified retired law enforcement officer who is carrying the [required] identification," he or she has the discretion to carry a concealed weapon. There is no discretion for the state to deny a qualified retired law enforcement officer the right to carry a concealed weapon.

Furthermore, the ordinary meaning of the words used by Congress does not afford discretion to any state (including the state of Maryland) to redefine either who are "qualified retired law enforcement officers" or who is eligible for the LEOSA right.

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1 The first two factors of this analysis are not in dispute and at every stage of the proceedings have been found to weigh in favor of Mr. Carey.

DuBerry, 824 F.3d at 1053. Instead, the text unambiguously describes the qualifying criteria and then confers upon the specific group of individuals who meet them a concrete right the deprivation of which is presumptively remediable under § 1983. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989).

The conclusion that LEOSA creates an individual right to carry finds additional support in Congress's avowed intentions in enacting the statute. *See* 150 Cong. Rec. S7772-05, 150 Cong. Rec. S7772-05, S7773, 2004 WL 1515732. The legislative history establishes that Congress's purpose was to afford qualified retired law enforcement officers a means of protection for both themselves and their families and, as an added benefit, to provide additional safety for the communities where the officers live and visit. *See* 150 Cong. Rec. S7301–02 (daily ed. June 23, 2004) (statement of Sen. Leahy); 150 Cong. Rec. H4812–13 (daily ed. June 23, 2004) (statement of Rep. Coble); *see also* Report of the Senate Judiciary Committee, regarding S. 253, S. Rep. No. 108-29, at 4 (2003); H.R. Rep. No. 108-560, at 4; 150 Cong. Rec. E1231 (extension of remarks, June 24, 2004) (statement of Rep. Cunningham).

Significantly, Congress enacted the statute despite strong dissenting views. *See* 150 Cong. Rec. H4813 (daily ed. June 23, 2004) (statement of Rep. Scott); 150 Cong. Rec. S1624–25 (daily ed. Feb. 26, 2004) (statement of Sen. Dodd). The dissenting statements filed with the Senate and House Judiciary Committees raised objections to the concealed-carry legislation based primarily on the principles of federalism, the states' traditional police powers, and practical concerns about the potential disruption of the efforts by state and local law enforcement to control firearms within their jurisdictions. *See* S. Rep. No. 108-29, at 12–13 (dissenting statement of Sen. Kennedy); H.R. Rep. No. 108-560, at 22–23, 79 (dissenting statement of Rep. Sensenbrenner & Rep. Flake).

Taken together, LEOSA's plain text and legislative history make clear Congress intended to create a concrete, individual right to benefit qualified retired law enforcement officers like Mr. Carey that is within "the competence of the judiciary to enforce." *See Golden State*, 493 U.S. at 106.

C. The Fourth Circuit's Holding That § 1983 Is Not An Available Private Remedy For Violations Of LEOSA Conflicts With The Presumption In Favor Of Reading § 1983 Liberally.

The statutory language of § 1983 speaks to the deprivations of "***any*** rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (emphasis added.) Accordingly, this Court has "repeatedly held that the coverage of [§ 1983] must be broadly construed." *Golden State*, 493 U.S. at 105 (1989). The legislative history stresses that, as a remedial statute, it should be "'liberally and beneficently construed.'" *Monell v. New York City Dept. of Social Services*, 436 U.S.

658, 684 (1978) (quoting Rep. Shellabarger, Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)).

II. REVIEW IS WARRANTED TO ESTABLISH THE IMPACT OF THE ANTICOMMANDEERING DOCTRINE ON LEOSA

The Fourth Circuit's decision claimed Mr. Carey's "interpretation of LEOSA presents an inescapable and fatal anticommandeering problem." *Carey v. Throwe*, 957 F.3d 468, 481 (4th Cir. 2020). This holding raises an issue of first impression that is central to understanding how the anticommandeering doctrine applies to LEOSA. Namely, does Mr. Carey's interpretation of the statute require Congress to directly compel states to enact and enforce a federal regulatory program? Furthermore, does the Fourth Circuit's own interpretation of the anticommandeering doctrine render LEOSA unenforceable?

Under the anticommandeering doctrine, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)). Despite the Fourth Circuit's assertions, Mr. Carey's interpretation of LEOSA does not directly compel state action nor does it find a federal regulatory program within the statute's text.

A. Mr. Carey's Interpretation of LEOSA Does Not Require Congress To "Directly Compel" State Action.

For the anticommandeering doctrine to be invoked and render LEOSA unconstitutional, LEOSA would need to be interpreted to "directly compel" the states to take action, as this Court has held "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997).

At issue are the passages in LEOSA concerning photo identification cards:

> **(d)** The identification required by this subsection - -
>
> **(1)** a photographic identification issued by the agency from which the individual separated from service as a law enforcement officer that identifies the person as having been employed as a police officer or law enforcement officer and indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet

> the active duty standards for qualification in firearms training as established by the agency to carry a firearm of the same type as the concealed firearm; or
>
> **(2)(A)** a photographic identification issued by the agency from which the individual separated from service as a law enforcement officer that identifies the person as having been employed as a police officer or law enforcement officer; and
>
> **(B)** a certification issued by the State in which the individual resides or by a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State that indicates that the individual has, not less than 1 year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the State or a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State to have met—
>
> **(I)** the active duty standards for qualification in firearms training, as established by the State, to carry a firearm of the same type as the concealed firearm; or
>
> **(II)** if the State has not established such standards, standards set by any law enforcement agency within that State to carry a firearm of the same type as the concealed firearm.

18 U.S.C.A. § 926C(d).

In subsection (d), Congress did not demand the states take affirmative action and, consequently, does not run afoul of the anticommandeering doctrine. This Court's decision in *Hodel v. Virginia Surface Min. & Reclamation Ass'n,* 452 U.S. 264 (1981) is instructive on this issue. In *Hodel*, this Court upheld the Surface Mining Control and Reclamation Act of 1977 because it did not "commandeer" the States into regulating mining. The Court found that "the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government." *Hodel*, 452 at 288.

Critically, Mr. Carey does not ask the Court to compel the state of Maryland to provide him with the photographic identification described in subsection (d)(1) & (2)(A). According to Mr. Carey's complaint, Maryland, through its agents, is already voluntarily enforcing the provisions of LEOSA. Simply put, Mr. Carey does not need

Congress or the Courts to force Maryland to act because it is already willingly doing so. Instead, Mr. Carey is asking the state of Maryland to abide by the provisions of LEOSA, a statute it willingly adopted.

B. Mr. Carey's Interpretation of LEOSA Does Not Require the Creation of a Federal Regulatory Program.

LEOSA does not create a federal regulatory program and Mr. Carey's interpretation of the statute does not require one. What LEOSA does is to confer the right upon qualified retired law enforcement officers to "carry a concealed firearm that has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 926C(a). To exercise this right, a plaintiff must, in addition to meeting the criteria for being a qualified retired law enforcement officer, "carry[ ] the identification required by subsection (d)."

Essentially, LEOSA establishes a federal right and, then, creates a set of qualifying criteria to exercise that right. States are then obligated to consider this right while implementing their own regulatory programs. This same legislative structure has been upheld by this Court when considering other statutes.

For example, the Court emphasized: "Titles I and III of the Public Utility Regulatory Policies Act of 1978 (PURPA) **require only consideration of federal standards**. And if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals." Because there was nothing in PURPA "directly compelling" the States to enact a legislative program, the statute was not inconsistent with the Constitution's division of authority between the Federal Government and the States. *New York v. United States*, 505 U.S. 144, 161-62 (1992) (internal citations omitted) (emphasis added).

Mr. Carey's interpretation of LEOSA requires the same kind of state action as that required by the passage of *Obergefell v. Hodges*, 576 U.S. 644 (2015). Through that case, the federal government recognized the right of same-sex couples to marry, which required state officers to issue marriage licenses. As in the case *sub judice*, the states were required to recognize a federal right and to conform it to their existing state regulatory programs.

C. The Fourth Circuit's Interpretation Of LEOSA Renders It Practically Unenforceable.

"The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Piphus*, 435 U.S. 247, 254-257 (1978)). By claiming Mr. Carey's attempt to vindicate his rights under LEOSA through § 1983 invokes the

anticommandeering doctrine, the Fourth Circuit's decision effectively renders LEOSA unenforceable, depriving qualified retired law enforcement officers the protection they deserve and Congress meant them to have.

The anticommandeering doctrine "is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). The doctrine is not designed to enable states to disregard statutory rights granted by Congress or to bar individuals from seeking to vindicate those rights in federal courts.

Not every state may agree with Congress' decision to grant currently serving and retired qualified law enforcement officers the right to carry concealed weapons. But, one of the primary reasons Congress passed LEOSA was to standardize the law regarding concealed carry to ensure those who have protected their communities have the ability to protect themselves. The Fourth Circuit's interpretation of the anticommandeering doctrine perversely seeks to use this federalism doctrine, recognizing the sovereignty of states, to keep individuals from vindicating federal rights in federal courts. If the Fourth Circuit's strained interpretation is allowed to stand, law enforcement officers will have no way to vindicate their rights and LEOSA will essentially be rendered meaningless.

III. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHAT QUALIFIES AS AN "ISSUE OF PUBLIC CONCERN AS A MATTER OF LAW"

"Adherence to precedent is 'a foundation stone of the rule of law.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (*quoting Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014)). "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). "[A]ny departure from the doctrine demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (*quoting Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). As it stands, the Fourth Circuit's decision squarely conflicts with its own precedent, as well as that of the Supreme Court, regarding what speech qualifies as a matter of public concern.

There is no dispute [as to] when speech by a government employee is protected by the First Amendment: To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (internal citations omitted). "Whether speech is a matter of public concern turns on the 'content, form,

and context' of the speech." *Lane v. Franks*, 134 S. Ct. 2369, 2373 (2014) (*quoting Connick v. Myers*, 461 U.S. 138, 147-148 (1983)). The dispute arises from the Fourth Circuit's flawed analysis of these factors.

A. The Fourth Circuit's Decision to Disregard Precedent Concerning The Content of Mr. Carey's Speech Warrants Review.

Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," *Connick*, 461 U.S. at 146, or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83-84 (2004); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-94 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967).

In dismissing Mr. Carey's First Amendment retaliation claim, the Fourth Circuit inaccurately stated "that the posts involved nothing more than the sort of personal grievance that does not garner First Amendment protection…" *Carey*, 957 F.3d at 475. Admittedly, "[p]ersonal complaints and grievances about conditions of employment" are not deemed to be matters of public concern. *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007). However, speech moves beyond "individualized concerns" when the speaker seeks to "communicate to the public or to advance a political or social point of view beyond the employment context." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 398 (2011).

The "content" of Mr. Carey's speech plainly relates to public, rather than private, matters. In his first online post to the blog, Mr. Carey copied the MNRP Code of Conduct and Agency Values and placed it alongside a series of photographs of provocatively dressed women and offensive comments from Captain Johnson's Facebook page. Mr. Carey's second post to the blog highlighted photographs Captain Johnson had put on his Facebook page showing his assault weapon next to which Captain Johnson joked, "I don't think the game warden can catch us . . . LOL" along with other photographs and comments making light of gun violence and death. Mr. Carey concluded his post by writing,

> With what we have had in Baltimore and the country over the last years . . . we do not need the unprofessional atmosphere that Capt. Ed Johnson is promoting on social media. He is denigrating law enforcement and fanning the flames of an already hostile environment that needs healing! What is even worse is that these postings were allegedly condoned at the top of Maryland Natural Resources Police chain of command, Colonel George Johnson, as the two are friends on Facebook.

The appalling behavior displayed by Mr. Johnson was, as the Fourth Circuit acknowledges, "conduct [] unbecoming of an MNRP officer." *Carey*, 957 F.3d at 476.

As such, Mr. Carey's speech "highlighted issues of public import" namely the misconduct of a member of law enforcement. *Snyder v. Phelps*, 562 U.S. 443, 131 S.Ct. 1207, 1211 (2011). Critically, this Court has long held that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance…" *Garcetti v. Ceballos*, 547 U.S. 410, 412 (2006). Until the holding in *Carey*, the Fourth Circuit's decisions have acknowledged and conformed to this precedent. *See Cromer v. Brown,* 88 F.3d 1315, 1325-26 (4th Cir. 1996) (concluding a letter of complaint from an association of African American law enforcement officers to their supervising sheriff was a matter of public concern because the complaint was not focused on a particular individual's situation, but rather "prompted an expression of concern about the inability of the sheriff's office to carry out its vital public mission effectively"), *Goldstein v. Chestnut Ridge Volunteer Fire Co.,* 218 F.3d 337, 352 (4th Cir. 2000) (opining a firefighter's complaints about inadequate training and equipment as well as unsafe procedures during emergency calls were matters of public concern), and *Campbell,* 483 F.3d at 269-70 (ruling a female police officer's allegations of sexual harassment and gender discrimination rose to a cognizable matter of public concern and emphasizing the plaintiff "did not bring the sexual harassment issues to [the Chief's] attention in order to resolve her own personal problem[, but] was seeking [to] challenge the practice within the department as much as she was seeking a resolution of her own complaint").

Over the last year, high-profile controversies over police shootings, department mismanagement, racial profiling, and race-based incidents have led to significant public interest surrounding the on and off duty behavior and opinions of police officers. Inappropriate online content and the threat of or the very real public outrage it invokes has led to numerous disciplinary actions throughout the country. *See* David L. Hudson, *Public Employees, Private Speech: 1st Amendment doesn't always protect government workers*, ABA Journal (May 1, 2017, 4:10 PM), https://www.abajournal.com/magazine/article/public_employees_private_speech. This is clearly a subject of general interest, value, and concern to the public. The public's interest in this topic is further evidenced by the reaction to Mr. Carey's posts. The posts generated a number of comments and were so popular they were reposted by the blog for a second time.

On a larger sense, the content of Mr. Carey's posts invokes the public's omnipresent interest in the character of public officials. From the Reynolds Pamphlet and the Teapot Dome scandal to modern day scandals involving President Clinton and Anthony Wiener, the American public has always found the character of our public officials to be of significant importance. Certainly, the content of Mr. Carey's posts calling out the misbehavior and questionable character of an armed public official, is of interest to a public that relies on such an individual for its safety.

B. The Fourth Circuit Failed to Analyze the Form and Context of Mr. Carey's Speech.

This Court has observed that "the boundaries of what constitutes speech on matters of public concern are not well defined…" *Snyder,* 131 S.Ct. at 1211. However, by identifying three factors; content, form, and context with which to analyze an individual's speech, the Court has fashioned a framework for lower courts to follow. The Fourth Circuit completely ignored the "form" and "context" factors in its analysis of Mr. Carey's speech, thus inappropriately basing its decision entirely on the "content" factor.

Mr. Carey's posts were made to the Salisbury News Blog, a popular website with the first responders' community in his area which, at the time of the posts, had more than 40 million hits. Crucially, this establishes the "form" of Mr. Carey's speech was "designed to reach as broad a public audience as possible," as, by speaking out on such a large social platform, Mr. Carey was clearly seeking to communicate to the public. *Snyder*, 131 S.Ct. at 1211. Consequently, two of the three factors designed to determine if speech is a matter of public concern weigh heavily in favor of Mr. Carey, a critical point nowhere addressed in the Fourth Circuit's lengthy discursive opinion.

CONCLUSION

At bottom, the criterion for enforceability of a federal statute under §1983 is whether that statute was intended to bind the states, on the one hand, to the benefit of would be plaintiffs, on the other. Here, both the plain language of LEOSA and its legislative history make it clear Congress intended to bind the states to allow qualified retired law enforcement officers the benefit of whatever protection a concealed firearm could provide. To deny LEOSA enforceability through §1983 is to dilute its imperative, commanding language down to the expression of wishes and recommendations. The fact Congress clearly meant for the states to comply with LEOSA, to abide by its terms, is not the same as requiring the states to carry out those terms: LEOSA creates, not a list of things for the states to do, but a set of rules with which they are to comply. The anti-commandeering arguments raised by the Fourth Circuit were considered and rejected by Congress in adopting LEOSA, and should not now be resurrected. The split among circuits interpreting LEOSA should be resolved in favor of affording qualified retired law enforcement officers the protection Congress intended them to have.

The criterion for First Amendment protection is whether the communication addresses a matter of general public interest. Here, Mr. Carey contends character counts, and social media posts by a public servant that reflect a character inconsistent

with public service are of general public interest because the public should be and demonstrably is interested in the character of public servants.

For all of foregoing reasons, Mr. Carey respectfully requests the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1194

NORRIS PAUL CAREY, JR.,

Plaintiff – Appellant,

v.

DEPUTY SECRETARY JOANNE THROWE; CAPTAIN EDWARD JOHNSON; CAPTAIN CHARLES VERNON; ROBERT K. ZIEGLER, Superintendent,

Defendants – Appellees,

and

MARYLAND NATURAL RESOURCES POLICE,

Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. George L. Russell, III, District Judge. (1:18-cv-00162-GLR)

Submitted: March 17, 2020 Decided: April 30, 2020

Before WILKINSON and KEENAN, Circuit Judges, and Rossie D. ALSTON, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Keenan and Judge Alston joined.

Robin R. Cockey, Ashley A. Bosché, COCKEY, BRENNAN & MALONEY, P.C., Salisbury, Maryland, for Appellant. Andrew M. Winick, HOFMEISTER & BREZA, Hunt Valley, Maryland, for Appellee Captain Edward Johnson. Brian E. Frosh, Attorney General, Roger L. Wolfe, Jr., Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Annapolis, Maryland, for Appellees.

WILKINSON, Circuit Judge:

In December 2016 and January 2017, Norris Paul Carey, Jr., then an employee of Maryland's Department of Natural Resources ("DNR"), submitted to a local website two anonymous blog posts about Edward Johnson, then Captain of the Internal Affairs Unit of the Maryland Natural Resources Police ("MNRP"). To say the least, the posts were not flattering. Among other things, they collected screenshots from Johnson's private Facebook page that showed photos of Johnson posing with scantily-clad women and various comments that he had made about gun violence. In the months that followed, though, it was Carey whose life took a turn. He was fired from the DNR, his Law Enforcement Officer Safety Act ("LEOSA") card to carry a concealed firearm was rescinded, and he was disparaged on social media. As Carey tells it, these actions were all part of a concerted and unlawful effort by persons at the DNR and MNRP to retaliate against him for the blog posts. The district court disagreed, calling the whole business the product of a personal spat and dismissing Carey's suit for failure to state a claim upon which relief may be granted. For the reasons that follow, we affirm.

I.

Carey served in the Maryland Natural Resources Police for twenty-six years.[*] For most of his tenure, Carey worked in field enforcement, performing tasks like polygraph examinations, before retiring on December 31, 2013. Three months before retiring, Carey

[*] Because this case follows the grant of a motion to dismiss, we "accept as true all of the factual allegations contained in the complaint." *Adams v. Ferguson*, 884 F.3d 219, 222 (4th Cir. 2018) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

became involved in an internal MNRP investigation concerning a missing M16 patrol rifle. During this probe, Captain Johnson interviewed Carey on the suspicion that Carey had improperly talked to a key suspect in the investigation—the first chapter in what would become a heated conflict between the two. Carey denied this, and the MNRP eventually dropped the matter. According to Carey, he ultimately retired in good standing.

Carey joined the Maryland Department of Natural Resources in a civilian capacity in August 2015. As one might suspect from their names, the MNRP and DNR are related; the former is the law enforcement arm of the latter. Carey was hired by the DNR as an at-will employee for their Boat Tax Enforcement Unit. While his contract was set to end on August 8, 2017, Carey's supervisor told him it would be renewed.

During his time with the DNR, Carey received a certification card that allowed him to carry a concealed firearm. Maryland issued this card to Carey pursuant to the Law Enforcement Officer Safety Act, a federal law that provides for retired law enforcement officers to carry concealed firearms under certain conditions. 18 U.S.C. § 926C. Two of these conditions are that the officer (i) retired in "good standing," and (ii) currently holds a certain form of state-issued identification (*i.e.*, in Maryland, the "LEOSA card").

But Carey's tenure with the DNR ended abruptly. On May 25, 2017, Joanne Throwe, the DNR Deputy Secretary, and Mike Lathrom, a Corporal within the MNRP, pulled Carey aside and told him that his contract had been terminated. Carey asked for an explanation but was never given one. It seems, though, he was not fired for cause.

To Carey, the reason for his termination became apparent: the defendants were retaliating against him for two blog posts that he submitted anonymously to the Salisbury

News Blog, a popular website among local first responders. In those posts, Carey went after Captain Johnson. Carey submitted the first one in December 2016 (the "December post"). There, he copied the MNRP's Code of Conduct and Agency Values and placed it alongside a series of screenshots from Johnson's Facebook. Those screenshots included photos of scantily-clad women (some with Johnson and some on their own) in provocative poses and the back of a man wearing a jacket associated with a motorcycle club.

Carey submitted his second post in January 2017 (the "January post"). There, Carey displayed not only some of the same provocative photos from Johnson's Facebook, but also added a series of screenshots where Johnson boasted about his gun collection and seemed to make light of gun violence. For instance, one photo showed Johnson's AR-15 with him commenting, "I don't think the game warden can catch us . . . LOL," J.A. 65, and another showed a picture of a skull with a bullet hole through its forehead, with Johnson remarking that it had a "45 caliber [headache]," *id.* at 61. The January post also featured certain commentary by Carey. For instance, he wrote that Johnson was "denigrating law enforcement and fanning the flames of an already hostile environment that needs healing" and queried, "what is going on with Maryland Natural Resources Police??" J.A. 61, 66.

Although each of these posts was made anonymously, it seems that word got out about their author. On January 21, 2017, an unknown person commented below the January post: "Since you seem to be protected on this site Paul Carey your deeds will be spread far and wide elsewhere including disparaging the very Department you're still employed by—for now . . . ." J.A. 110. According to Carey, things took a turn for the worst once he was outed as the posts' author. On top of getting fired, Carey alleges that

certain DNR and MNRP employees retaliated against him for the posts over two other episodes.

First, on April 28, 2017, MNRP Captain Charles Vernon called Carey to tell him that he had not retired from the MNRP in good standing and needed to return his LEOSA card (which was no longer valid). Confused by this, Carey reached out to the Maryland Police and Correctional Training Commission to check his retirement status. According to Carey, an official there confirmed that he had, in fact, retired in good standing. Carey therefore refused to return his LEOSA card, but he did stop carrying his concealed firearm. For the next few weeks, MNRP officials repeatedly contacted Carey's DNR supervisors to tell them Carey did not retire in good standing and was refusing to return his LEOSA card.

What is more, the tensions that erupted over Carey's posts boiled over into other aspects of his life. By way of background, while Carey was working for the DNR, he was also running a private business where he would offer independent polygraph examinations. As part of this, Carey was hired by the organizers of the White Marlin Open ("WMO"), a local fishing tournament, to conduct polygraph exams of tournament winners to ensure there was no foul play. For reasons not relevant here, the WMO soon descended into litigation, and Carey was later called as a witness to discuss his post-tournament polygraph exam. On May 8, 2017, about two weeks before Carey was fired by the DNR, Captain Johnson emailed him to ask for the date and time of the White Marlin trial—an email Carey understood as "threatening" because Johnson had no reason to contact him about his work in this litigation "other than to try to intimidate him." J.A. 114. The next day, an anonymous post appeared on the Salisbury News Blog that read: "Consider the drama in

court when they learn one of the polygraph examiners has a less than stellar background and lacks integrity." *Id*. at 115. Finally, and most significant, one day after the WMO trial ended, but about three weeks after Carey was fired, Johnson commented on the WMO's Facebook page: "Too bad one of the polygraphers—Paul Carey, has the integrity of a lifer on death row." *Id.* at 116.

In January 2018, Carey filed this lawsuit against the MNRP, Deputy Secretary Throwe, Captain Johnson, and Captain Vernon. That May, Carey amended his complaint to add as a defendant Robert Ziegler, the MNRP Superintendent responsible for overseeing the LEOSA certification program, and to remove the MNRP as a defendant. Carey raised three claims. First, Carey brought a First Amendment retaliation claim under 42 U.S.C § 1983 against Throwe, Johnson, and Vernon, arguing that he was unlawfully terminated for exercising his free speech rights. Second, Carey brought a claim, also under § 1983, against Ziegler and Vernon, alleging that they had interfered with his right to carry a concealed firearm under LEOSA by improperly rescinding his LEOSA card. Third, Carey brought a defamation per se claim against Johnson for the disparaging comment that he put on the WMO's Facebook page.

In the months that followed, the defendants filed motions to dismiss and/or for summary judgment and, in January 2019, the district court granted their motion to dismiss the entire lawsuit. *Carey v. Throwe*, No. GLR-18-162, 2019 WL 414873 (D. Md. Jan. 31, 2019). The court held that none of Carey's three claims could get out of the starting gate due to at least one fundamental defect. The court dismissed the First Amendment retaliation claim on the ground that neither of the Salisbury News posts at issue involved a

"matter of public concern," a prerequisite to bringing such a suit. Next, the court dismissed Carey's LEOSA claim, brought under § 1983, because LEOSA is not privately enforceable under that statute. Lastly, the court dismissed Carey's defamation per se claim, holding that Johnson's comment was nothing more than a hyperbolic opinion. This appeal followed.

II.

We review the district court's grant of a motion to dismiss de novo. *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir. 2007). To survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). We take all well-pled facts to be true, drawing all reasonable inferences in favor of the plaintiff, but "we need not accept the legal conclusions drawn from the facts, and we need not accept as true unwarranted inferences, unreasonable conclusions or arguments." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (internal quotation omitted).

III.

We first consider Carey's First Amendment claim for retaliatory discharge. Carey alleges that his posts are protected by the First Amendment, and that it was therefore unlawful for public officials at the DNR and MNRP to terminate him for publishing them.

A.

It is well settled that public employees may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). At the

same time, though, public employees "must accept certain limitations on [their] freedom" so that a government workplace can provide public services in an efficient and effective manner. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); see also *Connick v. Myers*, 461 U.S. 138, 149 (1983) (emphasizing that the First Amendment "does not require a public office to be run as a roundtable for employee complaints over internal office affairs").

In light of this balance, when a public employee is punished by his employer (the government) for his speech, we use a three-part test to assess the propriety of that adverse action. First, at the outset, we consider "whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest." *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998). Second, if the former, "we evaluate whether the employee's interest in First Amendment expression outweighs the employer's interest in the efficient operation of the workplace." *Liverman v. City of Petersburg*, 844 F.3d 400, 409 (4th Cir. 2016). And finally, "we decide whether the protected speech was a substantial factor in the employer's decision to take adverse employment action." *Ibid.*

This appeal concerns the threshold prong of this inquiry—whether the speech at issue touches on a matter of public concern. "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc). By contrast, if the speech at issue merely implicates a "purely personal" topic, the First Amendment does not apply and our analysis comes to an end. *Liverman*, 844 F.3d at 406. As such, "[p]ersonal grievances, complaints about conditions of employment, or expressions about other matters of personal

interest do not constitute speech about matters of public concern," and therefore cannot sustain a First Amendment retaliation claim. *Stroman v. Colleton Cnty. Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1992). In deciding whether certain speech falls on the "public concern" or "purely personal" side of the line, we naturally look to the "content, context, and form of the speech at issue in light of the entire record." *Urofsky*, 216 F.3d at 406.

B.

Carey submits that the December and January posts both involve matters of public concern. To him, they expose misbehavior on the part of a Captain in the MNRP and, by extension, the MNRP writ large. The district court disagreed, dismissing his claim on the ground that the posts involved nothing more than the sort of personal grievance that does not garner First Amendment protection in this context. *Carey v. Throwe*, No. GLR-18-162, 2019 WL 414873, at *5 (D. Md. Jan. 31, 2019). The district court got it right. As set out below, the touchstone for deciding if speech involves a matter of public concern is whether its content implicates the public welfare. Neither one of Carey's posts, however, meets this standard. The posts show Johnson's behavior to be boorish, tasteless, and boastful. But neither post impeaches Johnson's conduct of his professional duties or raises a matter of public interest. Rather, at bottom, they simply add up to an airing of personal grievances, and an expression of Carey's (no doubt correct) belief that Johnson's off-duty conduct was unbecoming of an MNRP officer.

It is helpful to take each of Carey's posts in turn. As noted, the December post copied the MNRP Code of Conduct and Agency Values and placed it alongside a series of sexist photos and offensive comments from Johnson's Facebook page. See, *e.g.*, J.A. 53

(screenshot of Johnson writing, "I tried to stay out of trouble in Vegas. Damn . . . but that strip search!" next to image of him with scantily-clad women in police officer costumes). The gist of Carey's first post, as best we can tell, is that Johnson's personal online presence fell below the MNRP's Code of Conduct. But while it may be a matter for departmental discipline, this kind of grievance misses the constitutional mark. Under our precedents, the private boorishness of a public employee, without more, does not rise to a constitutionally cognizable matter of public concern. See *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 344 (4th Cir. 2017) (finding former firefighter's "'like' [on Facebook] of [an] image depicting an elderly woman raising her middle finger and entitled 'for you Chief'" was not speech on matter of public concern). And while Carey asserts his workplace speech rights under *Connick*, it bears note that Johnson has an expressive right of his own—namely, the right to speak freely in an off-duty role, even in egregious taste.

Put simply, the December post fails to discuss any issue that the public is objectively "likely to be truly concerned with." *Arvinger v. Mayor of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988) (citation and internal quotation marks omitted). Of course, Johnson's Facebook speech is not insulated automatically from *Connick* challenge simply because it appeared on Facebook. Social media, as its name implies, has a dual private/public character. It may be someone's private page, but its postings often travel far and wide. Some will doubtless raise matters of public concern. But controversial and tasteless speech, even by prominent public figures and employers, abound on social media, and to have such comments invariably seed a lawsuit would simultaneously compromise our most precious values of both privacy and speech.

Here, nothing in Carey's December post suggests that Johnson was not performing his professional duties in an adequate manner, or that he otherwise had adversely impacted the public welfare. Rather, the post simply boils down to "a disagreement about the propriety of posting controversial photos on Facebook." *Carey*, 2019 WL 414873, at *5. Put another way, it concerns a "quintessential interpersonal dispute," with no immediate connection to the public well-being. *Id.* at *4; see also *Brooks v. Arthur*, 685 F.3d 367, 374-75 (4th Cir. 2012) (plaintiff's "personal displeasure with his supervisors" was not speech on matter of public concern because it "was not expressed in terms of a breakdown in effective prison management").

The January post has similar problems. Recall that this post had similar material regarding Johnson with scantily-clad women, but it also highlighted content where Johnson bragged about his gun collection or made light of gun control. See J.A. 61, 63-65. To be sure, the post captures a tone from Johnson that falls short of the sobriety owed such a topic. However, as with the December post, Johnson's churlish taste, on its own, does not rise to the level of professional misconduct—let alone a matter of public concern. See, *e.g.*, *Campbell v. Galloway*, 483 F.3d 258, 268 (4th Cir. 2007) (recognizing that not every issue of professional misconduct is inherently a matter of public concern).

Carey argues otherwise, noting that certain comments made by Johnson online might indicate a threat to the public safety. See J.A. 65 (screenshot of Johnson writing, "I don't think the game warden can catch us . . . LOL," next to photo of his AR-15). Though a closer question, we think such statements do not rise to a level of public concern. Taken in context, Johnson's remarks amount to empty bombast, or "bar stool braggadocio." See

United States v. Alvarez, 567 U.S. 709, 737 (2012) (Breyer, J., concurring in the judgment). There is nothing in the post to convey that Johnson posed any genuine threat to the public safety, or that his conduct might predictably affect the public in some way. Indeed, as the district court recognized, nowhere does the January post suggest that "Johnson failed to comply with agency protocol for gun safety or that he in any way endangered the public's safety." *Carey*, 2019 WL 414873, at *5; see also *Goldstein v. Chestnut Ridge Vol. Fire Co.*, 218 F.3d 337, 353 (4th Cir. 2000) (holding a firefighter's complaint listing twelve specific claims that "safety regulations were being violated" was matter of public concern).

Our holding on this point is, however, quite narrow. Posts involving firearms could well implicate matters of public safety or portend a proclivity to lawless violence. It is axiomatic that employee speech exposing such impending dangers would clear *Connick*'s bar of public concern. That is not this case, however. All in all, both of Carey's posts concern nothing more than purely personal speech, as they are devoid of any content that rises to a level of public concern. Of course, in a colloquial sense, the public very well may be interested in the lewd or boorish private behavior of a prominent public employer (or anyone else, for that matter). But this sort of curiosity is hardly a matter of "public concern" for First Amendment purposes. See *Connick*, 461 U.S. at 149 (stressing "every criticism directed at a public official . . . [does not] plant the seed of a constitutional case"). Rather, for speech to concern an issue of constitutional dimension, it must affect the public welfare in some cognizable way. See *Brooks*, 685 F.3d at 373 (warning against "elevat[ing] the infinitude of worker dissatisfactions" "to a constitutional plane"). As we have made plain, Carey's posts fall short of making this necessary connection.

Carey tries to avoid this conclusion by collapsing any distinction between Johnson and the MNRP. In essence, he maintains that Johnson's conduct is innately part-and-parcel of the MNRP's conduct, and that his unseemly Facebook page must *necessarily* bear on the agency as a whole. Not so. We have never held that a public employee's behavior, whether on-the-job or off, automatically imputes to his employer; otherwise, virtually anything involving a public employee would, by definition, be a matter of public concern. See *Brooks*, 685 F.3d at 374-76. Instead, before attributing a single employee's conduct to the governmental agency where he works, we look for concrete indicators that the employee's behavior is actually emblematic of a larger problem within the agency (and, as such, is a matter of public concern). *E.g.*, *Campbell*, 483 F.3d at 268-70 (detailing specific ways that private sexual harassment complaint related to department-wide policies toward women); *Cromer v. Brown*, 88 F.3d 1315, 1325-26 (4th Cir. 1996) (identifying five cases of systemic discrimination to buttress racial bias complaint). But here, Carey offers no specifics. He does not provide a single concrete example of how Johnson's social media presence has affected the MNRP. In fact, he does not seem to offer any concrete indication of any particular cultural or systemic problem within the department.

Indeed, rather than the sort of specifics we ordinarily require, Carey offers only attenuated links between Johnson's private conduct and the MNRP. For one, Carey avers that because Johnson was Facebook "friends" with a high-ranking MNRP officer, the MNRP must have known about (and approved of) his conduct online. This misses the mark. Johnson never posted anything in an official capacity or held himself out as speaking for the MNRP. Further, public officials are under no duty to actively monitor the social

media accounts of their innumerable employees in order to guard against suits like this one. Therefore, before ascribing Johnson's private conduct to the MNRP, we need more than some speculative *possibility* that MRNP officials in some way approved of what he posted.

It may be that Carey sincerely objects to how Captain Johnson has chosen to behave on social media. But "whether someone's sense of fair play is offended is not the constitutional inquiry." *Brooks*, 685 F.3d at 375. Nor does that inquiry turn, as the district court recognized, on whatever bad blood existed between Carey and Johnson. Instead, for speech to rise to the level of public concern, it generally must involve at least some objective nexus to the public welfare, beyond the simple fact that its subject happens to be a public employee. See *Campbell*, 483 F.3d at 268. The posts here do no such thing. We thus affirm the district court's dismissal of Carey's First Amendment retaliation claim.

IV.

Carey next argues that the defendants violated his right to carry a concealed firearm under the Law Enforcement Officer Safety Act, and that he is accordingly entitled to relief under 42 U.S.C. § 1983. The district court rejected this claim, reasoning that LEOSA was not privately enforceable under § 1983. We agree. The plain text of LEOSA forecloses Carey's argument. To boot, basic principles of federalism compel the same conclusion.

A.

LEOSA permits retired law enforcement officers, under certain conditions, to carry a concealed firearm notwithstanding most state or local laws. Specifically, LEOSA says:

> 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). In other words, for a retired law enforcement officer to fall within LEOSA's ambit, he must satisfy two conditions. First, he must be "qualified," under the Act. *Id.* at § 926C(c). Second, he must carry certain identification. *Id.* at § 926C(d). LEOSA's identification requirement can be satisfied in one of two ways. Under the first option, a person must have a single state-issued credential that (i) includes a photographic identification affirming he has worked as a law enforcement officer, and (ii) indicates he has passed the requisite firearms training and testing. LEOSA's second option essentially covers the same information over two documents. Maryland has decided to go with option one, and provides its qualified retired law enforcement officers a single "LEOSA card."

Carey's claim is that he is objectively a "qualified" retired law enforcement officer under LEOSA, satisfying the Act's first condition, but that defendants Vernon and Ziegler have improperly rescinded his state-issued identification out of retaliation, preventing him from satisfying its second. He seeks relief under § 1983 to get his LEOSA card reinstated and vindicate what he says is his right under the Act to carry a concealed firearm. J.A. 119.

Carey's claim must fail because § 1983 is not an available remedy for purported violations of LEOSA. "Section 1983 imposes liability on anyone who, under color of state law, deprives a person of any rights, privileges, or immunities secured by the Constitution and laws." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (internal quotation marks omitted). "In order to seek redress through § 1983," though, "a plaintiff must assert the

violation of a federal *right*, not merely a violation of federal *law*." *Ibid.* Whether a statute creates such a right enforceable under § 1983 turns on three factors identified by the Supreme Court in *Blessing*:

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

Id. at 340-41 (internal citations omitted). The Supreme Court has also clarified that the *Blessing* factors collectively amount to a high bar, and that "anything short of an unambiguously conferred right" cannot sustain a private remedy under § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). After all, when Congress wants to create a private cause of action, it knows how to do so expressly. See *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.") (citation and internal quotation marks omitted).

LEOSA does not satisfy this purposefully demanding inquiry. For starters, the Act lacks any express rights-creating language. *Gonzaga*, 536 U.S. at 287 (recognizing "the provisions [at issue] entirely lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights"). As noted, LEOSA states that certain qualified officers "may" carry concealed firearms under certain circumstances. 18 U.S.C. § 926C(a). This use of precatory rather than mandatory language is important. See *United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a

statute, usually implies some degree of discretion."). Indeed, when Congress intends to create private rights, it often speaks in clearer and more compulsory terms. See, *e.g.*, 20 U.S.C. § 1415(i)(2)(A) (stating that the relevant party "shall have the right" to bring a civil action under the statute). Moreover, LEOSA lacks any express remedial provision, either directly under the statute or indirectly by cross-reference to § 1983. This omission too is telling because Congress passed LEOSA after the *Blessing* and *Gonzaga* Courts made apparent that a statute would need to be unambiguous for it to be enforceable under § 1983. See generally *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 n.* (2015).

With regard to the three factors laid out in *Blessing*, therefore, LEOSA most directly falters on its third requirement because the Act does not "unambiguously impose a binding obligation on the States." 520 U.S. at 341. As noted, LEOSA places two burdens before retired law enforcement officers seeking concealed carry privileges: they must be "qualified," as defined by the Act, and they must be carrying certain identification. Critically, however, LEOSA contains no language—none—obligating states to issue any identification at all.

In fact, the plain text of LEOSA conveys the exact opposite, committing entirely to the discretion of the states the decision of *whether* to issue identification and, should they choose to do so, *what* they may require of individuals seeking such a credential. For one, LEOSA makes clear that the photographic identification described above must be "issued *by the agency* from which the individual separated from service as a law enforcement officer." 18 U.S.C. §§ 926C(d)(1) (emphasis added); 926C(d)(2)(A) (same); see also *id.* at § 926C(c)(5) (noting identification may be contingent on state or agency mental health

determination). Yet the Act says nothing as to whether, when, or how an agency must issue such a credential—rather, these decisions remain entirely with the state.

Further, LEOSA lays bare that states have total discretion over setting the standards and procedures, if they wish, for qualifying to carry a concealed firearm under the Act. See *id.* at § 926C(d)(1) (requiring identification indicating officer has met "the active duty standards for qualification in firearms training *as established by the agency*") (emphasis added); § 926C(d)(2)(B) (requiring same for either "the active duty standards for qualification in firearms training[] *as established by the State*" or "if the State has not established such standards, standards set *by any law enforcement agency within that State* to carry [the same sort of] firearm") (emphases added). Nowhere does LEOSA have any language requiring states to set standards in a particular way or to certify officers under certain conditions. Rather, LEOSA's text imposes no limit on states' extant regulatory authority over local firearms.

Carey intimates that we should infer such a binding limit from the Act's preemption provision. See Appellant's Op. Br. at 27-28 (citing *DuBerry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016)). It makes little sense, the argument goes, for Congress to preempt state and local law if states are nonetheless still free to prevent "qualified" officers from carrying concealed firearms by withholding the requisite identification. But we think this reads the preemption provision for more than it is worth, and gives LEOSA a sweeping scope that Congress never intended. LEOSA is instead best read as accomplishing a far simpler object. As it stands today, and as it stood when Congress passed LEOSA, states do not have to recognize concealed carry permits issued by other states. *Henrichs v. Ill.*

Law Enforcement Training & Standards Bd., 306 F. Supp. 3d 1049, 1058 (N.D. Ill. 2018). LEOSA carves out a small exception to that norm. Specifically, the Act preempts most state and local laws that could be used to criminally prosecute a LEOSA-qualified officer for carrying a concealed firearm across state lines. See *id.* at 1057-58 (collecting cases for this proposition). In other words, under no circumstances does LEOSA obligate any state to *issue* its own concealed carry permit; but it does generally prevent states from prosecuting out-of-state officers who choose to carry under a LEOSA-compliant permit *already issued*.

All told, LEOSA cannot be read as "unambiguously impos[ing] a binding obligation on the States" to issue concealed carry permits, *Blessing*, 520 U.S. at 341, and thus cannot sustain a private remedy here under § 1983. By our count, the Eleventh Circuit and every district court to address the question have reached the same conclusion. See *Burban v. City of Neptune Beach*, 920 F.3d 1274 (11th Cir. 2019); *Burban v. City of Neptune Beach*, No. 3:17–cv–262–J–34JBT, 2018 WL 1493177, at *6 (M.D. Fla. Mar. 27, 2018) (collecting cases). *But see DuBerry*, 824 F.3d at 1055. In light of LEOSA's plain language, we readily join this emerging consensus.

B.

Basic federalism principles confirm what the text and structure of LEOSA compel. It is a cardinal rule of statutory interpretation that Congress does not ordinarily intend to upset the Constitution's "healthy balance of power between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). But Carey's proffered

interpretation of LEOSA would have Congress contravening this balance at least twice over, which only reinforces our conclusion that LEOSA should be given its natural reading.

First, to put it plainly, Carey's interpretation of LEOSA presents an inescapable and fatal anticommandeering problem. As he would have it—indeed, as he *must* have it in order to proceed under § 1983—LEOSA would obligate states to create and issue the sort of identification required under the Act. But Congress can do no such thing. It is well settled that the Constitution contains "a fundamental structural decision . . . to withhold from Congress the power to issue orders directly to the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). In other words, because the Constitution only "confers upon Congress the power to regulate individuals, not States," *New York v. United States*, 505 U.S. 144, 166 (1992), Congress lacks the power to "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 935 (1997). For this reason, the Supreme Court struck down a federal statute that attempted to force state law enforcement officers to conduct background checks as part of a federal firearm regulatory program. *Printz*, 521 U.S. at 933-35.

Likewise here. On Carey's reading, LEOSA would force state law enforcement agencies to issue certain identification as part of a federal concealed carry scheme. But this is the exact sort of dragooning that the anticommandeering doctrine forbids. See *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981). Curiously, Carey argues that his reading of LEOSA harbors no constitutional infirmities *on these facts* because Maryland has voluntarily decided to issue the sort of identification required under

the Act. This misses the point. The anticommandeering doctrine turns on the nature of the federal ask, not the existence vel non of state acquiescence. See *Printz*, 521 U.S. at 929-30. Put otherwise, the doctrine is about the limits of federal power—limits that are fixed by the Constitution. *Murphy*, 138 S. Ct. at 1476. It is thus immaterial whether states voluntarily choose to be part of a federal program, if Congress lacked the power to create such a program in the first place. Cf. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

In short, Carey would have us turn the doctrine of constitutional avoidance on its head, and strain to adopt a reading of LEOSA that would render the Act unconstitutional, even though giving the statute its most natural interpretation would not. We, of course, decline to do so. See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830) (Story, J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the [C]onstitution.").

Second, even if we were to put the anticommandeering problem to the side, Carey's interpretation of LEOSA would run aground for a separate reason. At bottom, Carey's preferred reading of the Act would bring about a stark intrusion by the federal government into the traditional police power of the states over firearms regulation. Worse, Carey presses this reading even though the Act lacks any clear indication that Congress intended such a result—something we ordinarily require when a statute would alter the usual balance of state and federal power. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

The regulation of firearms has been at the heart of the states' police power since the Founding. See *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); see also *Aymette v.*

State, 21 Tenn. (2 Hum.) 154, 159 (1840) (upholding state concealed weapon ban on police power grounds); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America*, 25 L. & Hist. Rev. 139, 155-65 (2007) (detailing early history of state regulations). In fact, there is perhaps "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000); see also *United States v. Bass*, 404 U.S. 336, 349-50 (1971).

Carey's interpretation of the Act would amount to a marked assault on the traditional authority of the states over firearm regulations. Most directly, as noted, Carey would have the Act require all states, regardless of whether they permit concealed carry in general, to issue concealed carry permits to certain individuals based upon criteria set solely by the federal government. But that is not all. If LEOSA was privately enforceable, individual citizens would be able to litigate innumerable gun policy issues in the federal courts, rather than through the local political process. As one example, consider how the Act defines "law enforcement officer" capaciously, including those who "supervise the prosecution . . . of any person[] for any violation of law" and "engage in . . . the incarceration of any person" for the same. 18 U.S.C. § 926C(c)(2). Read naturally, LEOSA leaves it to states to decide who meets these definitions. But on Carey's view, every retired district attorney or corrections officer may petition a federal judge for the right to have a concealed firearm, no matter what the state legislature prefers. And in light of LEOSA's sparse text, that judge will have little to make his decision besides his own policy preference.

Ordinarily, when a statute is presented as containing a federal coup of this dimension, we take added steps to ensure that Congress intended such a result. See *Bond v. United States*, 572 U.S. 844, 856-60 (2014). Indeed, the Supreme Court has emphasized time and again that a statute should not be read as fundamentally altering the traditional balance of state and federal power without a clear statement or indication to the contrary. *Gregory*, 501 U.S. at 460 (requiring "unmistakably clear" text) (internal quotation omitted); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785 (1991); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also *Cort v. Ash*, 422 U.S. 66, 78 (1975) (asking whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law"). After all, the touchstone for statutory interpretation is congressional intent, and we do not readily presume that Congress intended to materially undercut the Constitution's federalist design.

The same interpretive principles should inform our analysis when assessing whether a statute is privately enforceable under § 1983. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 645-46 (1979) (Powell, J., concurring). Recall that the Supreme Court has made clear that nothing "short of an unambiguously conferred right [may] support a cause of action brought under § 1983." *Gonzaga*, 536 U.S. at 283. To the extent this standard permits a gradation, we think it sound to apply its most exacting lens when inferring a private remedy would upset the usual balance of state and federal power. Said otherwise, to borrow from the *Gregory* Court, if finding a remedy under § 1983 would

intrude on a historic state prerogative, it must be "unmistakably clear" that Congress intended for the statute at issue to be privately enforceable in such a manner. And it should go without saying at this point that LEOSA contains no such indication—indeed, as explained above, everything about its text and structure conveys the opposite.

"[W]here the text and structure of a statute provide no indication that Congress intend[ed] to create new individual rights, there is no basis for a private suit" under § 1983. *Gonzaga*, 536 U.S. at 286. So goes LEOSA. In short, the text, structure, and constitutional context of the Act all reveal that LEOSA does not give rise to a right privately enforceable under § 1983. We therefore affirm the district court's dismissal of Carey's LEOSA claim.

V.

Finally, we take up Carey's defamation per se claim. This count is based solely on the comment that Johnson posted on the White Marlin Open's Facebook page, which read: "Too bad one of the polygraphers—Paul Carey, has the integrity of a lifer on death row." J.A. 116.

As common sense would dictate, this is a far cry from what is necessary to haul someone into court, and is rather just another installment in some longstanding feud between Carey and Johnson. See J.A. 83-84, 92-94 (detailing the two's fraught history). For a statement to be actionable as defamation under Maryland law, it must "tend[] to expose a person to public scorn, hatred, contempt[,] or ridicule." *Seley-Radtke v. Hosmane*, 149 A.3d 573, 581 (Md. 2016) (citation and internal quotation marks omitted). Moreover, as a general matter under the First Amendment, a defamatory statement must also be something "susceptible of being proved true or false." *Milkovich v. Lorain Journal Co.*,

497 U.S. 1, 21 (1990). Naturally, statements of opinion do not usually meet this definition. But not always. In some cases, an expression of opinion may be defamatory if it clearly implies "an assertion of objective fact." *Id.* at 18.

That does not describe Johnson's comment. To the contrary, his remark on Facebook makes use of precisely the "sort of loose, figurative, or hyperbolic language" that is the stuff of everyday life in a free society, and which may not support a defamation claim. *Milkovich*, 497 U.S. at 21. Johnson's opinion does not contain any assertion of objective fact; it would strain even the most creative mind to figure how it could be proven true or false. Perhaps anticipating these problems, Carey urges us to take a broader lens and place the Facebook comment in context. See Appellant's Op. Br. at 30-31 (suggesting that the statement, in context, implies that Carey lied in holding himself out as a qualified polygraph expert in the White Marlin litigation). But this just makes a bad claim worse. Carey has decided to lodge a defamation *per se* claim, which means that we are to look only to the words of the immediate statement—not surrounding circumstances. *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 448 (Md. 2009). Not that it would make a difference either way, but we are bound here to stay within the four corners of Johnson's Facebook post. As such, we affirm the district court's dismissal of this claim.

VI.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NORRIS PAUL CAREY, JR.,	:	
Plaintiff,	:	
v.	:	Civil Action No. GLR-18-162
JOANNE THROWE, et al.,	:	
Defendants.	:	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendants Deputy Secretary Joanne Throwe ("Deputy Secretary Throwe"), Captain Edward Johnson ("Captain Johnson"), Captain Charles Vernon ("Captain Vernon"), and Superintendent Robert K. Ziegler's ("Superintendent Ziegler") Motion to Dismiss and/or for Summary Judgment (ECF No. 25) and Captain Edward Johnson's Motion to Dismiss Count III of the Complaint (ECF No. 13).[1] This 42 U.S.C. § 1983 (2018) action arises from Plaintiff Norris Paul Carey, Jr.'s termination from the Maryland Department of Natural Resources ("DNR") and the revocation of his Law Enforcement Officer Safety Act ("LEOSA"), 18 U.S.C. § 926C (2018), certification card. The Motions are ripe for disposition, and no hearing is necessary. See Local Rule 105.6 (D.Md. 2018). For the reasons outlined below, the Court will grant the Motions.[2]

[1] Captain Johnson's Motion to Dismiss Count III of the Complaint was mistakenly docketed as a motion for summary judgment. Because the Motion is titled a "Motion to Dismiss" and Captain Johnson raises arguments under a motion to dismiss standard, the Court will construe it as a motion to dismiss.

[2] Also pending is Defendants' first Motion to Dismiss and/or for Summary Judgment, filed on April 13, 2018. (ECF No. 15). In response, on May 3, 2018, Carey filed

I. BACKGROUND[3]

On December 31, 2013, Carey retired from the Maryland Natural Resources Police ("MNRP") after twenty-six years of service. (Am. Compl. ¶ 8, ECF No. 21). Three months prior to retiring from MNRP, Carey received a Notification of Complaint stating that Carey improperly communicated with another MNRP employee who was under investigation about the content of the investigation. (Id. ¶¶ 10–11). Captain Johnson, who was Captain of the Internal Affairs Unit at that time, oversaw the investigation. (Id. ¶ 13). Carey admitted to speaking with the employee in question, but denied disclosing any information about the investigation. (Id. ¶ 12). MNRP never brought any charges against Carey related to the Notice of Complaint, and Carey retired from MNRP in good standing. (Id. ¶¶ 19, 22).

On August 12, 2015, Carey began working for DNR. (Id. ¶ 23). On April 25, 2017, Carey received a LEOSA certification, which allowed him to carry a semi-automatic weapon. (Id. ¶ 69). On May 25, 2017, three months before Carey's contract expired, Deputy Secretary Throwe abruptly fired Carey. (Id. ¶¶ 29–32). She did not give Carey a reason for his termination, and prior to being terminated, Carey's supervisor had assured him that his contract would be renewed. (Id. ¶¶ 33–34).

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an Amended Complaint. (ECF No. 21). When a plaintiff files an amended complaint, it generally moots any pending motions to dismiss because the amended complaint supersedes the original complaint. Venable v. Pritzker, No. GLR-13-1867, 2014 WL 2452705, at *5 (D.Md. May 30, 2014), aff'd, 610 F.App'x 341 (4th Cir. 2015). Accordingly, the Court will deny the Motion as moot.

[3] Unless otherwise noted, the Court takes the following facts from Carey's Amended Complaint and accepts them as true. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citations omitted).

Carey alleges that he was fired from DNR in retaliation for two blog posts he submitted anonymously to the Salisbury News Blog (the "Blog") about Captain Johnson in December 2016 and January 2017. (Id. ¶¶ 44–59). The first blog post (the "December Post") displayed MNRP's Code of Conduct and Agency Values alongside photographs from Captain Johnson's personal Facebook page of women in "sexually provocative poses and the back of a man wearing a Pagan motorcycle jacket." (Id. ¶ 52). The second post (the "January Post") displayed photographs of Captain Johnson's assault weapon and his corresponding comments on Facebook, which made light of guns and gun violence. (Id. ¶ 59). One particular comment stated, "I don't think the game warden can catch us . . . LOL." (Id.).

On January 21, 2017, an anonymous commenter on Carey's January Post stated: "Since you seem to be protected on this site Paul Carey your deeds will be spread far and wide elsewhere including disparaging the very Department you're still employed by—for now . . . ." (Id. ¶ 60). On April 28, 2017, Captain Vernon called Carey and informed him that he had not retired from the MNRP in good standing and therefore had to return his LEOSA certification card. (Id. ¶ 70). Carey, confused by this assertion, checked his retirement status with an official of the Maryland Police and Correctional Training Commission who confirmed that he retired in good standing. (Id. ¶ 73). Carey therefore refused to return his LEOSA card, but stopped carrying a concealed firearm. (Id. ¶¶ 74, 81–82). Between May 9, 2017 and May 25, 2017—the date of Carey's termination from DNR—several MNRP officials repeatedly contacted Carey's supervisors at DNR to inform

them that Carey had not retired in good standing and that his LEOSA card was invalid. (Id. ¶ 80).

Around this time, Carey was also participating as a polygraph expert in an unrelated lawsuit regarding the winner of a fishing competition, the White Marlin Open (the "White Marlin Litigation"). (Id. ¶¶ 86–90). On May 8, 2017, Captain Johnson emailed Carey about the White Marlin Litigation in what Carey perceived to be a threatening manner. (Id. ¶ 92). Captain Johnson's email stated: "What is the date and time for the White Marlin Open trial in Baltimore Federal Court?" (Id. ¶ 91). An anonymous post also appeared on the Blog that stated, "[c]onsider the drama in court when they learn one of the polygraph examiners has a less than stellar background and lacks integrity." (Id. ¶ 93). On June 15, 2017, Captain Johnson wrote on the Facebook page for the White Marlin Open: "Too bad one of the polygraphers—Paul Carey, has the integrity of a lifer on death row." (Id. ¶ 101).

On January 18, 2018, Carey sued the MNRP, Deputy Secretary Throwe, Captain Johnson, and Captain Vernon. (ECF No. 1). On May 3, 2018, Carey filed an Amended Complaint that terminated MNRP as a Defendant and added MNRP Superintendent Ziegler as a Defendant. (ECF No. 21).

In his three-Count Amended Complaint, Carey alleges: First Amendment free speech retaliation under 42 U.S.C. § 1983 against Deputy Secretary Throwe, Captain Johnson, and Captain Vernon (Count I); violation of Carey's right to a LEOSA certification card under § 1983 against Superintendent Ziegler and Captain Vernon (Count II); and defamation per se against Captain Johnson (Count III). (Am. Compl. ¶¶ 105–32). Carey seeks declaratory and injunctive relief as well as monetary damages. (Id. at 17–20).

On April 13, 2018, Captain Johnson filed a Motion to Dismiss Count III of the Complaint. (ECF No. 13). Carey filed an Opposition on April 25, 2018. (ECF No. 17). To date, the Court has no record that Captain Johnson filed a Reply.

On July 2, 2018, Defendants filed a Motion to Dismiss and/or for Summary Judgment. (ECF No. 25). On August 7, 2018, Carey filed an Opposition. (ECF No. 29). On September 24, 2018, Defendants filed a Reply. (ECF No. 30).

II. DISCUSSION

A. Defendants' Motion to Dismiss and/or for Summary Judgment

1. Conversion of Defendants' Motion

Defendants style their Motion as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, for summary judgment under Rule 56. A motion styled in this manner implicates the Court's discretion under Rule 12(d). See Kensington Vol. Fire Dept., Inc. v. Montgomery Cty., 788 F.Supp.2d 431, 436–37 (D.Md. 2011), aff'd, 684 F.3d 462 (4th Cir. 2012). Pursuant to Rule 12(d), when "matters outside the pleadings are presented to and not excluded by the court, the [Rule 12(b)(6)] motion must be treated as one for summary judgment under Rule 56." The United States Court of Appeals for the Fourth Circuit has articulated two requirements for proper conversion of a Rule 12(b)(6) motion to a Rule 56 motion. First, that the "parties be given some indication by the court that it is treating the 12(b)(6) motion as a motion for summary judgment" and second, "that the parties first 'be afforded a reasonable opportunity for discovery.'" Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 721 F.3d 264, 281 (4th Cir. 2013) (quoting Gay v. Wall, 761 F.2d 175, 177 (4th Cir. 1985)).

When the movant expressly captions its motion "in the alternative" as one for summary judgment and submits matters outside the pleadings for the court's consideration, the parties are deemed to be on notice that conversion under Rule 12(d) may occur. See Moret v. Harvey, 381 F.Supp.2d 458, 464 (D.Md. 2005). "[T]he party opposing summary judgment 'cannot complain that summary judgment was granted without discovery unless that party had made an attempt to oppose the motion on the grounds that more time was needed for discovery.'" Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 244 (4th Cir. 2002) (quoting Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 961 (4th Cir. 1996)). Rule 56(d) provides that the Court may deny or continue a motion for summary judgment "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." "[T]he failure to file an affidavit under Rule 56[(d)] is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." Nguyen v. CNA Corp., 44 F.3d 234, 242 (4th Cir. 1995) (quoting Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994)).

Here, Defendants caption their Motion in the alternative for summary judgment and attach supporting affidavits for the Court's consideration. In response, Carey filed a Rule 56(d) affidavit, requesting discovery. (Carey Aff., ECF No. 29-1). In light of Carey's affidavit and because the Court does not rely on the supporting affidavits in resolving the Motion, the Court will treat Defendants' Motion as a motion to dismiss.

2. Standard of Review

The purpose of a Rule 12(b)(6) motion is to "test[ ] the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of

defenses." King v. Rubenstein, 825 F.3d 206, 214 (4th Cir. 2016) (quoting Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999)). A complaint fails to state a claim if it does not contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed.R.Civ.P. 8(a)(2), or does not "state a claim to relief that is plausible on its face," Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing Twombly, 550 U.S. at 555). Though the plaintiff is not required to forecast evidence to prove the elements of the claim, the complaint must allege sufficient facts to establish each element. Goss v. Bank of America, N.A., 917 F.Supp.2d 445, 449 (D.Md. 2013) (quoting Walters v. McMahen, 684 F.3d 435, 439 (4th Cir. 2012)), aff'd sub nom., Goss v. Bank of America, NA, 546 F.App'x 165 (4th Cir. 2013).

In considering a Rule 12(b)(6) motion, a court must examine the complaint as a whole, consider the factual allegations in the complaint as true, and construe the factual allegations in the light most favorable to the plaintiff. Albright v. Oliver, 510 U.S. 266, 268 (1994); Lambeth v. Bd. of Comm'rs, 407 F.3d 266, 268 (4th Cir. 2005) (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). But, the court need not accept unsupported or conclusory factual allegations devoid of any reference to actual events, United Black

Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979), or legal conclusions couched as factual allegations, Iqbal, 556 U.S. at 678.

3. Analysis

Defendants argue that Carey fails to state a claim for First Amendment retaliation, and that LEOSA does not create a federal right that is enforceable under § 1983. Defendants also contend that individual Defendants are entitled to qualified immunity and that Carey cannot state a claim under § 1983 against a state official in his official capacity. The Court agrees that Carey fails to state a claim for First Amendment retaliation and that LEOSA does not create a federal right that is enforceable under § 1983.

a. First Amendment Retaliation

Defendants contend that: Carey's December and January Posts were not speech on a matter of public concern; Carey fails to establish that his interest in his speech outweighs his employer's interest in an efficient workplace; Carey fails to demonstrate that he was deprived of a benefit; and Carey fails to establish a causal relationship between his speech and the deprivation of a benefit. Carey counters that: he engaged in speech on a matter of public concern; his interest in First Amendment expression outweighs his employer's countervailing interest; and a causal relationship exists between Carey's speech and his termination. The Court agrees with Defendants' first argument—Carey fails to establish that he spoke on a matter of public concern.

To bring a claim for retaliation under the First Amendment, a plaintiff must demonstrate: "(1) that he was a 'public employee . . . speaking as a citizen upon a matter of public concern [rather than] as an employee on a matter of personal interest'; (2) that his

'interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public'; and (3) that his 'speech was a substantial factor in the employer's termination decision.'" Grutzmacher v. Howard Cty., 851 F.3d 332, 342 (4th Cir. 2017) (quoting McVey v. Stacy, 157 F.3d 271, 277–78 (4th Cir. 1998)), cert. denied, 138 S.Ct. 171 (2017) (mem.).

"Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." Urofsky v. Gilmore, 216 F.3d 401, 406 (4th Cir. 2000) (en banc). "[M]atters of internal policy, including mere allegations of favoritism, employment rumors, and other complaints of interpersonal discord, are not treated as matters of public policy." Goldstein v. Chestnut Ridge Vol. Fire Co., 218 F.3d 337, 352 (4th Cir. 2000). The Court must "examine the content, context, and form of the speech at issue in light of the entire record" to determine if it rises to the level of speech on a matter of public concern. Urofsky, 216 F.3d at 406.

Here, neither of Carey's Blog posts rises to the level of speech on a matter of public concern. The December Post highlighted the photos of scantily clad women and the apparent reference to a motorcycle club that Captain Johnson had on his personal Facebook page. But the December Post's implication that Captain Johnson fell short of MNRP's internal Code of Conduct and Agency Values is a quintessential interpersonal dispute. There was no suggestion in the December Post that Captain Johnson was not fulfilling his duties, or that his actions were endangering the public welfare. Instead, the December Post reflected Carey's personal belief that Captain Johnson was not a model MNRP employee. See Brooks v. Arthur, 685 F.3d 367, 374–75 (4th Cir. 2012) (holding that a letter which

"was not expressed in terms of a breakdown in effective prison management, but rather focused on [the plaintiff's] personal displeasure with his supervisors" was not speech on a matter of private concern).

There is no indication that Captain Johnson's proximity to posing women or bikers implicated public safety or matters of social concern. Cf. Goldstein, 218 F.3d at 353 (holding that complaints about inadequate training for firefighters and flawed emergency procedures were matters of public concern); Edwards, 178 F.3d at 247 (holding that speech relating to proper use and handling of concealed weapons was a matter of public concern because it affected public safety). Carey did not insinuate that Captain Johnson's behavior was symptomatic of broader agency failings. Rather, it was a disagreement about the propriety of posting controversial photos on Facebook; this is a personal dispute that should not be constitutionalized.

The January Post, though closer to the line, also does not rise to the level of speech on a matter of public concern. Carey did not suggest that Captain Johnson failed to comply with agency protocol for gun safety or that he in any way endangered the public's safety. See id. Instead, Carey seemed to take issue with Captain Johnson's flippant discussion of gun violence and death. The tone Captain Johnson struck in discussing gun usage on a personal Facebook page may offend Carey, but this is a grievance of personal, not public, import. See Brooks, 685 F.3d at 375 ("whether someone's sense of fair play is offended is not the constitutional inquiry"). Carey did not clearly speak on a matter of public concern, and therefore he cannot state a claim for First Amendment retaliation.

Thus, the Court will grant Defendants' Motion as to Count I of the Amended Complaint. Accordingly, the Court will dismiss Count I.

b. LEOSA Claim

In Count II, Carey brings a LEOSA claim under § 1983. Defendants argue that the Court should dismiss Count II because LEOSA, codified at 18 U.S.C. § 926C (2018), does not give rise to a federal right enforceable under § 1983. Carey counters that LEOSA, which allows qualified retired law enforcement officers to carry a concealed firearm, gives rise to a federal right, the violation of which may be remedied by § 1983. The Court agrees with Defendants.

Section 1983 allows individuals to seek a remedy for the deprivation of federal constitutional and statutory rights by persons acting under color of state law. Maine v. Thiboutot, 448 U.S. 1, 4–5 (1980). Only "unambiguously conferred right[s]" can support a § 1983 cause of action. Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002). "[I]t is rights, not the broader or vaguer benefits or interests, that may be enforced under the authority of [§ 1983]." Id. Thus, to state a claim under § 1983, a plaintiff "must assert the violation of a federal right, not merely a violation of federal law." Tankersley v. Almand, 837 F.3d 390, 404 (4th Cir. 2016) (quoting Blessing v. Freestone, 520 U.S. 329, 340 (1997)).

Courts consider three factors when determining whether a statutory provision creates a federal right. Id. (quoting Blessing, 520 U.S. at 340). "First, Congress must have intended that the provision in question benefit the plaintiff." Id. (quoting Blessing, 520 U.S. at 340). "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." Id. (internal quotation marks omitted) (quoting Blessing, 520 U.S. at 340–41). "Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." Id. (quoting Blessing, 520 U.S. at 341).

The Fourth Circuit has not addressed whether LEOSA creates a federal right that is enforceable through § 1983. The Court of Appeals for the District of Columbia is the only circuit court that has addressed the issue. See DuBerry v. District of Columbia, 824 F.3d 1046 (D.C. Cir. 2016). DuBerry held that § 926C creates a federal right enforceable under § 1983. Id. at 1054–55. But various district courts have disagreed. See Henrichs v. Illinois Law Enf't Training & Standards Bd., 306 F.Supp.3d 1049, 1057 (N.D.Ill. 2018) (holding that LEOSA does not create a federal right enforceable under § 1983); Burban v. City of Neptune Beach, No. 3:17-cv-262-J-34JBT, 2018 WL 1493177, *6 (M.D.Fla. Mar. 27, 2018) (same); Ramirez v. Port Auth., 2015 WL 9463185, at *5–6 (S.D.N.Y. Dec. 28, 2015) ("LEOSA does not create an individual right actionable under § 1983.").[4]

Applying the factors to LEOSA, the Court finds that it does not give rise to a federal right enforceable under § 1983. Section 926C states: "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 . . . ." 18 U.S.C. § 926C (emphasis added).

[4] District courts that have considered whether LEOSA creates an private cause of action have also found in the negative. See Moore v. Trent, No. 09 C 1712, 2010 WL 52132727, at *3 (N.D.Ill. Dec. 16, 2010) ("[T]he court concludes that LEOSA does not reflect Congress's intent to create a federal private remedy."); Johnson v. New York State Dep't of Corr. Serv., 709 F.Supp.2d 178, 186 (N.D.N.Y. 2010) ("Congress did not intend to create a private cause of action under LEOSA.");

The first factor—whether Congress intended the provision to benefit the plaintiff—favors Carey. Both the text of § 926C, which is "phrased in terms of the persons benefitted," and the structure of § 926C(a), which preempts state law, demonstrate Congress's intent to confer an individual benefit. Gonzaga, 536 U.S. at 284. As to the second factor, § 926C's language is not so vague or amorphous as to defy judicial enforcement, again weighing in favor of Carey. LEOSA defines "qualified retired law enforcement officer," allowing for smooth judicial application and interpretation of § 926C. 18 U.S.C. § 926C(c).[5]

Section 926C does not, however, satisfy the third factor—imposition of an unambiguous obligation on the states. Section 926C does not, in fact, address the states at all. Instead, its text reads: "a qualified retired law enforcement officer . . . may carry a concealed weapon." § 926C(a) (emphasis added). "May" is permissive, indicating that "Congress did not unambiguously impose a binding obligation on the states, as U.S. Supreme Court precedent requires." Ramirez, 2015 WL 9463185, at *6 n.12.[6] See

[5] The Court is cognizant that judicial enforcement of LEOSA through § 1983 might "cause law enforcement to hesitate before enforcing gun control laws" because they are unsure about LEOSA's strictures. Ramirez, 2015 WL 9463185, at *6. The facts of this case demonstrate the confusion that could arise: the validity of Carey's LEOSA certification card was called into question, yet Carey refused to turn over his certification card. If LEOSA gave rise to a federal right enforceable through § 1983, law enforcement officials could be forced to sort through valid and invalid certification cards, hindering the enforcement of gun control laws. The Court's inquiry into the factors need not be "rigid or superficial," and these policy implications weigh against congressional intent to establish a cause of action that is enforceable under § 1983. Torraco v. Port Auth., 615 F.3d 129, 136 (2d Cir. 2010) (citing Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 322 (2d Cir. 2005)).

[6] By way of comparison, § 926A uses mandatory language: "shall be entitled to transport a firearm for any lawful purpose." 18 U.S.C. § 926A; Ramirez, 2015 WL 9463185, at *6 n.12. The use of shall and subsequently may within the same statute is telling. See id. (citing Lopez v. Davis, 531 U.S. 230, 241 (2001)) (noting that "shall" and

Tankersley, 837 F.3d at 407 (concluding that the Privacy Act "unambiguously imposes a binding and mandatory obligation on the states by using the phrase 'it shall be unlawful'" (emphasis added)); Hensley v. Koller, 722 F.3d 177, 182–83 (4th Cir. 2013) (finding the third factor fulfilled because 42 U.S.C. § 673(a)(3) requires states to enter into agreements with adoptive parents, specifies the contours of these agreements, and states that any adjustments to the agreements can only be made with the agreement of the adopting parents); Doe v. Kidd, 501 F.3d 348, 356 (4th Cir. 2007) ("[T]he provision uses mandatory rather than precatory terms: it states that plans 'must' provide assistance that 'shall' be delivered with reasonable promptness." (emphasis added)); Pee Dee Health Care, P.A. v. Sanford, 509 F.3d 204, 212 (4th Cir. 2007) ("[T]he language unambiguously binds the states as indicated by the repeated use of 'shall.'" (emphasis added)).

DuBerry held that § 926C's preemption of state law and the "nature of the ministerial inquiries into the historical facts in the officer's employment records and statutory powers of arrest, and into the objective firearms standard for active duty officers" imposed a sufficiently unambiguous obligation on the states. DuBerry, 824 F.3d at 1053. The Court cannot agree. Preemption carves out space for a federally created benefit, but it does not follow that the state is obligated to provide that benefit, or that an individual who is denied the benefit by the state has legal recourse to seek money damages. See Henrichs, 306 F.Supp.3d at 1056–57.

"may" have different implications, and the usage of one and then the other within the same statute indicates varied congressional intent).

What is more, by the DuBerry court's own reading of § 926C, the federal right created is the right to carry concealed firearms, not the right to the certification card to which § 926C(d) refers. DuBerry, 824 F.3d at 1055 ("[T]he firearms certification requirement does not define the right itself but is rather a precondition to the exercise of that right."). Section 926C, therefore, does not impose any obligation on the states to provide the certification card § 926C(d) requires. An individual's status as a qualified law enforcement official is also a precondition to the benefit § 926C establishes, rather than a part of the benefit itself. Nothing in the text of the statute suggests that a state's inquiry into whether an applicant is a qualified law enforcement official is mandatory. In short, § 926C speaks in precatory terms.

Thus, the Court concludes that LEOSA does not create a federal right enforceable under § 1983.[7] Accordingly, the Court will grant Defendants' Motion as to Count II.

B. Captain Johnson's Motion to Dismiss Count III of the Complaint

As a threshold matter, the Court addresses whether Captain Johnson's Motion to Dismiss Count III of the original Complaint applies to the Amended Complaint. An amended complaint "generally moots any pending motions to dismiss because the original complaint is superseded." Venable v. Pritzker, No. GLR-13-1867, 2014 WL 2452705, at

[7] The Court notes that a contrary holding, which would require states to grant LEOSA certifications or to provide the certification card detailed in § 926C(d)(1) and (2)(A), might implicate the Supreme Court's anti-commandeering jurisprudence. See Printz v. United States, 521 U.S. 898 (1997) (invalidating background check obligation imposed by Brady Act on state law enforcement personnel because it impermissibly "dragooned" them "into administering federal law").

*5 (D.Md. May 30, 2014) (citing Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 456 n.4 (2009)). But if the amended complaint does not resolve the deficiencies raised in the motion to dismiss the original complaint, the court may review the motion as addressing the amended complaint. See Buechler v. Your Wine & Spirit Shoppe, Inc., 846 F.Supp.2d 406, 415 (D.Md. 2012) (quoting 6 Charles Alan Wright et al., Federal Practice & Procedure § 1476 (3d ed. 2010)). In his Amended Complaint, Carey merely added Superintendent Ziegler as a Defendant and terminated MNRP as a Defendant. He did not amend his allegations against Captain Johnson in Count III. As a result, the Court applies the arguments in Captain Johnson's Motion to the Amended Complaint. The Court now turns to Captain Johnson's arguments for dismissal.

Among other arguments for dismissing Count III,[8] Captain Johnson contends the statement at issue—"Too bad one of the polygraphers—Paul Carey, has the integrity of a lifer on death row," (Am. Compl. ¶ 101)—is a nonactionable opinion. Carey counters that the statement is defamatory per se either because it impugns Carey's professional fitness or because it implies he is a criminal. The Court agrees with Captain Johnson that the statement at issue is nonactionable opinion.

To establish a prima facie case of defamation, a plaintiff must demonstrate that: "(1) the defendant made a defamatory statement to a third person, (2) the statement was false,

[8] Captain Johnson also argues that Carey fails to state a claim for defamation because Carey is a limited-purpose public figure and that Captain Johnson is entitled to qualified immunity. Because the Court agrees with Captain Johnson's argument that the statement at issue was a nonactionable opinion, it declines to address Captain Johnson's other arguments.

(3) the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm." Offen v. Brenner, 935 A.2d 719, 723–24 (Md. 2007) (citing Smith v. Danielczyk, 928 A.2d 795, 805 (Md. 2007)). Under Maryland law, a statement is defamatory if it "tends to expose a person to public scorn, hatred, contempt[,] or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with, that person." Seley-Radtke v. Hosmane, 149 A.3d 573, 581 (Md. 2016) (alteration in original) (quoting Gohari v. Darvish, 767 A.2d 321, 327 (Md. 2001)).

Though opinions are generally not defamatory, "an opinion couched as a fact may be just as damaging as publishing an erroneous fact." Samuels, 763 A.2d at 243 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990)). Accordingly, an expression of opinion is actionable "if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Id. (citing Restatement (Second) of Torts § 566 (Am. Law Inst. 1977)).

Here, Captain Johnson's statement is a nonactionable opinion because it does not imply defamatory facts. In Milkovich, the Supreme Court held that the opinions at issue were actionable because a "reasonable factfinder could conclude that the statements . . . imply an assertion that . . . Milkovich perjured himself . . ." 497 U.S. at 21. The statement in question was: "[a]nyone who attended the meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." Id. at 5. The Milkovich Court emphasized that the "general tenor" of the statement added to its credibility because it was "not the sort of loose, figurative, or hyperbolic language which

would negate the impression that the writer was seriously maintaining that [Milkovich] committed the crime of perjury." Id. at 21.

Captain Johnson's appraisal of Carey's integrity, by contrast, does not give rise to the same conclusion. Captain Johnson's statement is "loose, figurative, [and] hyperbolic." Milkovich 497 U.S. at 21. A reasonable factfinder would not conclude that the statement implied any clear fact-based assertion, least of all the assertion that Carey was guilty of conduct demonstrating the integrity of a "lifer on death row," (Am. Compl. ¶ 101). Compare Samuels, 763 A.2d at 245 (holding that "[a]n assertion that appellant was terminated because of inferior performance on the job suggested that it was founded on fact and that appellant was incapable or unqualified to fulfill the obligations of a senior administrator at a community college."), with Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 13–14 (1970) (concluding that a newspaper article stating an individual's negotiating position was "blackmail" was not actionable defamation because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the individual's] negotiating position extremely unreasonable"), and Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 284–86 (1974) (concluding that statements calling a union "scab" a "traitor" were not actionable defamation because "traitor" was used "in a loose, figurative sense . . . [and it was] merely rhetorical hyperbole, a lusty . . . expression of . . . contempt").

What is more, unlike the connotation of perjury in Milkovich which was "susceptible of being proved true or false," 497 U.S. at 21, the Court questions how one could prove Captain Johnson's assertion that "Carey has the integrity of a lifer on death

row" either true or false. Captain Johnson's statement is a verbal flourish of disdain; its very tenor undercuts its viability as a basis for a defamation claim. This is especially true in light of its publication on Facebook, where exaggeration and hyperbole abound.

The Court, therefore, concludes that Carey fails to state a claim for defamation per se. Accordingly, the Court will grant Captain Johnson's Motion.

III. CONCLUSION

For the foregoing reasons, the Court will grant Defendants' Motion to Dismiss and/or for Summary Judgment (ECF No. 25), construed as a motion to dismiss, and Captain Johnson's Motion to Dismiss Count III of the Complaint (ECF No. 13). The Court will deny as moot Defendants' Motion to Dismiss and/or for Summary Judgment (ECF No. 15) the original Complaint. A separate Order follows.

Entered this 31st day of January, 2019.

/s/
George L. Russell, III
United States District Judge