No. 20-351

In The
Supreme Court of the United States

NORRIS PAUL CAREY, JR.,

Petitioner,

v.

JOANNE THROWE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Carey retired from service as a member of the Maryland Natural Resources Police Force while being investigated for tipping off a fellow officer who was the subject of an internal investigation. After gaining contractual civilian employment at the Maryland Department of Natural Resources, Mr. Carey posted online comments about images of scantily clad women and firearms that he found on the personal Facebook page of Captain Johnson, the officer who led the earlier internal investigation of Mr. Carey.

Several months later, Mr. Carey applied for and obtained a State-issued identification card that, by operation of the federal Law Enforcement Officer Safety Act, immunizes a law enforcement officer from arrest for carrying a concealed firearm if he has retired "in good standing" and satisfies other preconditions. Upon learning that Mr. Carey had been issued the card, law enforcement officials rescinded it because Mr. Carey had not retired in good standing. When Mr. Carey refused to relinquish the card, his employment contract was terminated.

The questions presented are

1. Does the Law Enforcement Officer Safety Act confer on a retired law enforcement officer a federally enforceable right under § 1983 to contest the circumstances of his retirement and compel a State to issue an identification card, when the statute does not—and cannot, under the Tenth Amendment—require States to issue cards?

QUESTIONS PRESENTED—Continued

2. Did the Fourth Circuit correctly conclude that Mr. Carey failed to state a claim for First Amendment retaliation when his blog posts critical of Captain Johnson's personal Facebook pages did not constitute speech on a matter of public concern because they did not suggest a threat to public safety or reflect broader agency failings, but instead were, as the district court found, nothing more than the product of a personal spat?

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This case does not present the broad question of whether the Law Enforcement Officers Safety Act ("LEOSA")—which authorizes a "qualified retired law enforcement officer" to carry a concealed firearm under certain conditions, 18 U.S.C. § 926C(a)—creates "an enforceable right under Section 1983." Pet. i. Although there is a circuit split on that issue, this case presents a much narrower question: whether LEOSA, consistent with the Tenth Amendment, creates a federal right to compel a State to issue the "photographic identification" card that LEOSA requires, 18 U.S.C. § 926C(d)(1), and to contest a State's determination that an officer did not retire "in good standing" and therefore is not a "qualified" officer in the first place, *id.* § 926C(c)(1). On *that* issue, every district court and court of appeals to address the issue has concluded that there is no indication in the text and context of the statute that Congress intended to create the "unambiguously conferred right" required by this Court's precedents, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002), particularly when compelling a State to mobilize its administrative resources to issue the identification card would violate the anti-commandeering principle of the Tenth Amendment.

Mr. Carey does not claim that Maryland is refusing to issue LEOSA cards to qualified retired law enforcement officers. Instead, he seeks to have a federal district court examine whether his retirement while under internal investigation was a retirement "in good

standing" under state law and, in the unlikely event that the district court sees that issue his way, he seeks a court order requiring the State to issue him the photographic identification card available only to officers who retire in good standing. Mr. Carey's particular circumstances do not present the broad question posed in his petition.

Nor does Mr. Carey's First Amendment retaliation claim merit this Court's review, because the distinction the court of appeals drew between the airing of personal grievances and speech on matters of public concern is well-established in the First Amendment retaliation caselaw. On the facts presented here, the court of appeals reasonably concluded that Mr. Carey's online comments reflected the personal animosity between two estranged former colleagues and not a matter of public concern about the policies and procedures of the agency for which Captain Johnson worked.

STATEMENT

The Law Enforcement Officers Safety Act

1. LEOSA establishes the right of "qualified retired law enforcement officers" to carry a concealed weapon anywhere in the United States upon meeting certain conditions. 18 U.S.C. § 926C. The statute provides in relevant part that "an individual who is a qualified retired law enforcement officer and who is carrying the identification card required by subsection (d) may carry a concealed firearm that has been

shipped or transported in interstate or foreign commerce." § 926C(a). Other subsections of § 926C define the term "qualified retired law enforcement officer" as an officer who has separated from service "in good standing" after ten years in a position that exercises "statutory powers of arrest" (subsection (c)), describe the type of identification card that is "required by this subsection" (subsection (d)), and clarify that the statute does not supersede or limit certain state laws that prohibit or restrict the possession of concealed firearms on certain private and public property (subsection (b)). *See* Pet. 2-3.

Maryland issues LEOSA-compliant identification cards under § 3-513 of the Public Safety Article of the Annotated Code of Maryland. To qualify for a card, an officer must have "retired in good standing" and must meet certain other preconditions. Md. Code Ann., Pub. Safety § 3-513(c) (LexisNexis 2018). The card must include certain information, including the statement: "This card is the property of the issuing law enforcement agency." *Id.* § 3-513(d)(6).

Factual Background

2. Mr. Carey worked for the State of Maryland in two separate capacities. For 26 years, he was an officer of the Maryland Natural Resources Police Force. (Ct. App. J.A. 83 ¶ 8.) He retired from that role on December 31, 2013, while under internal investigation. (Ct. App. J.A. 83-84 ¶¶ 10-14.) Later, he obtained

contractual civilian employment with the Department. (Ct. App. J.A. 85 ¶¶ 23-26).[1]

Mr. Carey's Retirement While Under Internal Affairs Investigation, Subsequent Contractual Civilian Employment, and Termination

a. Three months before he retired from the Force, Mr. Carey learned that he was under investigation for sharing information about an internal affairs investigation with the target of that investigation. (Ct. App. J.A. 83 ¶¶ 10-11.) Captain Johnson, then of the internal affairs unit, oversaw the internal investigation into the allegations against Mr. Carey and interviewed him as part of the investigation. (Ct. App. J.A. 84 ¶¶ 13-14.) During the interview, Mr. Carey admitted to speaking to the target, but he denied sharing with him any information about the investigation. (Ct. App. J.A. 83-84 ¶ 12.) Because no charges had been brought against

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[1] The Maryland Department of Natural Resources is a principal department of the government of the State of Maryland, Md. Code Ann., Nat. Res. § 1-101(a) (LexisNexis 2018). The Maryland Natural Resources Police Force, established within the Department under § 1-201.1 of the Natural Resources Article, "specifically is charged with enforcing the natural resource and conversation laws of the State," *id.* § 1-204(a), and "serves as a public safety agency with statewide authority to enforce conservation, boating, and criminal laws," *id.* § 1-201.1(a). "In addition to any other powers conferred by [Title 1, subtitle 2 of the Natural Resources Article], . . . every Natural Resources police officer shall have all the powers conferred upon police officers of the State," and may exercise these powers "anywhere within the State." *Id*. § 1-204(a).

Mr. Carey by the time he retired, Mr. Carey believes that he retired in "good standing." (Ct. App. J.A. 84 ¶¶ 19-22.)

b. On August 12, 2015, Mr. Carey began working as an at-will, contractual employee for the Department of Natural Resources in its boat-tax-enforcement unit. (Ct. App. J.A. 85 ¶¶ 23-26.) On May 25, 2017, about three months before his contract was to expire, Deputy Secretary of Natural Resources Joanne Throwe informed Mr. Carey that his employment contract had been terminated. (Ct. App. J.A. 85-86 ¶¶ 29-32.) Deputy Secretary Throwe did not give Mr. Carey a reason for the termination of his contract. (Ct. App. J.A. 86 ¶ 34.)

Mr. Carey's Blog Posts

c. Mr. Carey alleges that the Department fired him in retaliation for sending two anonymous blog posts about Captain Johnson in December 2016 and January 2017 to the Salisbury News Blog. (Ct. App. J.A. 87 ¶¶ 44-45, 89 ¶¶ 57-59.) The December blog post compared the Police Force's "Code of Conduct and Agency Values" with posts from Captain Johnson's personal Facebook page, which showed photographs of Captain Johnson in his police uniform, photographs of scantily clad women in sexually provocative poses, and the back of a man wearing a Pagan motorcycle jacket. (Ct. App. J.A. 88 ¶ 52.) The January blog post showed photographs of an assault weapon, also from Captain Johnson's Facebook page, next to which Captain

Johnson had joked, "I don't think the game warden can catch us . . . LOL." (Ct. App. J.A. 89 ¶ 59.)

Issuance and Revocation of the LEOSA Card

d. On April 25, 2017, the Maryland Natural Resources Police Force issued Mr. Carey a LEOSA card. (Ct. App. J.A. 90 ¶ 69.) Three days later, Captain Charles Vernon, the officer in charge of processing LEOSA card applications, called Mr. Carey and informed him that, because he had not retired in good standing from the Force, he must return the LEOSA card. (Ct. App. J.A. 90 ¶¶ 70-71); *see also* Md. Code Ann., Pub. Safety § 3-513(c) (providing for the issuance of identification card where law enforcement officer, among other requirements, had retired "in good standing"). Claiming that someone at the Maryland Police and Correctional Training Commission had indicated that Mr. Carey had retired in good standing, Mr. Carey refused to return the LEOSA card to the Force. (Ct. App. J.A. 90-91 ¶¶ 73-74.)

Between May 9, 2017 and May 25, 2017, several high-ranking officials of the Maryland Natural Resources Police Force repeatedly contacted Mr. Carey's supervisors at the Department of Natural Resources to inform them that Mr. Carey had not retired from the Force in good standing and that the LEOSA card had been issued to Mr. Carey in error. (Ct. App. J.A. 91

¶ 80.) Mr. Carey continued to refuse to turn over the LEOSA card because it was not marked as "State's property," and because it had no force and effect after having been revoked by Captain Vernon. (Ct. App. J.A. 92 ¶ 82.) On May 25, 2017, Mr. Carey's contract with the Department of Natural Resources was terminated. (Ct. App. J.A. 85 ¶ 29.)

Captain Johnson's Facebook Post About the White Marlin Open

e. In May 2017, Mr. Carey participated as a polygraph expert in an unrelated lawsuit regarding the winner of a fishing competition, the White Marlin Open. (J.A. 92 ¶ 86, 93 ¶ 88.) On May 8, 2017, Captain Johnson allegedly emailed Mr. Carey in a manner that Mr. Carey perceived to be intimidating. (Ct. App. J.A. 93 ¶¶ 91-92.) The email asked, "What is the date and time for the White Marlin Open trial in Baltimore Federal Court?" (Ct. App. J.A. 93 ¶ 91.) The next day an anonymous post appeared on the Salisbury News Blog that stated, "Consider the drama in court when they learn one of the polygraph examiners has a less than stellar background and lacks integrity." (Ct. App. J.A. 93 ¶ 93.) Then, on June 15, 2017, Captain Johnson allegedly wrote on the White Marlin Open Facebook page, "Too bad one of the polygraphers—Paul Carey, has the integrity of a lifer on death row." (Ct. App. J.A. 94 ¶ 101.)

Procedural History

3. Mr. Carey filed a three-count complaint in the United States District Court for the District of Maryland on January 18, 2018. (Ct. App. J.A. 2.) In Count I of the operative first amended complaint, Mr. Carey alleged a First Amendment retaliation claim under 42 U.S.C. § 1983, arising from Mr. Carey's termination from his employment. (Ct. App. J.A. 95-97.) In Count II, Mr. Carey alleged a § 1983 claim arising from alleged violations of his rights under LEOSA, and he sought an order directing State officials to certify and acknowledge Mr. Carey as a retired law enforcement officer for the purposes of LEOSA and to issue Mr. Carey a LEOSA-compliant identification card. (Ct. App. J.A. 97-98.) In Count III, Mr. Carey alleged that Captain Johnson's public statement about Mr. Carey's integrity constituted defamation per se, and he sought compensatory and punitive damages against Captain Johnson individually. (Ct. App. J.A. 99-100.)

On July 2, 2018, the defendants moved to dismiss the complaint in its entirety or, in the alternative, for summary judgment (Ct. App. J.A. 122), and attached documentation showing that Mr. Carey had not retired from the Force in good standing (Ct. App. J.A. 131-32). On January 31, 2019, the district court issued a memorandum opinion granting the defendants' motion to dismiss, without considering the materials attached to the motion. Pet. App. B (*Carey v. Throwe*, No. GLR-18-162, slip op. (D. Md. Jan. 31, 2019)). On the First Amendment retaliation claim, the district court concluded that Mr. Carey had not alleged facts sufficient

to establish that his blog posts rose to the level of speech on a matter of public concern. Pet. App. B 9. As to the LEOSA claim, the district court concluded that LEOSA does not unambiguously confer a federally enforceable right to a LEOSA-compliant identification card. *Id*. at 15. The district court also concluded that Mr. Carey failed to state a claim for defamation because the statement at issue is nonactionable opinion. *Id*. at 16. Mr. Carey filed a timely appeal on February 15, 2019. (Ct. App. J.A. 171.)

4. On April 30, 2020, the United States Court of Appeals for the Fourth Circuit affirmed the district court on all three counts. Pet. App. A (*Carey v. Throwe*, No. 19-1194, slip op. (4th Cir. Apr. 30, 2020)). On the First Amendment retaliation claim, the court of appeals followed Fourth Circuit precedent based on *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny to conclude that Mr. Carey's online posts amounted to "an airing of personal grievances" that did not "impeach[] Johnson's conduct of his professional duties or raise[] a matter of public interest." Pet. App. A 10. As to the LEOSA claim, the Fourth Circuit concluded that the claim failed the test employed in *Blessing v. Freestone*, 520 U.S. 329 (1997), to identify a federal right enforceable under § 1983, because LEOSA does not "'unambiguously impose a binding obligation on the States'" to issue the identification cards on which Congress chose to condition the conceal-carry right. Pet. App. A 18 (quoting *Blessing*, 520 U.S. at 341). The contrary conclusion, the court

added, would violate the Tenth Amendment's anti-commandeering principles by "forc[ing] state law enforcement agencies to issue certain identification as part of a federal concealed carry scheme." Pet. App. A 21. Finally, the Fourth Circuit affirmed the district court's conclusion that Captain Johnson's public statement that Mr. Carey "has the integrity of a lifer on death row" is the "'sort of loose, figurative, or hyperbolic language'" that does "not support a defamation claim," *id.* at 26 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)), and is instead "just another installment in some longstanding feud" between the two estranged former colleagues, Pet. App. A at 25.

Mr. Carey seeks review of the Fourth Circuit's decision on the First Amendment and LEOSA claims, but not its disposition of the defamation claim.

REASONS FOR DENYING REVIEW

I. There Is No Circuit Split on the Issue That this Case Presents: Whether LEOSA Creates a Federal Right to Litigate the Circumstances of an Officer's Retirement or Compel States to Issue Identification Cards.

The decision that Mr. Carey misidentifies as providing an outcome-dispositive conflict among the circuits—*DuBerry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016)—reached a different issue, namely, whether a State may deprive a "qualified

retired law enforcement officer" of the federal right to carry a concealed firearm simply by refusing to perform certain ministerial tasks necessary to satisfy the preconditions of that right. Mr. Carey's case does not present that issue. And because the case involved the District of Columbia, *DuBerry* reached that issue without having to address the anti-commandeering concerns that every other court has cited in concluding that LEOSA does not create a § 1983 right under the circumstances presented here.

DuBerry involved a group of correctional officers who had retired in good standing, met the definition of "qualified retired law enforcement officer," and held the identification card required by LEOSA, but for whom the District of Columbia had "refused to certify that, as correctional officers, they had a statutory power of arrest." 824 F.3d at 1048; *see also id*. at 1050 (stating that each officer "has a photo identification card issued by the D.C. Department of Corrections"). *DuBerry* held that the officers, having satisfied the factual preconditions to exercising LEOSA's conceal-carry right, could challenge, under § 1983, the District's assertion that they did not have "arrest authority." *Id.* at 1050, *see also id.* at 1053 (discussing arrest authority). And the D.C. Circuit concluded that the District, by taking the position that LEOSA covered only officers who had the *general* power to make arrests, was attempting to "redefine" federal law on who are "'qualified law enforcement officers' or who is eligible for the LEOSA right." *Id.* at 1053; *see also id.* at 1056. It was that "reevaluation or redefinition of federal requirements"

that the court took issue with, and it was that "unlawful action" that the court found sufficient to state a claim under § 1983. *Id.* at 1055.

None of that describes the issue resolved by the Fourth Circuit. Here, there is no dispute about the federal definition of "qualified retired law enforcement officer," and the State makes no effort to redefine other statutory terms. Rather, the question presented here is whether a law enforcement officer has a § 1983 right to challenge, in federal court, a State's determination that an officer did not meet the qualifications for issuance of an identification card under *state* law, which in this case, requires an officer to "have retired in good standing." Md. Code Ann., Pub. Safety § 3-513(c). That Mr. Carey does not hold a valid state-issued identification card and disputes the circumstances of his retirement sets this case apart from *DuBerry*.[2]

Multiple courts have distinguished *DuBerry* on precisely this basis. For example, in *Burban v. City of Neptune Beach, Florida*, the Eleventh Circuit observed that "the *DuBerry* plaintiffs asserted a different right

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[2] In the portion of his petition devoted to the Tenth Amendment, Mr. Carey states that it is "[c]ritical[ ]" to that aspect of his argument that he "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)." Pet. 10. That is plainly not so. The operative first amended complaint repeatedly acknowledges that the State had "revoked" the identification card (*see*, *e.g.*, Ct. App. J.A. 91 ¶¶ 75, 81), and includes in its request for relief that the court "[e]nter an Order directing [State officials] . . . to issue Mr. Carey a LEOSA certification card" (Ct. App. J.A. 98).

than the one Ms. Burban seeks to vindicate here." 920 F.3d 1274, 1282 (11th Cir. 2019). As the Eleventh Circuit explained, the plaintiffs in *DuBerry* "sought only certification of the 'historical fact[]' of their service. They did not seek identification," as "their complaint alleged that 'each [plaintiff] has a photo identification card issued by the D.C. Department of Corrections stating that he is a retired employee of the D.C. Department of Corrections where he had the authority to arrest and apprehend, and to act in a law enforcement capacity.'" *Id*. (quoting *DuBerry*, 824 F.3d at 1050; internal citation omitted). "Given *Blessing's* command that courts are to assess the specific, concrete rights a plaintiff asserts, 520 U.S. at 346, we do not read *DuBerry* as reaching the question presented here." *Burban*, 920 F.3d at 1283.[3]

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[3] Although not cited by Mr. Carey, a subsequent decision in the *DuBerry* litigation, *DuBerry v. District of Columbia*, 924 F.3d 570 (D.C. Cir. 2019) ("*DuBerry II*"), was issued on the basis of a factual record that called into question whether the officers' identification cards were valid for purposes of LEOSA. *Id.* at 577. But the issue was not outcome-determinative in *DuBerry II*, and therefore does not create a split among the circuits. Indeed, the D.C. Circuit described any issue regarding the cards as "'irrelevant,'" because the plaintiffs—unlike Mr. Carey—were not requesting that a court order the issuance of cards, *id*. at 577 (quoting *DuBerry v. District of Columbia*, 316 F. Supp. 3d 43, 58 (D.D.C. 2018)). In fact, they expressly disavowed that relief. 924 F.3d at 582.

Nor in the *DuBerry* litigation was there any doubt that the retired law enforcement officials had retired in good standing and thus met that aspect of the federal definition of "qualified retired law enforcement officer." 924 F.3d at 578. Here, by contrast, the amended complaint acknowledges that the State communicated

Other courts have reached the same conclusion. *See Cole v. Monroe County*, 359 F. Supp. 3d 526, 532 n.3 (E.D. Mich. 2019) (distinguishing *DuBerry* on grounds that the plaintiffs there had "received their photographic identification cards" and there was no "issue in *DuBerry* as to whether plaintiffs retired in good standing"); *D'Aureli v. Harvey*, No. 1:17-cv-00363 (MAD/DJS), 2018 WL 704733, at *5 (N.D.N.Y. Feb. 2, 2018) (distinguishing *DuBerry* on grounds that "the opinion did not determine whether LEOSA created a right to identification" and instead was focused on whether a State could "revise the statutory definition of 'qualified retired law enforcement officers' in a manner that deprived the plaintiffs of their statutory rights" (internal quotation marks omitted)); *Negron v. Suffolk County Police Dep't*, No. 18-CV-5426(JS)(ARL), 2020 WL 3506061, at *8 (E.D.N.Y. June 29, 2020) (distinguishing *DuBerry* in case where State suspended plaintiff's pistol license and plaintiff failed to carry a LEOSA-compliant identification card); *see also Lambert v. Fiorentini*, 949 F.3d 22 (1st Cir. 2020) (affirming dismissal of § 1983 due process claims based on State's denial of identification card). Although the Fourth Circuit did not expressly distinguish *DuBerry*, instead simply citing it with the "*but see*" signal, Pet. App. A 20, the district court observed that the federal right recognized in *DuBerry* was "the right to carry concealed

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to Mr. Carey that he did *not* retire in good standing (Ct. App. J.A. 91 ¶ 80), which would mean that he was not a "qualified retired law enforcement officer" under LEOSA.

firearms, not the right to the certification card to which § 926C(d) refers," Pet. App. B 15.

Most importantly, because the *DuBerry* litigation involved the District of Columbia, the case did not involve the limitations that the Tenth Amendment places on federal power to command state action. Indeed, the D.C. Circuit noted that the District had cited "no authority that the doctrine is applicable to it." 824 F.3d at 1057. As discussed below, every court that has reached the anti-commandeering issue when applied to a *State* has concluded that requiring the States to issue LEOSA-compliant identification cards would violate the Tenth Amendment.

The importance of the distinction between rights asserted by officers who have retired in good standing and with a valid state-issued identification card, and those who have not, is grounded in the principle that, before determining whether an asserted federal right is actionable under § 1983, the Court must "determine exactly what rights, considered in their most concrete, specific form, [the plaintiff is] asserting." *Blessing*, 520 U.S. at 346. And on the specific issue presented by this case—whether an officer has a federal right to contest the circumstances of his retirement—the cases are unanimous in concluding that an officer does not.

Like the Fourth Circuit decision at issue here, those cases apply the three *Blessing* factors to evaluate whether a federal statute creates a right enforceable under § 1983:

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

520 U.S. at 340-41 (citations omitted). "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit . . . under § 1983." *Gonzaga*, 536 U.S. at 286.

The Fourth and Eleventh Circuits focused principally on the third factor of the *Blessing* test, evaluating whether LEOSA imposes a "binding obligation" on the States to issue a compliant identification card.[4] Both courts observed that a retired officer may carry a concealed weapon pursuant to LEOSA only *if* he or she is also "carrying the identification required by subsection (d)." *Burban*, 920 F.3d at 1280. "This provision does not obligate States to create—much less issue—LEOSA-compliant identification." *Id*. As the Fourth Circuit put

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[4] Some courts have also concluded that LEOSA claims fail the first of the three *Blessing* factors because Congress, although it may have intended that LEOSA benefit *some* retired law enforcement officers, did not intend to benefit officers who do not have the required agency-issued identification. *See*, *e.g.*, *Henrichs v. Illinois Law Enf't Training & Standards Bd*., 306 F. Supp. 3d 1049, 1055 (N.D. Ill. 2018).

it, "LEOSA contains no language—none—obligating states to issue any identification at all." Pet. App. A 18. Other courts have come to the same conclusion. *See*, *e.g.*, *Cole*, 359 F. Supp. 3d at 531-32 (allegation that city set "standards for acquiring an identification card higher than those enumerated in LEOSA is insufficient" to state a claim for relief under § 1983); *Mpras v. District of Columbia*, 74 F. Supp. 3d 265, 270 (D.D.C. 2014) (concluding that "nothing in LEOSA bestows a federal right to the identification required by subsection (d)"); *D'Aureli*, 2018 WL 704733, at *4 ("Federal and state courts have repeatedly concluded that there is no enforceable right to identification under LEOSA[.]"); *Henrichs*, 306 F. Supp. 3d at 1056 ("Absent an obligation on the States to issue subsection (d) identifications, there is no enforceable right to such an identification under § 1983.").

That conclusion is confirmed by the larger statutory scheme, which accommodates state discretion, rather than compelling state action. As the Fourth Circuit observed, the plain text of LEOSA "commit[s] entirely to the discretion of the states the decision of whether to issue identification and, should they choose to do so, what they may require of individuals seeking such a credential." Pet. App. A 18. Congress also left it to the States to set "the standards and procedures, if they wish," for the firearms training necessary to carry a concealed firearm under the Act, and to determine their own "regulatory authority over local firearms." *Id*. at 19.

Nor does the Act's preemption provision suggest the creation of a federal right to a state-issued identification card. That provision, as the Fourth Circuit concluded, "preempts most state and local laws that could be used to criminally prosecute a LEOSA-qualified officer for carrying a concealed firearm" into Maryland, but "under no circumstances does LEOSA obligate any state to *issue* its own concealed carry permit." *Id.* at 20 (emphasis in original). LEOSA simply does not "'unambiguously impose a binding obligation on the States'" to issue LEOSA-compliant identification cards. *Id.* at 18 (quoting *Blessing*, 520 U.S. at 341).

Nothing about the statutory scheme suggests that Congress intended to federalize state-law decisions about whether an individual officer retired in good standing or whether to issue the officer an identification card. *Cf. Bishop v. Wood*, 426 U.S. 341, 349 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."). Mr. Carey gives no good reason for the Court's further review of the decision below.

II. Requiring States to Issue Identification Cards in Support of the Federal Scheme Would Violate the Tenth Amendment.

Mr. Carey's second ground for this Court's review—that it is warranted "to establish the impact of the anticommandeering doctrine on LEOSA," Pet. 9—effectively asks for an advisory opinion on an aspect

of the Fourth Circuit's decision that was not necessary to its holding. The Fourth Circuit did not hold that LEOSA violates the anticommandeering principle of the Tenth Amendment, as articulated in *Printz v. United States*, 521 U.S. 898 (1997). Instead, the court of appeals noted that *Mr. Carey's interpretation* of LEOSA would implicate the Tenth Amendment.

Mr. Carey had argued before the court that LEOSA "obligate[d] the states to create and issue the sort of identification required under the Act." Pet. App. A 21. It was *that* assertion, and not LEOSA itself, that the Fourth Circuit concluded presented an "inescapable and fatal anticommandeering problem." *Id*. Other courts agree. The Eleventh Circuit, for example, concluded that a request, like Mr. Carey's, for an order to "require states to issue identification plainly seeks to control how States regulate private parties, as opposed to regulating state activities," and thus "raise[s] serious anticommandeering concerns." *Burban*, 920 F.3d at 1281. District courts too have concluded that, if LEOSA were read "to compel the [state defendants] to provide the plaintiffs with the identification required under subsection (d)," it would "necessarily violate[ ] the holding in *Printz* because it would then constitute a federal program under which state officers are required take action in order to help achieve the statute's objective." *Johnson v. New York State Dep't of Corr. Servs.*, 709 F. Supp. 2d 178, 186-87 (N.D.N.Y. 2010); *see also*, *e.g.*, *Henrichs*, 306 F. Supp. 3d at 1057 ("[I]f Plaintiffs could sue under § 1983 to compel the Board to issue subsection (d) identifications to them, then LEOSA

would effectively dragoon state officials into administering a federal law, which *Printz* prohibits.").

Mr. Carey assures the Court that there are no "anti-commandeering" problems here, because he "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)." Pet. 10. That assertion, as he acknowledges, is "[c]ritical[]" to his Tenth Amendment argument, Pet. 10, but it is also not true. The operative complaint specifically includes as a request for relief that the district court "[e]nter an Order directing [state officials] . . . to issue Mr. Carey a LEOSA certification card." (Ct. App. J.A. 98.) Why? Because the operative complaint also alleges that the State determined that Mr. Carey had not retired in good standing and thus had *revoked* Mr. Carey's card, which thereafter "had no force and effect." (Ct. App. J.A. 92 ¶ 82.) If that were not the case and Mr. Carey actually held a valid LEOSA card, he would have no grounds on which to assert even an injury under LEOSA, much less a right enforceable under § 1983.

Mr. Carey erroneously argues that his requested relief does not intrude on the State's sovereignty because "Maryland, through its agents, is already voluntarily enforcing the provisions of LEOSA." Pet. 10. To begin with, Maryland issues identification cards through its own state law, not LEOSA. *See* Md. Code Ann., Pub. Safety § 3-513(c) (providing for the issuance of identification card where law enforcement officer, among other things, had retired "in good standing"). That the card issued under state law might satisfy

LEOSA's requirements does not mean that Maryland is "enforcing the provisions of LEOSA," as Mr. Carey claims.

Nor does it matter, for purposes of the Tenth Amendment, that Maryland has elected to issue identification cards on its own. Although that may affect the *amount* of commandeering that Mr. Carey's argument would require, "[a]ny weighing of the states' burden is irrelevant where 'it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty.'" *Johnson*, 709 F. Supp. 2d at 187 (quoting *Printz*, 521 U.S. at 932) (emphasis in original; ellipses omitted). As the Eleventh Circuit observed, "a State's decision to voluntarily follow certain standards does not mean it must forgo any challenge to other federal standards with which it does not want to comply." *Burban*, 920 F.3d at 1281. Therefore, the allegedly minor burden placed upon Maryland to issue Mr. Carey an identification card does not eliminate the anti-commandeering concerns to which Mr. Carey's request for relief gives rise.[5]

[5] Nor is there any merit to Mr. Carey's claim that the Fourth Circuit's decision renders LEOSA "meaningless." Pet. 12. LEOSA gives an officer who retires in good standing and holds a valid identification card a federally enforceable right to be immune from arrest for carrying a concealed firearm, even in States that otherwise do not recognize a concealed-carry right.

III. The Fourth Circuit Followed Established Precedent in Concluding That Mr. Carey's Blog Posts About Captain Johnson's Personal Facebook Page Did Not Constitute Speech on a Matter of Public Concern.

To prevail on a First Amendment retaliation claim, Mr. Carey must establish that he engaged in speech "'as a citizen' on a 'matter[] of public concern,'" *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1417 (2016) (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)), and that his speech, and not something else, was the cause of his termination, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). But if Mr. Carey has not engaged in what can "be fairly characterized as constituting speech on a matter of public concern, it is unnecessary . . . to scrutinize the reasons for [his] discharge." *Connick*, 461 U.S. at 146; *see also* Pet. App. A at 9.

Mr. Carey acknowledges that "'[p]ersonal complaints and grievances about conditions of employment' are not deemed to be matters of public concern." Pet. 13. He offers reasons, though, as to why he believes the Fourth Circuit and the district court both wrongly concluded that his blog posts about "scantily clad women" and firearms appearing on an estranged former colleague's personal Facebook page did not involve a "matter of public concern." None has any merit.

Mr. Carey primarily accuses the Fourth Circuit of having disregarded its own precedents, citing three cases that he believes compel a decision in his favor.

Pet. 12, 14. But the Fourth Circuit addressed all three cases and explained why each supported the conclusion that Mr. Carey's blog posts about distasteful material on Captain Johnson's personal Facebook page raised personal grievances and not matters of public concern.

The speech at issue in *Cromer v. Brown* involved a letter from an association of black law enforcement officers about how internal racial discrimination was destroying the "'effectiveness of the [sheriff's office] as a Law Enforcement Agency.'" 88 F.3d 1315, 1325 (4th Cir. 1996) (citation omitted). The seven-page letter detailed charges of systemic racism, including five specific examples of an "'overall white [management] structure.'" *Id.* (citation omitted). In addressing *Cromer*, the Fourth Circuit here drew a clear distinction between those allegations of "systemic discrimination" and Mr. Carey's blog posts about Captain Johnson's personal Facebook page. Whereas the former were "emblematic of a larger problem within the agency," the latter offered no "indication of any particular cultural or systemic problem within the department." Pet. App. A at 14.

Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337 (4th Cir. 2000), similarly involved allegations of systemic problems that are not present here. The plaintiff there—a firefighter—wrote multiple letters to the company's executive committee identifying a dozen specific safety violations, including insufficient training of firefighters, insufficient investigation of safety violations, and inadequate gear on emergency calls. *Id.* at 353. The Fourth Circuit in *Goldstein* found that

systemic concerns about public safety "are quintessential matters of 'public concern,'" *id.*, but here it distinguished Mr. Carey's posts, because they did not "suggest that 'Johnson failed to comply with agency protocol for gun safety or that he in any way endangered the public's safety.'" Pet. App. A 13 (quoting Pet. App. B 10).

Nor is *Campbell v. Galloway*, 483 F.3d 258 (4th Cir. 2007), to the contrary. There, the Fourth Circuit held that an officer's complaint about sexual harassment within the police force might, or might not, involve "matters of public concern," depending "on the content, form and context of the complaint." *Id.* at 269. The Fourth Circuit concluded that the officer's allegations about "multiple instances" of physical and verbal harassment, involving several different officers, amounted to a matter of public concern. *Id.* at 269-70. After evaluating the content, form, and context of Mr. Carey's posts, the Fourth Circuit reached the opposite conclusion on the facts of this case, observing that, as *Campbell* acknowledged, "not every issue of professional misconduct is inherently a matter of public concern." Pet. App. A at 12 (citing *Campbell*, 483 F.3d at 268).

The Fourth Circuit did not ignore these precedents. As it has before, *see Brooks v. Arthur*, 685 F.3d 367, 374-75 (4th Cir. 2012), the court compared them to the allegations before it, and concluded here that each case involved "systemic complaints" about "a larger problem within the agency," whereas Mr. Carey's complaints about Captain Johnson's personal Facebook posts did not. Pet. App. A 14. In doing so, the lower

court followed a well-worn jurisprudential path. *Compare Lane v. Franks*, 573 U.S. 228, 241 (2014) (speech about "corruption in a public program and misuse of state funds" is on a matter of public concern), *with Connick*, 461 U.S. at 148 (speech conveying "one employee's dissatisfaction" with his superiors "and an attempt to turn that displeasure into a cause celèbre" is not on a matter of public concern). That factual distinction, drawn from "the content, form, and context" of the blog posts, *id*. at 147-48, does not merit this Court's further review.

Nor is it enough that Mr. Carey's blog posts relate to "the character of public officials." Pet. 14. As the Fourth Circuit observed, no authority stands for the proposition that speech relates to a matter of public concern simply because it involves a public official. Without some connection to a larger, systemic problem, "a public employee's behavior, whether on-the-job or off, [does not] automatically impute[ ] to his employer; otherwise, virtually anything involving a public employee would, by definition, be a matter of public concern." Pet. App. A 14; *see Connick*, 461 U.S. at 149 (rejecting the notion that "every criticism directed at a public official . . . would plant the seed of a constitutional case"). After all, it is not uncommon for courts to conclude that speech about the behavior of a public official does not present a "matter of public concern." *See*, *e.g.*, *Brooks*, 685 F.3d at 374 (concluding that correctional officer's complaints about his superiors did not involve a matter of public concern because it "was not expressed in terms of a breakdown in effective

prison management, but rather focused on his personal displeasure with his supervisors").

Finally, Mr. Carey's assertion that he posted to what he describes as "a popular website with the first responders' community in his area," Pet. 15, does not transform his speech about Captain Johnson's personal Facebook posts into a matter of public concern. Even if the posts were so popular that they were reposted for a second time, Pet. 14, the short history of social media is replete with examples of personally embarrassing photographs and salacious comments that draw wide attention, but which do not involve matters of social, political or community interest rising to the level of "public concern."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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