No. 21-895

In the Supreme Court of the United States

JOHN RODRIGUES, JR.,

Petitioner,

v.

COUNTY OF HAWAII; and SAMUEL JELSMA, individually,

Respondents.

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

AMENDED REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Ninth Circuit Court of Appeals and District Court nullified LEOSA (18 U.S.C. Sec. 966C) for all Qualified Retired Law Enforcement Officers ("QRLEOs"). Both Courts misapplied the doctrine of "Probable Cause" to supercede LEOSA and ignored the Supremacy Clause's preemption analysis, including Congress' intent. State law firearms offenses, preempted by federal law, cannot form the basis for "Probable Cause." Under the Ninth Circuit Court of Appeals and District Court's interpretation, there are no circumstances under which a QRLEO can exercise his or her statutory right to defend themselves, their families and the community without violating local firearms laws. This Court's intervention is necessary because the Ninth Circuit Court of Appeals and District Court opinions nullified a lawful Congressional Act without basis.

ARGUMENT

I. THE NINTH CIRCUIT AND DISTRICT COURT AVOIDED THE PREEMPTION ANALYSIS.

The issue in this case has always been about preemption under the Supremacy Clause, Art. VI, cl.2.

A violation of 42 U.S.C. 1983, includes a deprivation of a federal statutory right. *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). In a Sec. 1983 case, "Probable Cause" grants government officials "qualified immunity" from liability. *Messerschmidt v. Millender*, 565 U.S. 535, 546, 132 S.Ct. 1235, 1244–45, 182 L.Ed.2d 47, 2012 WL 555206 (2012). The definition of "Probable Cause" includes the reasonable belief that the "suspect committed a crime in the officer's presence." *D.C. v. Wesby*, 138 S.Ct. 577, 586, 199 L.Ed.2d 453, 2018 WL 491521 (2018).

The Ninth Circuit Court and District Court intentionally avoided any analysis under the Supremacy Clause. See, App. 5a (9th Cir.); App. 26a-27a (USDC).

In *Howlett By and Through Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), the Court addressed the issue of whether state law can immunize state actors in a federal Sec. 1983 lawsuit. 496 U.S. at 359, 110 S.Ct., at 2433. In *Howlett,* supra,

the plaintiff brought a Sec. 1983 action, in state court, against the School District for an unconstitutional search of his car and school suspension for five (5) days. 496 U.S. at 359, 110 S.Ct., at 2433-2434. The state law in question granted the school district immunity from suit in Sec. 1983 actions. 496 U.S. at 359, 110 S.Ct., at 2434. The trial court dismissed the plaintiff's case which was affirmed on appeal on the basis that the state's waiver of immunity law did not apply to Sec. 1983 cases. 496 U.S. at 359-360, 110 S.Ct., at 2436. The Court overturned the decision based on the Supremacy Clause, and that Sec. 1983 preempted state law, "When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all." *Howlett By & Through Howlett v. Rose*, 496 U.S., at 371, 110 S.Ct., at 2440, 110 L.Ed.2d 332 (1990).

In this case, the Ninth Circuit and District Court relied on "Probable Cause" arising from alleged state law firearms violations. Both courts and Respondent ignored the unequivocal language in

LEOSA that expressly preempted state firearms laws. See, *DuBerry v. D.C.*, 824 F.3d 1046, 1052 (D.C. Cir. 2016), "Congress used categorical language in the 'notwithstanding' clause of subsection (a), to preempt state and local law to grant qualified law enforcement officers the right to carry a concealed weapon." *DuBerry v. D.C.*, 824 F.3d, at 1052.

"Probable Cause" could not be based on state law firearm offenses, which were preempted by federal law, including the possession, transport or display of firearms. There are no cases that the Ninth Circuit Court, the District Court and Respondent could cite that stand for the proposition that alleged violations of preempted state laws, can be the basis for "Probable Cause" that would grant state actors "Qualified Immunity" in Sec. 1983 actions. When Congress enacted LEOSA, it was the "supreme sovereign" on matters of federal law and preempted the state's authority over firearms regulations for QRLEOs. *Howlett,* 496 U.S., at 376, 110 S.Ct., at 2443; see also, *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500, 108 S.Ct. 1350,

1353–54, 99 L.Ed.2d 582, 1988 WL 33516 (1988), "As we have repeatedly stated, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. (Citations omitted)" If state firearms laws are preempted by LEOSA, then LEOSA is a federal statutory right upon which the Petitioner could maintain his Sec. 1983 lawsuit.

II. CONFLICT AMONG CIRCUIT COURTS REGARDING LEOSA.

There is a distinct conflict between the Circuits concerning whether LEOSA preempted state firearms laws and can be the federal, statutory right, upon which a plaintiff could maintain a Sec. 1983 action against state actors. The Respondent ignored the conflicting opinions regarding LEOSA in *Duberry v. D.C.*, 924 F.3d 570 (D.C. Cir. 2019) and the Fourth Circuit analysis in *Carey v. Throwe*, 957 F.3d 468, 479, 2020 WL 2071060 (4th Cir. 2020), cert. denied, 141 S.Ct. 1054, 208 L.Ed.2d 522, 2021 WL 78108 (2021) and the Eleventh Circuit's analysis in *Burban v. City*

of Neptune Beach, Florida, 920 F.3d 1274 (11th Cir. 2019). There is a growing body of law, that ignores the Supremacy Clause analysis and allows state laws to nullify LEOSA protections.

In this case, the Ninth Circuit's opinion goes beyond the *Carey,* supra, and *Burban*, supra, decisions. The Ninth Circuit's opinion nullified LEOSA as it applies to all QRLEOs. Congress' purpose and intent in adopting LEOSA was clear:

> The Law Enforcement Officers Safety Act of 2003, S. 253, is **designed to protect officers** and **their families** from vindictive criminals, and to **allow thousands of equipped, trained and certified law enforcement officers**, whether on-duty, off-duty or **retired, to carry concealed firearms in situations where they can respond immediately to a crime across state and other jurisdictional lines**. (Emphases added)
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> S. REP. 108-29, 4, 5, 2003 WL 1609540 (Leg.Hist.), at 4 and 5.

Under the Ninth Circuit's and District Court's interpretation, any QRLEO who simply possesses, transports, has to brandish or use firearms to protect

himself, his family or the community, regardless of circumstances, will subject themselves to arrest for local firearms violations and be barred from filing a Sec. 1983 lawsuit.

This case illustrates the danger of arbitrariness that the Ninth Circuit's and the District Court's opinions allow for. The County of Hawaii Police Department recognized that LEOSA would apply to the Petitioner at the time of his arrest. ER, v.2: 273. Later, the decision was made not to prosecute the Petitioner, because he was a QRLEO under LEOSA. ER, v.2: 129. However, Respondent Jelsma, shopped the case around and persuaded the Attorney General for the State of Hawaii to prosecute the Petitioner. ER, v.2: 337; ER, v.2: 275-277. Local jurisdictions and police departments throughout the Country have no guidance in determining when LEOSA would apply, if ever. A QRLEO in one jurisdiction will be protected under LEOSA but in a neighboring county, a QRLEO would not. This case is a concrete example of arbitrariness in the application of LEOSA that will reach the federal judiciary in greater frequency.

III. THE NINTH CIRCUIT'S OPINION CAN ONLY BE CHARACTERIZED AS AN ABDICATION OF FEDERAL JUDICIAL AUTHORITY.

The Ninth Circuit failed to properly conduct any preemption analysis. In *Oneok, Inc., v. Learjet, Inc.,* 575 U.S. 373, 135 S.Ct. 1591, 191 L.Ed.2d 511 (2015) the Court noted that:

> The Supremacy Clause provides that "the Laws of the United States" (as well as treaties and the Constitution itself) "shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. **Congress may consequently pre-empt, i.e., invalidate, a state law through federal legislation. It may do so through express language in a statute**. But even where, as here, a statute does not refer expressly to pre-emption, Congress may implicitly pre-empt a state law, rule, or other state action. (Citation omitted) (Emphases added)
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> *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376–77, 135 S.Ct. 1591, 1594–95, 191 L.Ed.2d 511, 2015 WL 1780926 (2015); see also, *Chicago & N.W. Transp. Co. v.*

> *Kalo Brick & Tile Co.*, 450 U.S. 311, 317–18, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981), "But when Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law pre-empted by federal regulation whenever the "challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (Citation omitted)' "

In the present case, the Petitioner was doing what a QRLEO was allowed under LEOSA. He was defending his family from a person (Brooks) who had threatened his son with firearms on three (3) different occasions (ER, v.2: 135-136 (Petitioner's Deposition "PD": pages 20-21: lines 20-6); ER, v.2: 136 (PD: 23:4-14); ER, v.2: 137 (PD: 25:8-24). On January 26, 2017, Brooks pointed and fired a handgun at the Petitioner. ER, v.2: 125; 135 (PD: 17-18:21-9); ER, v.2: 147 (PD: 68:2-18); ER, v.2: 295; 297. The Petitioner was protecting his son and himself by possessing, transporting, and displaying firearms as a QRLEO. S. REP. 108-29, 4, 5, 2003 WL 1609540 (Leg.Hist.), at 4 and 5.

The Ninth Circuit Court and District Court ignored the genuine issues of material fact concerning the Petitioner's qualifications as a QRLEO. The Petitioner repeatedly presented his LEOSA identification card. ER, v.2: 142 (PD: 45:11-22); ER, v.2: 145 (PD: 57:1-20); ER, v.2: 147 (PD: 67: 23-24). The Petitioner met all requirements to qualify as a QRLEO. ER, v.2: 87-89 (retired in good standing); ER, v.2: 89, v.4: 727-740 (engaged in law enforcement over ten years); ER, v.2: 90-91, 92-93, 94-95, 330-331; ER, v.4: 727-740 (met all qualifications in firearms training for active law enforcement officers); ER, v.2: 326-327 (not unqualified for mental health reasons); ER, v.2: 327 (not under the influence of alcohol or drugs); ER, v.2: 327 (not prohibited from receiving firearms); ER, v.2: 90-91 (possessed a valid photograph ID from the HCPD); and ER, v.2: 90-91, 92-93, 94-95, 330-331; ER, v.4: 727-740 (possessed a valid certification from the HCPD that not less than one year before, that he qualified for the use and could carry concealed firearms).

There was a genuine issue of material fact

about whether the Petitioner had on his person his Firearms Qualification Card. The Petitioner testified under oath that he was unsure whether he had the card on his person at the time of his arrest. ER, v.2: 144 (PD: 56:5-24). These genuine issues of material fact should have been reserved for the Trier of Fact.

The Ninth Circuit's opinion avoided the issue of preemption as well as the genuine issues of material fact.

IV. THE NINTH CIRCUIT'S DECISION WAS NOT LEGALLY SOUND AND *CERTIORARI* IS WARRANTED.

The Ninth Circuit Court failed its most fundamental duty, to interpret laws within the framework of the Constitution. Federalist No. 78, at 466 (Hamilton) (Clinton Rossiter ed., 1961), Signet Classic (2003). Petitioner's preemption issue merits this Court's intervention:

> Whether the constitutional rights asserted by petitioner were " 'given due recognition by the [Court of Appeal] is a question as to which the [petitioner is] entitled to invoke our judgment, and this [he has] done in the appropriate way. It therefore is within our province to inquire

> not only whether the right was denied in express terms, **but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support**. (Emphasis added)' "
>
> *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 366, 110 S.Ct. 2430, 2437, 110 L.Ed.2d 332, 1990 WL 75259 (1990).

In *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 6, 106 S.Ct. 2369, 2372, 91 L.Ed.2d 1 (1986), the Court stated:

> But we have consistently emphasized that the **first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law**, and where a congressional statute does not expressly declare that state law is to be preempted, and where there is no actual conflict between what federal law and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law. (Citations omitted) (Emphasis added)
>
> *Wardair Canada, Inc. v. Florida Dept. of*

> *Revenue*, 477 U.S. 1, 6, 106 S.Ct. 2369, 2372, 91 L.Ed.2d 1 (1986); *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357, 106 S.Ct. 1890, 1899, 90 L.Ed.2d 369 (1986), "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law. (Citation omitted)"; *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 884–85, 120 S.Ct. 1913, 1927, 146 L.Ed.2d 914, 2000 WL 645536 (2000), preemption is "fundamentally" a question of congressional intent.

The Ninth Circuit Court and District Court refused to consider the Petitioner's preemption argument. Both Courts ignored the issue of federal preemption of Hawaii's firearms arms laws concerning the possession, transport and display of firearms by a QRLEO. App. 5a (9th Cir.); App. 29a - 33a (USDC). The Ninth Circuit Court memorandum opinion and the District Court's opinion challenges this Court's well established precedent regarding the Supremacy Clause and preemption analysis.

The effect of the Ninth Circuit and District Court's opinions was the nullification of LEOSA as it applies to all QRLEOs. QRLEOs cannot possess,

transport, display or use their firearms to protect themselves, their family and their community as intended by Congress. S. REP. 108-29, at 4, 2003 WL 1609540. Instead, QRLEOs will have to determine what restrictions each local jurisdiction may enforce to avoid "Probable Cause" that a local law was violated. That is the exact opposite of what LEOSA was intended to accomplish. See, 150 Cong. Rec. H4811 (daily ed. June 23, 2004) (statement of Rep. Delahunt), at 1445, "The reality is that this legislation will preempt, if you will, or supersede, the laws of 31 States that currently restrict carrying a concealed weapon to on-duty officers."

This Court's intervention is needed to give effect to Congress' intent and delineate the boundaries between state and federal law concerning LEOSA, QRLEOs and Sec. 1983 cases.

CONCLUSION

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The court must declare the sense of the law; and if they

> should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. (Emphasis included)
>
> Federalist No. 78, at 467 (Hamilton) (Clinton Rossiter ed., 1961), Signet Classic (2003).

Despite the disconcerting facts, the Petitioner, as a QRLEO, was doing what LEOSA allowed him to do. The issue of preemption under LEOSA was ignored by the Ninth Circuit and District Court. The preemption issue is critical in providing guidance and boundaries for the lower courts and law enforcement. Otherwise, LEOSA becomes a patchwork quilt of application. The Petitioner respectfully submits that the petition for writ of certiorari be granted.

Respectfully submitted,

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