10-2025-cv

United States Court of Appeals

for the

Second Circuit

LYNDON S. JOHNSON, LARRY RIVENBURG, MORRIS A. DARLING, LEONARD DAVIDOW, DAVID BOWHALL,

Plaintiffs-Appellants,

– v. –

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, STATE OF NEW YORK, BRIAN FISCHER, in his official capacity as Commissioner of the New York State Department of Correctional Services, DENISE O'DONNELL, in her official capacity as Commissioner of the New York State Division of Criminal Justice Services, DAVID PATERSON, in his official capacity as Governor of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

A. District Court

This action arises under a law of the United States, 18 U.S.C. § 926C, the *Law Enforcement Officers Safety Act of 2004*, (hereinafter referred to as "*LEOSA*") (108 Public Laws 277; 118 Stat. 865; 2004 H.R. 218). By this action, Plaintiffs-Appellants seek a declaration of the rights and responsibilities of the parties, as well as a permanent injunction, directing Defendants-Appellees to comply with *LESOA.* The lower court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. Venue was proper in the Northern District of New York pursuant to 28 U.S.C. § 1391(a) because Defendants-Appellees maintain their principal place of business in Albany, New York and the events giving rise to Plaintiffs-Appellants' claims occurred in the Northern District of New York.

B. Jurisdiction of the Court Of Appeals

On April 30, 2010, the lower court granted a motion in favor of the Defendants-Appellees, dismissing the Amended Complaint in its entirety. A Memorandum-Decision and Order was entered on April 30, 2010. (A. 76-91). Judgment was entered April 30, 2010. (A. 92). The Order and Judgment are appealable as a final decision pursuant to 28 U.S.C. § 1291. On May 21, 2010, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B), Plaintiffs-Appellants

commenced a timely appeal, as a matter of right, by filing a Notice of Appeal. (A. 93-94).

STATEMENT OF ISSUES PRESENTED

1. Whether the Federal Courts may compel the State to comply with the *Law Enforcement Officer's Safety Act of 2004*?

Answer of the lower court: No. The lower court found that although *LEOSA* clearly established a federal right for retired law enforcement officers, Congress lacked the Constitutional authority to enact legislation which would require the States to comply with *LEOSA*.

2. Whether a private right of action exists under *LEOSA*?

Answer of the lower court: No. The lower court determined that Congress did not intend to create a private cause of action under *LEOSA*.

STATEMENT OF THE CASE

Plaintiffs-Appellants are requesting to be afforded the opportunity to qualify with firearms and receive appropriate photographic identification from their former employer, the New York State Department of Correctional Services (hereinafter referred to as "*DOCS*"), so that they may enjoy the rights and privileges of *LEOSA*. That statute authorizes both active qualified law enforcement officers and retired qualified law enforcement officers to carry concealed weapons and transport those weapons across State lines. As Plaintiffs-

Appellants herein are all retired law enforcement officers, the present action regards only the rights and responsibilities as pertaining to retired law enforcement officers.

Plaintiffs-Appellants Lyndon S. Johnson, Larry Rivenburg, Morris A. Darling, Leonard Davidow and David Bowhall are all correctional officers and sergeants who have retired from with over twenty-five (25) years of service as law enforcement officers (hereinafter, Plaintiffs-Appellants are referred as the "*Retired Officers*"). The Retired Officers should be able to enjoy the rights and privileges granted by *LEOSA*. However, Defendants-Appellees, in particular, DOCS and the Division of Criminal Justice Services, (hereinafter referred to as "*DCJS*") have resisted and frustrated Congressional intent by refusing to provide firearm qualification and appropriate identification required by *LEOSA*. For clarity purposes, the individual defendants, sued in their official capacity, the Commissioners of DOCS and DCJS, will be hereinafter collectively referred to as the "*Commissioners*").

The Retired Officers request, as otherwise "qualified" retired law enforcement officers, upon application and payment[1] of appropriate fees, that they be afforded the opportunity to qualify with firearms, and be provided with the

[1] The Retired Officers are willing to bear all costs associated with firearm qualification and procurement of identification, such that there will be no financial impact upon the State of New York.

appropriate photographic identification so that they may carry concealed weapons across state lines.

This action was commenced with the filing of Complaint on or about August 26, 2009 with the Clerk of the United States District Court in the Northern District of New York. The Retired Officers filed an Amended Complaint on or about November 9, 2009. (A. 6-18). On or about November 23, 2009, Defendants-Appellees filed a Motion to Dismiss the Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b). Thereafter, on April 30, 2010, without oral argument, but after both parties were able to respond, reply and otherwise brief the matter in writing, the lower court, the Honorable David N. Hurd, United States District Judge for the Northern District of New York presiding, granted Defendants-Appellees' Motion, dismissing the Amended Complaint in its entirety. (A. 76-91). Judge Hurd's decision dismissing the Amended Complaint is found at 2010 U.S. Dist. Lexis 42741.

On May 21, 2010, the Retired Officers commenced a timely appeal by filing a Notice of Appeal with the Clerk of the United States District Court for the Northern District of New York. (A. 93-94).

STATEMENT OF FACTS

A. Legislative History of *LEOSA*

The *Law Enforcement Officers' Safety Act of 2004* ("*LEOSA*") was designed to establish national measures of uniformity and consistency to permit trained and certified on duty, off duty or retired law enforcement officers to carry concealed firearms in most situations so that they may respond immediately to crimes across state and other jurisdictional lines, as well as to protect themselves and their families from vindictive criminals.[2] *LEOSA* accomplishes its objectives by preempting State laws as related to active and retired law enforcement officers.[3]

The legislative history of *LEOSA* unequivocally demonstrates that Congress intended to preempt State law. As explained in the House Committee Report:

> A State has traditionally, in the exercise of its sovereignty, controlled who within its borders may carry concealed weapons and when law enforcement officers may carry firearms.
>
> Current law allows an individual State to decide whether or not it wishes to allow out-of-State officers to carry a concealed weapon within that State's borders. Current law allows active, but not retired, Federal law enforcement officers to carry a concealed weapon anywhere within the jurisdiction of the United States. However, it does not allow active and retired State and local law enforcement officers to carry a concealed

[2] *See*, Congressional Debate on Law Enforcement Officers Safety Act 2004, 150 Cong. Rec S7772 at 7773 (July 7, 2004). (A. 21).
[3] *See*, *Law Enforcement Officer's Safety Act of 2003*, H.R. REP. NO. 108-560 (June 22, 2004) at 4. (A. 25).

> weapon without the permission of each specific State. H.R. 218, the "Law Enforcement Officers Safety Act of 2003," ***would override State laws and mandate that retired and active police officers could carry a concealed weapon anywhere within the United States***.
>
> * * *
>
> Currently, some States do not permit a law enforcement officer from other States to carry a concealed weapon within their borders. This legislation would allow current and retired police officers to carry a concealed weapon in any of the 50 States.
>
> The Fraternal Order of Police ("FOP") and the Law Enforcement Alliance of America ("LEAA") support the legislation, while the Police Executive Research Forum ("PERF") and the International Association of Chiefs of Police ("IACP") oppose this legislation.
>
> LEAA argues that this legislation will "allow tens of thousands of additionally equipped, trained and certified law enforcement officers to continually serve and protect our communities regardless of jurisdiction or duty status at no cost to taxpayers." FOP contends that this legislation will help its members to protect citizens in the wake of a terrorist attack and that it is even more necessary since September 11, 2001.
>
> Additionally, supporters argue that this legislation must include retired officers as well as current officers because retired officers need to be able to protect themselves and their families and because they are just as trustworthy as they were when they were employed full time. Supporters also maintain that active and retired law enforcement officers often have to defend themselves outside their own State from criminals whom they have arrested.

See, Law Enforcement Officer's Safety Act of 2003, H.R. REP. NO. 108-560 (June 22, 2004) at 3-4 (emphasis added). (A. 24-25).

As the Committee Report indicates, opponents recognized that *LEOSA* preempted State laws and voiced concerns that *LEOSA* was an incursion into State sovereignty:

> Opponents of this legislation argue that this is an issue of States' sovereignty. The States have traditionally had the right to determine who is eligible to carry firearms in their communities. This legislation would disregard the judgment of State authorities on what many believe is an important public safety issue.

(*See*, *Id.* at 4) (A. 25).

B. Statutory Framework of *LEOSA*

On July 22, 2004, *LEOSA* was enacted into law. (108 Public Laws 277; 118 Stat. 865). U.S.C. §926C provides, in relevant part:

> 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.

Under the statutory framework, for a retired law enforcement officer to qualify for the exemption from State laws that prohibit the carrying of concealed firearms, he must:

(i) Have retired in good standing;

(ii) Have been qualified by the agency to carry or use a firearm;

(iii) Have been employed at least 15 years as a law enforcement officer, or was forced to retire due to a service connected disability;

(iv) Have non-forfeitable rights to a pension benefits;

(v) Meet the same state firearms training and qualifications as an active duty officer;

(vi) Not be prohibited by federal law from receiving a firearm; and,

(vii) Be carrying photo identification issued by the agency.

C. The Retired Officers Satisfy *LEOSA* Requirements.

The Retired Officers satisfy the above criteria, other than (ii) being qualified by the agency to carry or use a firearm and, (vii) having a photographic identification issued by the agency. The Retired Officers are otherwise "qualified" retired law enforcement officers and should enjoy the rights and privileges granted by *LEOSA*. However, the Commissioners have frustrated the law, thereby denying

the Retired Officers those rights and privileges granted by *LEOSA*. To relieve New York State of any financial burden, the Retired Officers have offered to pay for any costs associated with the weapons qualification process and identification procurement, including administrative costs. (A. 13 -14 ¶51; 14 ¶¶52-53; 15 ¶54; 16 ¶57). Therefore, providing the relief requested in the Amended Complaint would be of no cost to the taxpayers of New York.

D. The Retired Officers Attempt to Bring New York State into Compliance.

After enactment of *LESOA* in 2004, Counsel for the Retired Officers had several meetings with the DOCS and DCJS to bring New York State into compliance with the Federal law. On July 19, 2007, Counsel for the Retired Officers wrote to DCJS requesting that whatever steps necessary to implement HR 218 be taken. (A.12 ¶42). On September 20, 2007, Deputy Commissioner Mary B. Kavaney responded that DCJS was declining to implement *LEOSA*. Deputy Commissioner Kavaney's response stated: "[a]fter consideration by State policymakers, it has been decided that the prior administration's policy not to certify compliance with firearms training standards for retired law enforcement officers will remain in effect. This decision was based primarily on concerns regarding liability and the impact on State training resources. In addition, many

law enforcement officials across the State have serious misgivings about this law." (A. 12 ¶¶43-44).

On October 17, 2008, Counsel for the Retired Officers again wrote to DCJS to inquire as to whether the State's policy regarding the certification and training of retired law enforcement officers had changed. (A. 13 ¶45). On October 23, 2008, Deputy Commissioner Mary B. Kavaney responded, indicating that the State's policy as articulated in her September 20, 2007 letter had not changed. (A. 13 ¶46).

On November 10, 2008, Counsel for the Retired Officers wrote to the Commissioner of DOCS on behalf of the Retired Officers to assert their rights under HR 218 to allow them, as qualified retired law enforcement officers to enjoy the privileges and right provided by H.R. 218. (A. 13 ¶47).

On November 21, 2008, the Commissioner of DOCS responded to Plaintiffs-Appellants' individual letters stating: ". . . the Department has determined that it will not, at this time, go forward with any type of weapons training and qualification program for retirees. There are a number of legal and logistical reasons underpinning this determination." (A. 15 ¶55).

SUMMARY OF ARGUMENT

In the present case, the lower court correctly found that *LEOSA*, without dispute, established a right for retired law enforcement officers to carry a

concealed weapon across State lines. However, the Retired Officers herein respectfully submit that the lower court erred in its determination that a remedy, permissible under the U.S. Constitution, was unavailable. Without question, the Tenth Amendment of the U. S. Constitution prohibits the Federal government from commandeering State officials to administer Federal programs; from expending State resources in furtherance of a Federal objective; or directing a State to legislate in a specific manner. *See*, *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997); *New York* v. *United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

Unlike the statutes at issue in the cases referenced above, *LEOSA* does not require implementation of a Federal program. Instead, *LEOSA* makes use of the States' pre-existing standards in firearms qualification. In contrast to the expensive and unwieldy programs at issue in *Printz*, *supra*, and *New York*, *supra*, *LEOSA* establishes a right accruing to a small, specific group -- retired law enforcement officers -- to carry firearms across State lines. As indicated herein, to effectuate this right would be of no cost to the taxpayers of the State of New York.

The statute is silent regarding the existence of a private right of action. However, as discussed *infra*, analysis of the statute indicates that an implied right of action should exist. *LEOSA* clearly creates a federal right in favor of the persons protected, and does not focus on the conduct of the regulated or the

regulators. Moreover, the statute provides no other enforcement mechanism. Therefore, a private right of action should be implied.

STANDARD OF REVIEW

"The decision of the District Court granting the motion for judgment on the pleadings is reviewed *de novo.*" *Lafaro v. New York Cardiothoracic Group, PLLC,* 570 F.3d 471, 475 (2d Cir. 2009), *citing Pierce v. Underwood*, 487 U.S. 552, 558, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988). On a motion to dismiss, the Court accepts "all allegations in the complaint as true and draw[s] all inferences in the non-moving party's favor." *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003), *quoting Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). The Court is tasked with deciding whether "the moving party [in this case the Defendants-Appellees] . . . [are] entitled to judgment as a matter of law." *Burns Int'l Sec. Servs. v. International Union*, 47 F.3d 14, 16 (2d Cir. 1995). The Court may only grant the Defendants' motion if "it appears ***beyond doubt*** that the plaintiff can prove ***no*** set of facts in support of his claim which would entitle him to relief." *Phillip v. University of Rochester*, 316 F.3d 291, 293 (2d Cir. 2003), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (emphasis added).

ARGUMENT

POINT I

THE COURT MAY COMPEL THE STATE TO COMPLY WITH *LEOSA*

A. *LEOSA* Does Not Commandeer State Officials or Require that a State Use its Own Governmental System to Implement Federal Commands

The Tenth Amendment is a 'shield' which protects states and localities from Federal commandeering, not a "sword allowing states and localities to engage in passive resistance that frustrates federal programs." *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999). Statutes enacted pursuant to the Commerce Clause or other enumerated powers of Congress do not violate the Tenth Amendment unless they "commandeer the states' executive officials" or "legislative processes" by imposing upon the state an affirmative duty to administer or enact a federal program. *State of Connecticut v. Physicians Health Services of Connecticut Inc*, 287 F.3d 110, 122 (2d Cir. 2002); *see also, Cellular Phone Taskforce v. Fed. Communications Comm'n*, 205 F.3d 82, 96 (2d Cir. 2000) (holding that a federal telecommunications law preempting states' ability to regulate the health and safety issues with respect to certain personal wireless service facilities does not violate the Tenth Amendment because the "statute does not commandeer local authorities to administer a federal program").

In *State of Connecticut, supra,* this Court rejected a Tenth Amendment challenge to a provision of the Employee Retirement Income Security Act that barred a state from bringing a *parens patrie* claim against a medical insurance company. This Court held that the bar on the State's claim did not amount to the commandeering of the State's executive or legislative branches and thus did not violate the Tenth Amendment. *State of Connecticut, supra,* 287 F.3d at 122.

In *United States v. Sage,* 92 F.3d 101 (2d Cir. 1996) this Court upheld the Child Support Recovery Act of 1992 ("*CSRA*") in the face of a Tenth Amendment challenge contending that the *CSRA* "invade[d] areas of legislation historically reserved to the States . . . namely 'the protection of family relations.'" *United States v. Sage, supra,* 92 F.3d at 107. This Court found that *CSRA* did not command a State to provide benefits to a child. *Id.* Instead, the *CSRA* accepts the validity of the State court judgment and seeks to implement those State policies when the parent and the child live in different States and the judgment has been willfully flouted. *Id.*

In the present case, *LEOSA* is not a law under which the Federal government demands that a State use its own governmental system to implement federal commands. *LEOSA* does not commandeer State officials or the legislative process. Nor does *LEOSA* require creation of a State governmental system to

implement Federal objectives. *LEOSA* makes use of the States' pre-existing standards for allowing law enforcement officers to carry firearms. *See*, 18 U.S.C. § 926C (d). *LEOSA* requires the State to take actions consistent with their past and present procedures. DOCS' mandates that all active officers annually qualify on the firing range to possess and use weapons in the course of their duties. This qualification certification procedure is part of a long-standing system in place for qualifying its current Correctional Sergeants and Officers under applicable New York State firearms training standards. Implementation of *LEOSA* requires that such qualification be extended to retired employees, at the retirees' own expense. Moreover, DOCS issues appropriate identification to all active Correctional Sergeants and Officers. Issuance of "retired" identification credentials, at the retirees' expense, would place no burden upon the State. These actions neither require nor contemplate a new State system.

The legislative history of the *LEOSA* demonstrates that Congress intended for the States to certify retired officers and provide credentials. "State and law enforcement agencies also would have to provide an annual certification or identification process that demonstrates that the retiree has met the State's or agency's training and qualification standards to carry a firearm. Because most States have a reauthorization system in place, [CBO] estimates that the costs for

those governments to comply would be insignificant . . .”[4] By not affording the Retired Officers the opportunity to qualify and be certified, the Commissioners are frustrating Federal law.

As *LEOSA* is a recently enacted statute, there is scant case law regarding its interpretation. One particular unpublished case, which the Retired Officers respectfully submit was incorrectly decided, is *Zarrelli v. Rabner*, 2007 N.J. Super. Unpub Lexis 2068 (2007 WL 1284947) (N.J. Super. AD 2007). Analysis of that decision reveals no consideration of the extensive legislative history which demonstrates that Congress intended to preempt state laws by enacting *LEOSA*. Furthermore, the *Zarrelli* court found that the statute was “bereft of any indication that Congress, on passing the Act, intended to mandate that the various states implement a procedure for issuing certifications . . .” *Id*. at 5-6. As indicated in legislative history, that conclusion is incorrect:

> H.R. 218 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would permit qualified current and former State and local law enforcement officers to carry certain concealed firearms. Currently, 17 States prohibit anyone from carrying concealed weapons and 32 States prohibit out-of-State, off-duty law enforcement officers from carrying concealed weapons; this bill would preempt those laws.
>
> States and law enforcement agencies also would have to provide an annual certification or identification process that

[4] *See, Law Enforcement Officer’s Safety Act of 2003*, H.R. REP. NO. 108-560 (June 22, 2004) at 9. (A. 30).

> demonstrates that the retiree has met the State's or agency's training and qualification standards to carry a firearm. Because most States have a reauthorization system in place, CBO estimates that the costs for those governments to comply would be insignificant and well below the annual threshold established in UMRA ($60 million in 2004, adjusted annually for inflation). H.R. 218 contains no new private-sector mandates as defined in UMRA.

See, Law Enforcement Officer's Safety Act of 2003, H.R. REP. NO. 108-560 (June 22, 2004) at 9. (A. 30).

In dismissing the complaint, the *Zarrelli* Court relied on *Printz v. U.S., supra*, 521 U.S. 898, to conclude that New Jersey could not be compelled to comply with *LEOSA*. The Retired Officers respectfully submit that such reliance was misplaced. The *Printz* case regarded implementation of an amendment to the Gun Control Act of 1968, commonly referred to as the "*Brady Act*." The *Brady Act* purported to direct state law enforcement officers to participate in the administration of a federally enacted regulatory scheme *Printz, supra*, 521 U.S. at 904. Regulated firearms dealers were required to forward *Brady* forms to a state or local officer referred to as the Chief Law Enforcement Officer (commonly referred to as a "*CLEO*"). *Id.* The *Brady Act* imposed an obligation upon the CLEO to make "reasonable efforts" within five days to determine whether the sales reflected in the forms were lawful. *Id.* Thus, the CLEOs, state officers, on state time, had to investigate whether the sale violated Federal law. Moreover, under the scheme, the CLEOs were empowered to grant waivers of the federally

prescribed five day waiting period. *Id.* at 904-905. Under that Statutory scheme, the *Brady Act* required extensive state involvement with a federal program.

The U.S. Supreme Court in *Printz* began its analysis by reviewing the *Federalist Papers* and subsequent precedent, finding no clearly established historic authority regarding whether Congress may "impress the state executive into its service." *Id.* at 907. Indeed, the *Printz* Court noted: "[f]ederal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes." *Id.* at 925.

In a series of cases, statutes requiring the States to administer federal programs were struck down. For example, in *New York v. United States*, *supra*, 505 U.S. 144, a mandate that the States administer a federal regulatory program requiring the States to enact legislation to provide for the disposal of radioactive waste generated within their borders or to take title and dispose of such radioactive waste themselves was invalidated. That law effectively required the States to legislate pursuant to Congress's direction or to implement an administrative solution. In striking down the law, the *New York* Court concluded that "[t]he

Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States, supra,* 505 U.S. at 188.

LEOSA does not command States to administer a Federal program. State employees certifying retired law enforcement officers pursuant to *LEOSA* do not need to know or apply any Federal rules or regulations. State officers are not investigating gun sales like in *Printz, supra,* or regulating nuclear waste disposal like in *New York, supra*.

Instead, *LEOSA* provides the Retired Officers with the privilege of carrying concealed weapons across State lines. That privilege was earned based upon their long service as law enforcement officers. The Commissioners should not be able to frustrate that right by withholding certification.

Moreover, the rationale for the holding in *Printz* was based, in part, upon the burden placed upon the States. *Printz v. U.S., supra,* 521 U.S. at 930. The Court found that "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects." *Id.* at 930, *citing*, Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47

Vand. L. Rev. 1563, 1580, n.65 (1994). Under the statutory scheme of the *Brady Act*, "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service--and at no cost to itself--the police officers of the 50 States." *Printz v. U.S.*, *supra*, 521 U.S. at 922.

In the present case, the State of New York would not be forced to absorb any costs because the Retired Officers would pay for qualification certification and identification. That is drastically different than the burden placed upon the States in *Printz, supra* and *New York, supra.* In the present case, because *LEOSA* does not require the State to administer a federal program, absorb costs, or implement federal policy, the holding in *Printz* is not controlling.

Because *LEOSA* does not commandeer State officials, the legislative process, or require state implementation of a Federal program, it is more comparable to *Reno v. Condon*, 528 U.S. 141, 120 S. Ct. 666, 145 L. Ed. 2d 587 (2000) which upheld the Driver's Privacy Protection Act of 1994 ("*DPPA*"). The *DPPA* regulates the disclosure and resale of personal information, such as name, address, telephone number, vehicle description and Social Security number contained in the records of state Department of Motor Vehicles ("DMV"). In *Reno, supra*, the U.S. Supreme Court held that in enacting the statute, Congress did not run afoul of the federalism principles enunciated in *New York* v. *United States*, *supra*, 505 U.S. 144, and *Printz* v. *United States*, *supra*, 521 U.S. 898.

In its analysis of the *DPPA*, the U.S. Supreme Court acknowledged that the Federal statutes in *New York, supra* and *Printz, supra*, were held invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of Federalism contained in the Tenth Amendment. In *New York, supra*, Congress commandeered the State legislative process by requiring a State legislature to enact a particular kind of law. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. *Reno v. Condon*, 528 U.S. at 149, *citing Coyle* v. *Smith*, 221 U.S. 559, 565, 31 S. Ct. 688, 55 L. Ed. 853 (1911); *New York v. United States, supra*, 505 U.S. at 162.

In *Reno v. Condon, supra*, similar to the present case, South Carolina contended that the *DPPA* violated the Tenth Amendment because it "thrusts upon the States all of the day-to-day responsibility for administering its complex provisions . . . [thereby making] state officials the unwilling implementors of federal policy." *Reno v. Condon, supra*, 528 U.S. at 149-50. Although the *DPPA* required significant time and effort on the part of state employees, the U.S. Supreme Court found the *DPPA* to be valid, relying on *South Carolina* v. *Baker*, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592, (1988). In *Baker*, the U.S.

Supreme Court upheld a statute that prohibited States from issuing unregistered bonds because the law "regulated state activities," rather than "seeking to control or influence the manner in which States regulate private parties." *Reno v. Condon*, *supra*, 528 U.S. at 150, citing *South Carolina v. Baker*, *supra*, 485 U.S. 514-515. In *Reno*, *supra*, the U.S. Supreme Court reasoned that the DPPA, "[l]ike the statute at issue in *Baker*, the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The *DPPA* regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno v. Condon*, *supra*, 528 U.S. at 151.

In the present case, *LEOSA* provides a select group of individuals, based upon their long-standing dedicated service as law enforcement officers, certain rights and privileges. To enjoy those rights, the Retired Officers would merely have to qualify annually on the firing range and be provided appropriate identification. Such actions do not constitute commandeering of state officials, or implementing a federal program.

B. *LEOSA* Pre-Empts State Law

"[T]he purpose of Congress is the ultimate touchstone" of pre-emption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct.

2608, 120 L. Ed. 2d 407 (1992), *citing Malone v. White Motor Cor*p., 435 U.S. 497, 504, 98 S. Ct. 1185, 55 L. Ed. 2d 443 (1978), *quoting Retail* Clerks v. *Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963). Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Cipollone v. Liggett Group, Inc.*, *supra*, 505 U.S. at 516, *quoting Jones v. Rath Packing Co*., 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604, (1977).

"When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority . . .[internal citation omitted] there is no need to infer congressional intent to pre-empt state laws from the substantive provisions." *Id.* at 517, *quoting California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987). The U.S. Supreme Court has held "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991), *quoting Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L.Ed.2d 171 (1985).

In determining whether *LEOSA* preempts State law, the analysis begins with the statute itself. The face of the statute clearly presents a clear intention to bind the States. The first sentence of 18 U.S.C. 926C reads: *"[n]otwithstanding any other provision of the law of any state . . . "* (emphasis added.). The Retired Officers respectfully submit that this first sentence presents a "reliable indicum" of Congressional intent with respect to State authority.

Section (b) of 18 U.S.C. § 926C further provides that "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 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.

The inclusion of section (b) further illustrates Congressional intent to pre-empt State law. *LEOSA* preempts State handgun laws with respect to one certain class of individuals – retired law enforcement officers. However, 18 U.S.C. §926C(b) relinquishes some of that power back to the states, *i.e.*, to regulate concealed weapons on private property and state or local government property. This is a clear manifestation that Congress intended to bind the States with regard to permitting retired law enforcement officers to carry concealed weapons.

As indicated in the legislative history, *LEOSA*'s detractors were well aware of its intent to bind the states. Indeed, Representative Sensenbrenner strongly opposed the Act because *LEOSA* did exactly that – override state law.

> It is no secret that I am opposed to this legislation. I believe it violates the principles of federalism and undermines the authorities of the States. The State has traditionally, in the exercise of sovereignty, controlled who within its borders may carry concealed weapons and when law enforcement officers may carry firearms. Current law allows an individual State to decide whether or not it wishes to allow out-of-State officers to carry a concealed weapon within that State's borders. Current law allows active, but not retired Federal law enforcement officers to carry a concealed weapon anywhere within the jurisdiction of the United States; and it does not allow active and retired State law enforcement to carry a concealed weapon without the specific permission of each State.
>
> H.R. 218 would override States' right-to-carry laws and mandate that retired and active police officers could carry a concealed weapon anywhere within the United States. This legislation would disregard the judgment of State authorities on what many believe is an important public safety issue.
>
> While approximately 33 States do specifically allow individuals to carry concealed weapons, that leaves 17 other States that do not. H.R. 218 would supersede the laws of those 17 States, including Wisconsin, and allow current and retired law enforcement officers from anywhere within the United States to carry a concealed weapon in those States, regardless of State law. Such a measure is an affront to State sovereignty and the Constitution, which I cannot support.

(*See, Law Enforcement Officer's Safety Act of 2003*, H.R. REP. NO. 108-560 (June 22, 2004) at 13 (Rep. Sensenbrenner's Comments on *LEOSA*). (A. 34).

In the present matter, Congress intended "to allow current and retired police officers to carry a concealed weapon in any of the 50 States."[5] Therefore, to the extent that New York laws prevent retired law enforcement officers from carrying concealed weapons, those laws should be preempted. Based upon the foregoing, the Retired Officers respectfully submit that *LEOSA* preempts State law.

POINT II

A PRIVATE CAUSE OF ACTION IS CONSISTENT WITH THE STATUTORY SCHEME

When "determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, [the court's] task is one of statutory construction." *Northwest Airlines v. Transp. Workers Union*, 451 U.S. 77, 91, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981), *citing Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S. Ct. 2479, 61 L. Ed. 2d. 82 (1979).

In *Lindsay v. Ass'n of Prof'l Flight Attendants*, 581 F.3d 47, 52-54 (2d Cir. 2009), this Court recently applied the factors[6] from *Cort v. Ash*, 422 U.S. 66,

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[5] *See, Law Enforcement Officer's Safety Act of 2003*, H.R. REP. NO. 108-560 (JUNE 22, 2004) at 4. (A. 25).

[6] This Court noted that recent U.S. Supreme Court decisions have subordinated the *Cort v. Ash* factors, but nonetheless found the factors to be relevant and based the *Lindsay* holding upon the *Cort v. Ash, supra*, factors. *Lindsay v. Ass'n of Prof'l Flight Attendants, supra*, 581 F.3d at 52, n.3.

95 S. Ct. 2080 45 L. Ed. 2d 26 (1975) to analyze the Congressional intent of whether individuals may bring private suits to enforce a particular statute. The *Cort v. Ash*, *supra*, factors are:

1) Whether the plaintiff is "one of the class for whose especial benefit the statute was enacted" or, in other words, whether the statute creates a federal right in favor of the plaintiff;

2) Whether there is any indication of legislative intent, explicit or implicit, either to create or to deny a private right of action;

3) Whether a private right of action is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff;

4) Whether the cause of action is one traditionally relegated to state law, in an area that is basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.

Lindsay v. Ass'n of Prof'l Flight Attendants, supra, 581 F.3d at 52, *citing Cort v. Ash*, *supra*, 422 U.S. at 78.

Addressing these factors indicates a private right of action is indeed appropriate in the present case.

First, *LEOSA* clearly creates a federal right in favor of the Retired Officers. *LEOSA* preempts State laws to permit a class of persons, *i.e.*, retired law

enforcement officers, to carry concealed weapons. The Committee Report specifically mentions retired law enforcement officers as benefiting from this statute:

> [S]upporters argue that this legislation must include retired officers as well as current officers because retired officers need to be able to protect themselves and their families and because they are just as trustworthy as they were when they were employed full time. Supporters also maintain that active and retired law enforcement officers often have to defend themselves outside their own State from criminals whom they have arrested.

See, Law Enforcement Officer's Safety Act of 2003, H.R. REP. NO. 108-560 (June 22, 2004) at 4. (A. 25).

Applying the *Cort v. Ash, supra,* factors in *Lindsay v. Ass'n of Prof'l Flight Attendants, supra,* this Court noted that "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Lindsay v. Ass'n of Prof'l Flight Attendants, supra*, 581 F.3d at 53, *quoting Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). In the present case, *LEOSA* does ***not*** focus on the person regulated, instead *LEOSA* focuses on the individuals

protected[7] -- retired law enforcement officers. Thus, there is an implication of an intent to create a private right of action in favor of the Retired Officers.

Second, the language of the statute is silent regarding whether a private right of action was intended. Although the statute does not specifically provide for a private cause of action, the statute does not expressly deny, withhold or limit a private right of action. Indeed, *LEOSA* does not provide for ***any*** other enforcement mechanism, whether administrative, regulatory or through the Attorney General. Therefore, if the Retired Officers cannot bring a cause of action under *LEOSA*, the statute will be unenforceable and the intent of Congress will be completely frustrated. In other words, if the States refuse to certify retired officers as qualified and provide them with photographic identification, then 18 U.S.C. 926C will be a nullity, as it is currently with respect to the Retired Officers herein. Therefore, a private right of action should accrue to the Retired Officers.

Third, a private cause of action is consistent with the underlying scheme[8] of the statute. By this action, the Retired Officers are requesting only

[7] To further illustrate the significance of the benefit bestowed upon Plaintiffs-Appellants and other retired law enforcement officers, the legislative history states: "Convicted criminals often have long and exacting memories. A law enforcement officer is a target in uniform and out, active or retired, on duty or off duty." Congressional Debate on Law Enforcement Officers Safety Act 2004, 150 Cong. Rec S7772 at 7773 (July 7, 2004). (A. 24).

prospective injunctive relief to be certified and properly credentialed to carry concealed weapons across the State and into other jurisdictional lines.[9] The Retired Officers are not requesting any monetary damages, nor do the Retired Officers submit that any should be available.

In *Lindsay v. Ass'n of Prof'l Flight Attendants*, *supra*, 581 F.3d at 54-55, this Court found that the statute at issue there vested collective bargaining authority in the representative union. Therefore, a private right of action was inconsistent with the statutory scheme. In the present case, *LEOSA* does not provide for alternative enforcement, such as through union action, as did the statute in *Lindsay*. Therefore, a private cause of action is ***not*** inconsistent with *LEOSA*'s statutory scheme.

Fourth, as indicated in the legislative history, States have traditionally determined who may, and who may not, carry concealed weapons within their boundaries.[10] The legislative history of *LEOSA* clearly establishes that *LEOSA* preempts State law and that Congress unequivocally intended to supersede State

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[8] As provided in the legislative history, the *Law Enforcement Officers Safety Act* creates a mechanism by which . . . retired officers [are] permitted to carry their firearms across State and other jurisdictional lines, at no cost to taxpayers, in order to better serve and protect our communities. (See, Congressional Debate on Law Enforcement Officers Safety Act 2004, 150 Cong. Rec S7772 at 7773 (July 7, 2004). (A. 23).

[9] *Id.*

[10] *See*, *Law Enforcement Officer's Safety Act of 2003*, H.R. REP. NO. 108-560 (June 22, 2004) at 3. (A.24).

law. Therefore, to provide for a uniform and consistent national application of *LEOSA*, as intended by Congress, a private cause of action should accrue in favor of the Retired Officers.

Reviewing the factors discussed in *Cort v. Ash*, *supra*, militates toward a private cause of action in favor of the Retired Officers. The statute clearly bestows a privilege onto the Retired Officers -- the purpose of which will be frustrated unless a private right of action lies as there is no other enforcement mechanism. Without any means of enforcement, individual States will essentially be free to "opt out" of *LEOSA* at their choosing. This would thwart the will of Congress. Therefore, based upon the foregoing, the Retired Officers respectfully submit that *LEOSA*, 18 U.S.C. §926C, creates a private right of action.

CONCLUSION

WHEREFORE, based upon the foregoing, the Plaintiffs-Appellants respectfully request an Order reversing the lower court's Memorandum-Decision and Order, vacating the dismissal of the Amended Complaint and remanding this matter for further proceedings, together with award of Attorney's fees and costs incurred by Plaintiffs-Appellants in prosecuting this appeal.

Dated: September 16, 2010

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CERTIFICAE OF COMPLIANCE WITH RULE 32(A)

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this Brief contains 7,112 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In making this assertion, I have relied upon the word count of the word processing program used to prepare the Brief.

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in Times New Roman, 14-point font.

Dated: September 15, 2010
Albany, New York

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I, Maryna Sapyelkina, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On

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