No. 20-812

In the Supreme Court of the United States

LISA M. FOLAJTAR,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL et al.,

Respondents.

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

Brief of Neal Goldfarb as *Amicus Curiae* in Support of Respondents

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Contents

Table of Authorities

Cases

Constitutional Provisions

Statutes

Historical Materials (listed chronologically)

Briefs and Petitions

Other Materials

Interest of Amicus[1]

Amicus Neal Goldfarb is an attorney with an interest and expertise in linguistics, and in applying the insights and methodologies of linguistics to legal interpretation. He has written about the latter topic extensively, in papers, amicus briefs, and blog posts.[2]

Amicus's interest in this case stems from his having carried out a corpus-linguistic analysis of the Second Amendment's operative clause ("the right of the people to keep and bear Arms"), which shows that the Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), was mistaken about the Second Amendment's original meaning.[3]

Introduction and Summary of Argument[4]

The petition in this case is one of several currently pending that seek review of decisions rejecting claimed

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1. All parties were timely notified and have consented in writing to the filing of this brief. No party's counsel authored any part of this brief. Nobody other than amicus contributed any funds toward the brief's preparation or submission.

2. Amicus blogs at LAWnLinguistics. Links to his articles and briefs are available at bit.ly/ GoldfarbPapers and bit.ly/GoldfarbBriefs, respectively.

3. Neal Goldfarb, *A (Mostly Corpus-Based) Reexamination of* D.C. v. Heller *and the Second Amendment,* (2019) bit.ly/Goldfarb2dAmAnalysis ("*Goldfarb Analysis*").

4. This brief follows two typographic conventions generally followed in linguistics: (a) *Italics* signal that a word or phrase is being used to refer to itself as an expression. *E.g.*, "The word *language* has eight letters." (b) 'Single quotation marks' are

denials of rights under the Second Amendment.[5] Amicus has filed briefs in two of those cases, opposing the petitions: *New York State Rifle & Pistol Assn. v. Corlett*, No. 20-843 and *Holloway v. Wilkinson*, No. 20-782. In those briefs, amicus has argued (1) that the issue each petition seeks to raise should not be decided until the Court has considered the challenge to *Heller* that is posed by his analysis (and by other corpus-based analyses of the Second Amendment), and (2) that the Court should not address the substance of that challenge until scholars and advocates on all sides of the gun-rights issue have had an opportunity to debate the corpus evidence, and the issues that would follow from a conclusion that *Heller* was wrongly decided.

Amicus submits that those same grounds militate against granting the petition in this case. But rather than repeat the arguments in his previous briefs, he will address an issue that his corpus analysis did not deal with: the original meaning of *well regulated militia*.

As amicus will show, *Heller* was mistaken in its interpretation of *well regulated militia*. That conclusion is based both on flaws in the opinion's reasoning and on evidence of 18th-century linguistic usage.

Flaws in *Heller's* reasoning. The *Heller* opinion's reasoning was flawed in two respects. First, it failed to heed the bedrock interpretive principle that

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used to enclose statements of the meaning of a word or phrase. *E.g.*, "*Closed* means 'not open.'"

5. *See, e.g,* Petition for Writ of Certiorari, *New York State Rifle & Pistol Assn. v. Corlett*, No. 20-843 (U.S. filed Dec. 17, 2020); Petition for Writ of Certiorari, *Folajtar v. Wilkinson*, No. 20-812 (U.S. filed Nov. 24, 2020).

words must be understood in light of their context, and not in isolation. As applied to the interpretation of *well regulated militia*, that principle required the Court to consider the possibility that the phrase as a whole had an accepted meaning that differed in some way from the separate meanings of the words that were its component parts. But that's not what the Court did. Instead, it first interpreted *militia* out of context, and then moved on to interpret *well regulated* out of context.

Second, *Heller*'s reasoning as to *well regulated militia* is flawed even when considered on its own terms. Under the Court's interpretation, a well regulated militia had the following defining characteristics:[6]

1. It consisted of "all males physically capable of acting in concert for the common defense."
2. It was something distinct from, and apparently unconnected to, "the state- and congressionally-regulated military forces described in the Militia Clauses [of the Constitution.]"
3. It was subject to "proper discipline and training," despite the apparent absence of any command structure (or indeed of *any* organizational structure) capable of imposing such discipline and training.

The third characteristic, having to do with training and discipline, is inconsistent with the first two, which entail a lack of organization.

18th-century usage. The Court in *Heller* did not attempt to determine how *well regulated militia* was

6. 554 U.S. at 596.

used during the 184 years between the settlement of Jamestown and the ratification of the Second Amendment. Nor did it consider the use during that period of phrases such as *regulate the militia*, *regulating the militia*, and *regulation of the militia*

In an effort to answer the questions that the Court did not ask, Amicus has undertaken an examination of the usage of *well regulated militia*, and of phrases such as those above, and the results of that examination do not support the interpretation in *Heller*. Quite the contrary: the usage evidence points toward the conclusion that *well regulated militia* was most likely understood to refer to a militia that was under the regulation of the relevant colonial or state government.

Argument

I. *Heller*'s analysis of *well regulated militia* was flawed.

A. It was inappropriate to interpret *militia* and *well regulated* independently of one another, rather than interpreting the phrase as an integrated linguistic unit.

In seeking to determine the Founding Era meaning of *well regulated militia*, the Court in *Heller* proceeded on the implicit assumption that it was sufficient to examine *militia* separately from *well regulated*, without considering the possibility that the phrase was used and understood in such a way that the meaning of the whole wasn't simply the sum of the meanings of its separate components.[7]

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7. 554 U.S. at 587.

The Court interpreted *militia* to mean "all males physically capable of acting in concert for the common defense,"[8] and not (as the petitioners had argued) "the state- and congressionally-regulated military forces described in the [Constitution's] Militia Clauses."[9] Having thus interpreted the third word in *well regulated militia*, the Court moved on to the first two: "The adjective 'well-regulated' implies nothing more than the imposition of proper discipline and training."[10]

By extracting *militia* and *regulated* from the phrase in which they occurred, the Court acted contrary to the "fundamental principle…that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[11] That principle was expressed evocatively by Learned Hand 80 years ago: "Words are not pebbles in alien juxtaposition" he said; they "have only a communal existence" and "the meaning of each interpenetrate[s] the other[.]"[12] And remarkably, Hand's statement anticipated one of the most important insights that would later emerge from corpus linguistics, and in particular from corpus-based lexicography beginning in the 1980s. That insight is that in considering the meanings of words as used in context, it will often make sense to view the basic unit

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8. *Id.* at 595 (cleaned up).

9. *Id.* at 596 (cleaned up).

10. *Id.* at 597 (cleaned up).

11. *Deal v. United States*, 508 U.S. 129, 132 (1993) (per Scalia, J.).

12. *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)), *quoted with approval in King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

of meaning as including not just the word itself, but also one or more of the words that accompany it.[13]

Although that suggestion might seem counter-intuitive, the Court went expressed a similar view in a recent case that concerned the tolling of a statute of limitations:

> The District offers no reason why, in interpreting "tolled" as used in § 1367(d), we should home in only on the word itself, ignoring the information about the verb's ordinary meaning gained from its grammatical object. Just as when the object of "tolled" is "bell" or "highway traveler," the object "period of limitations" sheds light on what it means to "be tolled."[14]

One could rephrase this passage, with no appreciable change in meaning, by saying, "What we are concerned with here is not the meaning of the verb 'toll' by itself, but the meaning of the phrase 'toll a period of limitations.'"

So the approach to word meaning that amicus takes here is similar in substance to the Court's approach in *Artis* and very much in the spirit of the statement by Learned Hand.[15] In the present context, that approach

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13. Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Context of Corpus Linguistics*, 2017 BYU L. Rev. 1359, 1378-87 (2018).

14. *Artis v. District of Columbia*, 583 U.S. __, 138 S. Ct. 594, 603-04 (2018).

15. For further discussion of this approach in the context of *Artis*, see Neal Goldfarb, *Artis v. District of Columbia, part 2: Units of Meaning and Dictionary Definitions*, LAWnLinguistics (Feb. 27, 2018), bit.ly/ArtisUnitsMeaning.

calls for treating the full phrase *well regulated militia* as the unit of meaning that is at issue. And in investigating the use of that phrase in 18th-century America, it will be informative to look at the use of *regulate* and *regulation* in contexts in which it was the militia that was referred to as the entity being regulated.

Those issues will be addressed in part II of this brief, but before turning to them, it will be worthwhile to point out that *Heller*'s interpretation of *well regulated militia* runs into problems even when considered on its own terms.

B. *Heller*'s separate interpretations of *militia* and *well regulated* don't cohere when they are combined into an interpretation of the full phrase.

As noted above, *Heller*'s interpretation of *well regulated militia* had two components:

1. *Militia* was interpreted to mean "all males physically capable of acting in concert for the common defense,"[16] and as *not* referring to what the Court called "the organized militia": the "state- and congressionally-regulated military forces" that are the subject of the militia clauses of the Constitution.[17]
2. *Well regulated* was interpreted as "[implying] nothing more than the imposition of proper discipline and training."[18]

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16. 554 U.S. at 595 (cleaned up).

17. *Id.* at 596.

18. *Id.* at 597.

Given the conclusion that the militia to which the Second Amendment refers was not the "organized militia," it follows that what the Second Amendment refers to as "the militia"— essentially the entire able-bodied male population of the 13 states—amounted to what we can call the *un*organized militia. But that creates a problem for *Heller*'s interpretation: if the militia was unorganized, who (or what entity) could have imposed the discipline and training that would have been needed in order to convert the (unorganized) militia into a well regulated militia?

It seems unlikely that the necessary command structure could have emerged spontaneously, from the bottom up, from the overall population of able-bodied males, except perhaps in scattered areas. And although *Heller* rejected the argument that what the Second Amendment referred to was the militias that were organized and controlled by each colony, and (after Independence) by each state, the reality was that whatever discipline and training was imposed on the able-bodied male population, it was the "organized militias' that imposed it.

When one keeps in mind that participation in the various state militias was mandatory for all able-bodied males within a specified age-range (subject to limited exemptions), it is difficult to make sense of the idea that "the militia" as described by *Heller* was something separate and apart from the state militias.[19]

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19. The Court suggested in *Heller* that if the Second Amendment were interpreted as protecting "no more than the right to keep and use weapons as a member of an organized militia," as the petitioners contended, Congress would be able to eviscerate that right by invoking its Article I power over the mil-

II. Evidence of 18th-century usage indicates that *well regulated militia* was most likely understood to denote a militia organized and regulated by the government of the colony or state.

The discussion above has shown that *Heller*'s interpretation of *well regulated militia* doesn't hold up to scrutiny, but it leaves open the question of how *well regulated militia* was actually used during the mid-to-late 18th century, and therefore of how it was likely to have been understood.

In this section, amicus addresses that question. He does so by presenting the relevant linguistic evidence, which includes not only the use of *well regulated militia*, but also of phrases such as *regulate the militia*, *regulating the militia*, and *regulation of the militia*. While none of those is the precise phrase used in the Second Amendment, they provide relevant evidence. As will be

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itia. Under that interpretation, the Court said, "the Second Amendment protects citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them." 554 U.S. at 600. But that argument fails.

The petitioners had framed their argument on the assumption that the meaning of *bear arms* had two separate components: (1) a kind of action (carrying weapons) and (2) the context in which that action was embedded (serving in the militia). But as is shown by amicus's analysis, that framing was mistaken. The corpus data suggests that *bear arms* was understood to mean (depending on the context) 'serve in the militia,' 'engage in combat,' and so on. *Goldfarb Analysis* 39-52. Under that interpretation, the federal government's power to act in the way described by the Court would have been barred by the Second Amendment itself.

seen, the most important interpretive issue regarding *well regulated militia* is to determine the entity that is doing the regulating. And when all the evidence is considered, it points toward the conclusion that *well regulated militia* was most likely understood to refer to a militia that was under the regulation of the relevant colonial or state government.

The Court should note that the discussion below does not include any uses of *well regulated militia* that occur in state constitutional provisions; such provisions are not informative with regard to the issue here, because for purposes of the present discussion they pose the same interpretive issue as is posed by the use of *well regulated militia* in the Second Amendment itself.[20]

A. Colonial and state militia statutes

Each of the 13 colonies (and after Independence, the original 13 states) enacted a series of statutes establishing a militia and setting out detailed and comprehensive rules governing it.[21]

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20. Note also that in some of the quotations that are presented, nonsubstantive changes have been in the interest of readability without any mention in the citation. These include matters such as indenting the first line of some paragraphs, changing *Mr Mason* to *Mr. Mason, and* removing italicization that seemed to reflect merely a stylistic choice that now reads merely as archaic. However, spelling generally has not been modernized

21. For a compilation of all militia statutes enacted before the ratification of the Constitution, see United States Selective Service System, *Military Obligation: The American Tradition* (Arthur Vollmer, compiler 1947) (14 volumes) ("*Military Obligation*"). The series is subtitled "A Compilation of the Enact-

Many of these statutes used the phrase *well regulated militia* and phrases such as *regulating the militia*, typically in the title, the preamble, or both. As is shown by the examples provided here, the use of those phrases makes clear that the concept of "regulating" the militia was understood to entail regulation *by the government*, and that in a "well regulated militia" the regulation was understood to be regulation *by the government*.

1. "regulating the militia," "regulation of the militia," "regulate the militia," etc.

In many of the colonies and states, the militia statutes had titles indicating that the statute's purpose (or one of its purposes) was to "regulate" the militia. Those titles represent clear examples of phrases such as "regulating the militia," "regulation of the militia," and "regulate the militia" being used to denote *governmental* regulation of the militia.

A representative sample of such titles is set out below; In many colonies/states, a series of statutes bearing such titles were enacted over a period of several decades.

Connecticut (1784):

> An Act for forming, regulating, and conducting the military Force of this State.[22]

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ments of Compulsion from the Earliest Settlements of the Original Thirteen Colonies in 1607 Through the Articles of Confederation 1789."

22. Act (undated), Conn. Acts & Laws 144, 144 (1784).

Massachusetts (1776):

> An Act for forming and regulating the Militia ….[23]

New Hampshire (1786):

> An Act for forming and regulating the Militia ….[24]

New Jersey (1781):

> An Act for the regulating, training, and arraying of the Militia….[25]

New York (1778):

> An Act for the better regulating the Militia of the Colony of New York.[26]

North Carolina (1778/79):

> An Act to Regulate and Establish a Militia in this State.[27]

Pennsylvania (1780):

> An act for the regulation of the militia ….[28]

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23. Act of Jan. 22, 1776, 5 Mass. Acts & Resolves 445, 445 (1886)

24. Act of June 24, 1786, 5 Laws of N.H. 12, 12 (Henry Harrison Metcalf, ed. 1916).

25. Act of Jan. 8, 1781, N.J. Acts 166, 166 (1784)

26. Act of April 1, 1775, 5 Colonial Laws of New York 732, 732 (1894).

27. Act of April 8, 1777, N.C. Laws, 1777, Ch. 1, *in* 24 N.C. State Recs. 1, 1 (1905).

28. Act of March 20, 1780, 10 Penn. Stat. 144, 144-45 (1904).

South Carolina (1778):

> An Act for the regulation of the Militia ….[29]

Virginia (1756):

> An Act for the better regulating and disciplining the Militia[30]

2. "well regulated militia"

Many of the colonial and state militia statutes included preambles stating the statute's purpose(s) or identifying the factors that motivated the statute's enactment, with the preamble typically being followed by several pages of rules governing the militia's organization and operation. And in many of those preambles, the stated purpose or motivation was the preservation of a "well regulated militia." Thus, the rules enacted by the colonial and state legislature enabled and governed the "imposition of proper discipline and training" that was the hallmark of a well regulated militia.

A representative sample of the statutory preambles is set out below. They are all from the period after the colonies declared their independence, because those are the closest in time to the framing and ratification of the Second Amendment

Connecticut (1784):

> Whereas the Defence and Security of all free States depends (under God) upon the Exertions of a well regulated and disciplined Militia.
>
> Wherefore,

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29. Act of March 28, 1778, 9 S.C. Stat. 682, 682.

30. Act, April 1757, 7 Va. Laws 93, 93 (W. Hening 1820).

Be it Enacted…[31]

Delaware (1785):

> Whereas a well regulated Militia is the proper and natural defence of every free state; and as the laws heretofore made for the regulation thereof within this state are expired, and it is necessary that a militia be established;
>
> Be it therefore enacted…[32]

North Carolina (1778/79):

> Whereas, a well regulated militia is absolutely necessary for the Defending and Securing the Liberties of a free State
>
> Be it therefore Enacted…[33]

Pennsylvania (1780):

> Whereas…:
>
> And whereas a well regulated militia is the only safe and constitutional method of defending a free state, as the necessity of keeping up a standing army, especially in times of peace, is thereby superceded:
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> …
>
> Therefore:
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> Be it enacted…[34]

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31. Act (undated), Conn. Acts & Laws 144, 144 (1784)

32. Act of June 4, 1785, Del. Laws, June 1785, *reprinted in* II Part 3 *Military Obligation*, *supra* note 21, at 26.

33. Act of April 8, 1777, N.C. Laws, 1777, Ch. 1, *in* 24 N.C. State Recs. 1, 1 (1905).

34. Act of March 20, 1780, 10 Penn. Stat. 144, 144-45 (1904) (section numbering omitted).

Rhode Island (1779):

> Whereas the Security and Defense of all free States essentially depend, under God, upon the Exertions of a well regulated Militia: And whereas…: Wherefore, for the better forming, regulating and conducting the military Force of this State, Be it Enacted by this General Assembly, and by the Authority thereof it is hereby Enacted…[35]

South Carolina (1778):

> Whereas, the establishment of a well regulated militia in a free State, will greatly conduce to its happiness and prosperity, and is absolutely essential to the preservation of its freedom; and whereas, it is necessary that the laws hitherto enacted for the regulation of the militia of this State, be amended….
>
> Be it therefore enacted…[36]

B. George Washington (1777)

Early in the Revolutionary War, George Washington wrote to William Livingston, the governor of New Jersey complaining about the lack of discipline in the New Jersey militia and urging the enactment of "a well regulated Militia Law":

> The irregular and disjointed State of the Militia of this province, makes it necessary for me to inform you, that unless a Law is passed by your

35. Act of the Last Monday in October, 1779, R.I. Acts & Resolves, 1779, reprinted in II Part 12 *Military Obligation*, *supra* note 21, at 144.

36. Act of March 28, 1778, 9 S.C. Stat. 682, 682.

> Legislature to reduce them to some order, and oblige them to turn out in a different Manner from what they have hitherto done, we shall bring very few into the Feild, and even those few, will render little or no Service.
>
> Their Officers are generally of the lowest Class of people, and instead of setting a good Example to their Men, are leading them into every kind of Mischeif, one Species of which is, plundering the Inhabitants under pretence of their being Tories. A Law should in my Opinion be passed, to put a stop to this kind of lawless Rapine, for unless there is something done to prevent it, the people will throw themselves of choice into the hands of the British Troops.
>
> But your first object should be a well regulated Militia Law. The people, put under good Officers, would behave in quite another manner, and not only render real Service as Soldiers, but would protect, instead of distressing the Inhabitants.[37]

C. Report to the Continental Congress (1783)

As the Revolutionary War was drawing to a close, a committee of the Continental Congress prepared a report making recommendations as to the structure and organization of the post-war U.S. military. The report (written by Alexander Hamilton) undeniably regarded well regulated militias as being under *govern-*

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37. Letter from George Washington to William Livingston (Jan. 24, 1777), https://founders.archives.gov/documents/Washington/03-08-02-0153.

ment regulation: it recommended that as Congress considered "the means of national defence," it "ought not to overlook that of a well regulated militia," and said that "as the keeping up such a militia and proper arsenals and magazines by each State is made a part of the Confederation, the attention of Congress to this object becomes a constitutional duty."[38]

D. Lafayette (1786)

In February 1786, several years after he had led American troops in the final battles of the Revolutionary War, and at a time when the inadequacies of the Articles of Confederation had become apparent, the Marquis de Lafayette wrote a letter to George Washington in which he lamented those inadequacies and reflected on what steps Congress ought to take to remedy them. Those steps included "strengthen[ing] the Confederation," empowering Congress to regulate trade, and—most important for purposes of this brief—"establish[ing] a well Regulated Militia."[39]

So again, one sees evidence that the regulation that was a hallmark of a well regulated militia was regarded as being imposed from top down, by the government, rather than emerging spontaneously, from the bottom

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38. Continental Congress, *Report of a committee on a military peace arrangement* (Oct. 23, 1783), *in* 25 Journals of the Continental Congress 722, 741 (Gaillard Hunt, ed. 1922) (cleaned up). Information about the report is provided in the notes to the report at Founders Online, https://founders.arch ives.gov/documents/Hamilton/01-03-02-0252.

39. Letter from Lafayette to George Washington (Feb. 6, 1786), https://founders.archives.gov/documents/Washington/04-03-02-0461 (cleaned up).

up, as the Court in *Heller* seems to have assumed was the case.

E. The Constitutional Convention (1787)

On August 18, 1787, there was debate regarding the power to be given to the federal government regarding the militia. The power that was under discussion was repeatedly referred to as the power to "regulate" the militia.

1. George Mason

In the following statements, Mason argued that the power of "regulating the militia" should be given to the federal government, on the ground that if that function were left to the states, it would be impossible to attain the uniformity of regulation that he thought would be necessary:

> Mr. Mason introduced the subject of regulating the militia. He thought such a power necessary to be given to the Genl. Government. He hoped there would be no standing army in time of peace, unless it might be for a few garrisons. The Militia ought therefore to be the more effectually prepared for the public defence. Thirteen States will never concur in any one system, if the displining [sic] of the Militia be left in their hands. If they will not give up the power over the whole, they probably will over a part as a select militia. He moved as an addition to the propositions just referred to the Committee of detail, & to be refer-

> red in like manner, "a power to regulate the militia."[40]
>
> * * *
>
> Mr. Mason moved as an additional power to make laws for the regulation and discipline of the Militia of the several States reserving to the States the appointment of the Officers. He considered uniformity as necessary in the regulation of the Militia throughout the Union.[41]

2. Oliver Ellsworth

Ellsworth favored giving the federal government some power to regulate the militia, but less power that was advocated by Mason:

> Mr. Elseworth was for going as far in submitting the militia to the Genl Government as might be necessary, but thought the motion of Mr. Mason went too far. He (moved) that the militia should have the same arms (& exercise and be under rules established by the Genl Govt. when in actual service of the U. States and when States neglect to provide regulations for militia, it shd. be regulated & established by the Legislature of U.S.)[42]

3. James Madison

Like Mason, Madison favored giving plenary power to regulate the militia to the federal government. While

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40. 2 *The Records of the Federal Convention of 1787* 326 (Max Farrand, ed. 1911).

41. *Id.* at 330.

42. *Id.* at 330-31.

Madison didn't use the phrase *well regulated militia*, it is clear that he, like those quoted above, regarded the regulation of the militia as a governmental function: "Mr. Madison thought the regulation of the Militia naturally appertaining to the authority charged with the public defence."[43]

F. *The Federalist* No. 29 (Hamilton 1788)

The Federalist No. 29 was devoted to the subject of the militia, and the views it expressed were of a piece with the previously-quoted statement from the committee report to the Continental Congress. However, Hamilton expressed his views at greater length and in more detail than he had in the committed report.

In the following excerpt, Hamilton speaks of "regulating the militia" and of "the regulation of the militia," making clear that he regarded those functions as belonging to government:

> The power of regulating the militia, and of commanding its services in times of insurrection and invasion are natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the Confederacy….
>
> …This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority….[44]

Consistent with that view, Hamilton said that "if a well-regulated militia be the most natural defense of a free country, it ought certainly to be under the regula-

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43. *Id.* at 332.

44. *The Federalist No. 29*, at 182 (Alexander Hamilton) (Clinton Rossiter ed., 1961)

tion and at the disposal of that body which is constituted the guardian of the national security"—i.e. the federal government.[45]

Finally, Hamilton talked about the amount of training that would be necessary if order for "the great body of the yeomanry, and…the other classes of the citizens" to "acquire the degree of perfection which would entitle them to the character of a well-regulated militia." He very clearly thought that such training would be so burdensome as to "be a real grievance to the people, and a serious public inconvenience and loss."[46] So it is probably safe to assume that Hamilton would have disagreed with *Heller*'s view of what a well regulated militia amounts to.

G. George Washington (1794)

In an address to Congress during his second term as President, Washington returned to the themes of his letter to George Livingston 17 years earlier: the inadequacies of the militias and the establishment of a well regulated militia as being governmental responsibility:

> [I]t ought not to be forgotten, that the militia laws have exhibited such striking defects, as could not have been supplied but by the zeal of our citizens. Besides the extraordinary expense and waste, which are not the least of the defects, every appeal to those laws is attended with a doubt of its success.
>
> The devising and establishing of *a well-regulated militia*, would be a genuine source of legis-

45. *Id.* at 183.

46. *Id.* at 184.

> lative honour, and a perfect title to public gratitude. I therefore entertain a hope, that the present session will not pass, without carrying to its full energy, the power of organizing, arming and disciplining the militia….[47]

H. John Sevier, governor of Tennessee (1797)

In an address to the Tennessee legislature in 1797, Gov. John Sevier expressed much the same sentiment as Washington had in 1794. He "recommend[ed] to [the legislature's] consideration as a present and necessary measure a well regulated militia law, calculated to establish discipline and to ensure punctual attendance at private and general musters."[48] So Sevier understood the job of regulating the militia as belonging to the government, as had Washington, Lafayette, and Hamilton before him.

I. Jabez Parkhurst (1798)

In a Fourth of July oration delivered in 1798, the speaker (one Jabez Parkhurst) listed several means by

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47. George Washington, Address to the Third Congress, Second Session (Nov. 19, 1794), *in* George Washington, *A Collection of the Speeches of the President of the United States to Both Houses of Congress, at the Opening of Every Session, with Their Answers* 72, 78 (1796).

48. John Sevier, Second Inaugural Address (Sept. 22, 1797), in John Sevier, *Executive Journal of Gov. John Sevier* (Samuel C. Williams, ed.), East Tenn. Hist. Soc. Pubs. Part II.2 135, 147 (1930) (cleaned up), available at http://teachtnhistory.org/file/1930%20Executive%20Journal%20of%20Gov.%20John%20Sevier,%20Cont.%20(Williams).pdf.

which "a free people [could] preserve their liberties," one of which was "a well regulated MILITIA, equal at least to the defense of the nation against sudden foreign attacks or domestic violence."[49] What is notable for purposes of this brief is Parkhurst's assumption that a well regulated militia would provide an effective defense against "*sudden* foreign attacks" (emphasis added). He therefore must have regarded a well regulated militia as being capable of acting quickly in response to unforeseen events. It seems unlikely that an unorganized militia of the kind referred to in *Heller* would have been capable of that kind of swift reaction.

Parkhurst also said that having a well regulated militia "puts arms in the hands of every man"—a statement that is ambiguous, but that undercuts *Heller* under both interpretations.[50] Interpreted literally, Parkhurst's statement linked individual possession of weapons with service in the militia, and portrayed such service as bringing about the arming of "every man." That relationship between militia service and being armed is precisely the opposite of what *Heller* posited, which was that it was the existence of an armed citizenry that made it possible for the militia to exist.

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49. Jabez Parkhurst, *An oration, delivered on the Fourth of July, 1798, in the Presbyterian Church, at Newark, before a numerous audience, assembled to celebrate the twenty-second anniversary of American independence* (1798), Evans Early American Imprint Collection Text Creation Partnership, https://quod.lib.umich.edu/e/evans/N25802.0001.001/1:2?rgn=div1;view=fulltext.

50. *Id.*

Under a figurative reading, on the other hand,[51] the phrase "[putting] arms in the hands of every man" would probably have been understood to mean something like 'to make every man a soldier.' That would weigh against *Heller*'s interpretation of *bear arms* and of the relationship between the militia service on the one hand and the right to bear arms on the other.

J. Summary

The Court's view in *Heller* of what a well regulated militia amounted to is quite different from the view that is uniformly expressed, or at least presupposed, in the statutes and statements set out above. *Heller* cannot possibly be squared with this evidence.

Moreover, amicus has found no evidence that would support the interpretation adopted in *Heller*. While the usage data includes uses that don't permit one to reach a conclusion either way, amicus did not come across any uses that could reasonably be read as supporting *Heller*'s interpretation.

This is not to say that no such evidence exists. But given what this brief has shown, the burden is on supporters of *Heller*'s interpretation to bring any such evidence to light.

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51. *Cf. Goldfarb Analysis* 25-27 (discussing the many figurative uses of *arms*).

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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