No. 20-782

In the Supreme Court of the United States

RAYMOND HOLLOWAY, JR.,

Petitioner,

v.

ROBERT M. WILKINSON, ACTING 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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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. Links to amicus's articles and briefs are available at bit.ly/GoldfarbPapers and bit.ly/GoldfarbBriefs, respectively. Amicus blogs at LAWnLinguistics.

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

4. This brief follows a typographic convention generally followed in linguistics, whereby *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."

denials of rights under the Second Amendment.[5] In one of those cases—*New York State Rifle & Pistol Assn. v. Corlett*, No. 20-843 (filed Dec. 17, 2020)—amicus has filed a brief opposing the petition, on the grounds that the issue that the 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 that the Court should not address the latter issue 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. However, amicus will not repeat here the arguments he made in his previous brief. Instead, he presents two arguments that are more narrowly focused, but that support amicus's contention as to why the petition should be denied.

The first argument is based on a very recent decision by the Vermont Supreme Court, handed down only a week before this brief's filing. *State v. Misch*, 2021 VT 10 (Feb. 19, 2021). The decision concerns the Vermont analogue of the Second Amendment ("That the people have a right to bear arms for the defense of themselves and the State"), but it is highly relevant to analysis of the Second Amendment, both because the

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

court dealt with expressions similar or identical to key phrases in the Second Amendment (*the people have a right* and *bear arms*) and because it discussed an expression that played an important role in *Heller*'s analysis (*for the defence of themselves*).

On every one of those issues, the Vermont court's conclusion was contrary to *Heller*'s. The conclusion as to *bear arms* was based on the corpus evidence showing how that phrase was used during the Founding Era. And while the court did not rely on corpus data in reaching its conclusion regarding *the people have a right* and *for the defense of themselves*, the fact is that the corpus evidence supports that conclusion.

Amicus's other argument examines postratification scholarship by St. George Tucker, William Rawle, and Joseph Story, which *Heller* relied on as confirming its individual-rights interpretation of the Second Amendment. The Court's discussion of that work was based on an interpretation of *bear arms* that the corpus evidence shows to have been mistaken. Amicus therefore revisits that work, in the light of that evidence. And as he explains, it makes perfect sense to conclude that Tucker, Rawle, and Story all understood the Second Amendment as protecting a collective right closely linked to service in the militia.

Argument

I. The Vermont Supreme Court recently held—based largely on corpus data—that *bear arms* "most often meant to serve in a military capacity," and that *the right of the people to bear arms* was most likely understood as being linked to service in the militia.

In a decision handed down a week before the filing of this brief, the Vermont Supreme Court became the first court in the country to address what amicus has referred to as the corpus-based challenge to *Heller*. *State v. Misch*, 2021 VT 10 (Feb. 19, 2021). Although *Misch* arose under state law (the Vermont Constitution's analogue to the Second Amendment[6]), those aspects of the decision that amicus will discuss here are equally relevant to analysis of the Second Amendment.

The decision's relevance stems in part from the linguistic commonalities between the Vermont provision and the Second Amendment, and in part from the fact that the Vermont provision was one of the nine examples of the use of *bear arms* that the Court in *Heller* regarded as the ones "most relevant to the Second Amendment: nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to 'bear arms in defense of themselves and the state' or 'bear arms in defense of himself and the state.'"[7] These provisions figured importantly in *Heller* because the Court read them as having ''unambiguously used [*bear arms*] to

6. Vt. Const., Ch. I, Art. 16.

7. 554 U.S. at 584 (footnote omitted).

refer to the carrying of weapons outside of an organized militia."[8] The decision in *Misch* shows that conclusion to be mistaken, and it show more broadly that the challenge to *Heller* that is posed by the corpus data must be taken seriously.

The constitutional provision at issue in *Misch* was originally adopted in 1777, and except for changes in spelling and punctuation, it reads the same today as it did then:

> That the people have a right to bear arms for the defense of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not be kept up; and that the military should be kept under strict subordination to and governed by the civil power.[9]

The focus in *Misch* was on what one might call the "operative provision" of Art. 16: "That the people have a right to bear arms for the defense of themselves and the State[.]"[10] The court began by considering the phrase *bear arms for the defense of…the State*, and it began that part of its discussion by taking note of the corpus data.[11] The court noted that "several studies have reviewed hundreds of instances of 'bear arms' and

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8. *Id.*; *see id.* n.8 (listing the relevant provisions).

9. Vt. Const., Ch. 1, Art. 16 (originally adopted as Vt. Decl. of Rights, ch. 1, § XV (1777), *in* 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3083 (Francis N. Thorpe, ed. 1909) (hereinafter, *Thorpe*)).

10. 2021 VT 10 at ¶¶ 15-31. *Cf. Heller*, 554 U.S. at 577 ("The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.").

11. *Id.* ¶¶ 15-19.

have found that the phrase was 'overwhelmingly used in a collective or military sense.'"[12] The court therefore concluded that "while there was some contemporary use of the term 'bear arms' in a literal or individualistic sense, corpus data has revealed that 'bear arms' most often meant to serve in a military capacity."[13]

That fact, together with Art. 16's reference to bearing arms "for the defense of…the State" and with the relevant historical context, the court held that "the phrase relates to a right to bear arms as a necessary condition to service in a State militia."[14] And after taking note of how *bear arms* was used in other parts of Vermont's constitution, the court said that "the right to bear arms, while an individual right, was an individual right in service of a collective responsibility."[15] Thus, the court concluded this part of its analysis by stating that "the right to 'bear arms for the defense of…the State" in Article 16 was most likely a right to bear arms for the purpose of service in the state militia."[16]

The court then dealt with the fact that there no longer exists anything resembling a militia of the sort known to the founders:

> To the extent that the right to bear arms is tied to the purpose of supporting service in the state militia, this aspect of Article 16 has little

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12. *Id.* ¶ *17* (*quoting* Darrell Miller, *Owning Heller*, 30 U. Fla. J. L. & Pub. Pol'y 153, 160-61 (2020)).

13. *Id.*

14. *Id.*

15. *Id.* ¶ 19.

16. *Id.* ¶ 23.

> meaning in today's world….[T]he institution of the state militia, with which the right to "bear arms" was associated, is not only distinct from individual self-defense, but has no modern manifestation.[17]

This led the court to conclude that "the right to 'bear arms for the defense...of the State' is essentially obsolete."[18]

However, that did not fully resolve the question of how Art. 16 was likely to have been understood when it was adopted in 1777; there remained the question of what further meaning, if any, is added by the fact that Art. 16 refers not only to "the right of the people to bear arms for the defense of…the State," but also to the people's right to "bear arms for the defense of themselves."[19] It was this language that led the Court in *Heller* to describe the Vermont provision and others like it as providing *unambiguous* examples of *bear arms* being used to denote activity unrelated to militia service.[20] But in *Misch*, the Vermont Supreme Court saw things differently.

Although the court said that "the reference to 'defense of themselves' lends support to the view that Article 16 establishes a right to bear arms to protect individual interests [unrelated to militia service]," it viewed the text, when considered in its historical context, as being "equivocal."[21] The source of that per-

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17. *Id.*

18. *Id.*

19. *Id.*

20. 554 U.S. at 584-85.

21. *Misch*, 2021 VT 10 at ¶¶ 24-26.

ceived ambiguity was Art. 16's description of the right to bear arms as a "right of *the people*" (emphasis added): "The association of the right with 'the people,' rather than persons, distinguishes it from many, though not all, rights enumerated in the Vermont Constitution that protect individual liberty or action disconnected from the body politic."[22] For example, the Vermont Constitution "recognizes that all 'persons' are born equally free and independent, and have inherent, unalienable rights," it "requires compensation when any 'person's' property is taken for public use," it "recognizes freedom of religion for all 'persons,'" it "indicates that every 'person' ought to have a remedy at law for injuries or wrongs," and it "provides a host of protections to a 'person' in prosecutions for criminal offenses."[23]

"In contrast," the court noted, "the Vermont Constitution generally refers to 'the people' when recognizing rights associated with the body politic, to be exercised collectively."[24] These include "the rights of governing and regulating the internal police," the fact that "government is accountable to 'the people,'" and that "free debate and deliberation in the Legislature is [described as being] essential to the rights of 'the people.'"[25]

Given these factors, among others, the court determined that "the description of the right to bear arms

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22. *Id.* ¶ 26.

23. *Id.* (cleaned up; citations to specific constitutional provisions omitted).

24. *Id.* ¶ 27.

25. *Id.*

in Article 16 as belonging to 'the people' places it in the category of rights generally associated with and exercised by the body politic as contrasted with rights conferred on and exercised by an individual." As a result, the court concluded that "the right of the people to bear arms for the defense of themselves" could reasonably be understood in the same way as "the right of the people to bear arms for the defense of…the State" That is to say, both aspects of the right can reasonably be understood as "an individual right to bear arms for the purpose of defending the collective body politic, rather than individual persons."[26] This led the court to say that it "[could not] conclude with confidence based on the text alone, understood in its historical context, that Article 16 necessarily embodies a right to possess weapons for individual self-defense."[27] In summing up, the court said, "The text of Article 16. as written in the eighteenth century, was likely designed to protect the right of the people to bear arms for the purpose of constituting and serving in the state militia."[28]

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26. *Id.* ¶ 29. For analyses of English history that support this conclusion, see Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 Cardozo Law Review De Novo 18 (hereinafter, Charles, *The Right of Self-Preservation and Resistance*), and Patrick J. Charles, *"Arms for Their Defence"?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in* McDonald v. City of Chicago, 57 Cleve. State L. Rev. 350 (2009) (hereinafter, Charles, *"Arms for their Defence"?*).

27. *Id.*

28. *Id.* ¶ 31 (cleaned up).

At first glance, the Vermont Supreme Court's conclusion regarding *the right of the people* might seem to be irrelevant to the Second Amendment, since it relies entirely on provisions specific to the Vermont Constitution. But when one reviews the corpus data regarding expressions such as *the right of the people* and *the people have a right*, what emerges is essentially the same pattern that the Vermont Supreme Court found in the Vermont Constitution. As discussed in amicus's analysis, the majority of such uses denote rights that are collective by definition, in that they can be exercised only by a group of people acting together.[29] As reflected in the corpus data, these include the rights—

> "to amend, and alter, or annul their Constitution, and frame a new one,"
> "to assemble and consult for the common good,"
> "to change their government,"
> "to elect and remove their civil rulers," and
> "to establish such a Government, as they please,"

Thus, the pattern of usage that is seen in the Vermont Constitution does not represent some sort of New England eccentricity. Rather, it reflects a pattern of 18th-century English usage much more broadly. So as a matter of such usage, there is no reason to reject a reading of the Second Amendment in which "the right of *the people* to…bear arms" is understood as a collective right held by the body of the people as a whole, rather than as a purely individual right.

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29. *Goldfarb Analysis* 30. For the underlying data, see Neal Goldfarb, *Corpus data regarding "the right of the people," "the people have a right," and "the people's right"* (April 29, 2019) (Excel spreadsheet), bit.ly/RightOfThePeople.

However, the Court in *Heller* was presumably unaware of the relevant usage evidence, and was instead guided solely by the use of *the right of the people* in the Constitution itself, which it described as in all cases referring to an individual right.[30] But while that conclusion was consistent with the principle that "a word or phrase is presumed to bear the same meaning throughout a text,"[31] that presumption "assumes a perfection of drafting that, as an empirical matter, is not often achieved," and as a result it is "particularly defeasible by context."[32] The corpus data discussed above provides an ample basis for finding that presumption to have been overcome here.

This conclusion is not changed by the fact, noted in *Heller*, that "in all six other provisions of the Constitution that mention 'the people,' the term ambiguously refers to all members of the political community, not an unspecified subset."[33] The rights described in the list above belonged (collectively) only to white male citizens, and not to white women or to blacks of either gender. And more to the point, the corpus data includes statements equating "the people" with those eligible for militia service.[34]

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30. 554 U.S. at 579-80.

31. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) (cleaned up).

32. *Id.* at 170, 171 (cleaned up).

33. 554 U.S. at 580.

34. *Goldfarb Analysis* 57-58. *cf. id.* at 49-51 (setting out statements to the effect that those who bear arms were, by reason of having done so, entitled to vote).

II. The fact that *Heller* was mistaken about the original meaning of *bear arms* undermines the Court's reliance on the work of Tucker, Rawle, and Story.

Heller's interpretation of *bear arms* was of course central to its textual analysis, but it also provided an essential part of the foundation for almost every other aspect of the Court's analysis. With that foundation being flawed, the analytical structure that was built upon it can no longer be accepted as valid.

This point can be illustrated by considering *Heller*'s reliance on the work of three 18th- and 19th-century scholars, which it regarded as confirming the Court's individual-rights interpretation: St. George Tucker, William Rawle, and Joseph Story.[35] When these scholars' work is reevaluated from a perspective that is informed by the corpus evidence, it supports the interpretation that emerges from that evidence. In fact, these scholars' work makes more sense when read in that light than it does under the interpretation in *Heller*.[36]

A. Tucker

In his edition of *Blackstone's Commentaries*, St. George Tucker's first mention of bearing arms or of the right to bear arms (apart from quoting the certain proposed amendments to the Constitution) appears in his discussion of Congress's power under Art. 1, § 8 "to

35. 554 U.S. at 605-09.

36. The space available in this brief does not permit an examination of every issue raised by the work of Tucker, Rawle, and Story. The discussion here is therefore limited to the portions of their work that are the most important.

provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress."[37]

Tucker notes that although the clause was "founded upon the principle…'that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state,'" it was "thought to be dangerous to the state governments."[38] But he goes on to state that "all room for doubt, or uneasiness upon the subject, seems to be completely removed, by [the Second Amendment], viz. 'That a militia being necessary to the security of a free state, the right of the people to keep, and bear arms, shall not be infringed.'"[39]

In this context, where the stated concern was the interests of "the state governments" it is eminently sensible to read the right to bear arms as being intimately tied to the state militias. In fact, that reading makes more sense than does *Heller*'s interpretation, in which the link between the right to bear arms on the one hand and the state militias on the other is indirect

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37. St. George Tucker, *View of the Constitution of the United States, in* 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* Appx. 272-73 (1803) (hereinafter, Tucker, *View of the Constitution*).

38. *Id.* (quoting Va. Bill of Rights, § 13 (1776), but mistakenly citing it as "Art. 8").

39. *Id. at* 273.

(with an armed citizenry being merely a necessary precondition for the formation of state militias).[40] But even if one does not agree that the military-related reading is the better one, it certainly is no less reasonable than the reading in *Heller*.

Tucker's next encounter with the right to bear arms (and with the phrase *bear arms* itself) occurs in his discussion of the Second Amendment:

> This may be considered as the true palladium of liberty....The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.[41]

Here, too, *bear arms* can sensibly be understood in its idiomatic military sense.

Such an understanding would be at odds with *Heller*, which interpreted Tucker's mention of the "right of self defence," to refer to *individual* self-defense. But that interpretation is due for reexamination, now that the corpus evidence has shown it to have been based on a mistake about the meaning of *bear arms*. And when one looks at the issue anew, the interpretation in *Heller* does not hold up.

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40. *See Heller*, 554 U.S. at 598.

41. Tucker, *View of the Constitution* at 300 (ellipsis in the original).

To begin with, that interpretation is hard to square with Tucker's very next statement: that "in most governments it has been the study of rulers to confine this right within the narrowest limits possible."[42] While one can understand why rulers would wish to restrict the right of subjects to act in *collective* self-defense, which could lay the groundwork for resistance, rebellion, or revolution, one would think that the right of *individual* self-defense would be of much less concern.

Support for reading Tucker as having referred to collective self-defense comes the Vermont Supreme Court's decision in *Misch*,[43] as well as from corpus data on expressions such as *the right of the people*, *self defence*, and *self preservation*.[44] And support can also be found in work on both American and English history.[45]

Heller was also mistaken in its discussion of Tucker's treatment (in his version of *Blackstone's Commentaries*) of what the Court referred to as "the Blackstonian arms right."[46] According to *Heller*, that right consisted of the right to use weapons for personal self-defense:

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42. *Id.* at .

43. 2010 VT 10 at ¶¶ 24-31.

44. *See Goldfarb Analysis* 29-30; Neal Goldfarb, *COFEA data ('self defence' & 'self preservation')* (Excel spreadsheet), https://bit. ly/2ZPCPhl.

45. In addition to the sources cited in note 26, above, see Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 Rutgers L.J. 1041 (2007); Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective,* 6 Chi.-Kent L. Rev. 27 (2000) (hereinafter, Schwoerer, *To Hold and Bear Arms*).

46. 554 U.S. at 606; *see id.* at 595-96.

> [Americans] understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury." 1 Blackstone's Commentaries 145-146, n.42 (1803) (hereinafter Tucker's Blackstone).[47]

But this statement is inaccurate in several respects.

In Tucker's edition of Blackstone, the right of individual self-defense was treated as an aspect of the right of personal security,[48] which in turn was one of the three "absolute rights of individuals" belonging to all English subjects (the others being personal liberty and private property).[49] Nowhere in the discussion of the right of personal security is there any mention of a right to use weapons in self-defense; the words *arms* and *weapon(s)* are wholly absent from that discussion,

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47. *Id.* at 595-96. Note that the Court's citation to the first volume of *Tucker's Blackstone* is erroneous; the passage that is cited appears in the second volume. 2 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 145-46 n.42 (1803) (hereinafter, *Tucker's Blackstone*).

48. 2 *Tucker's Blackstone* 129-31.

49. *Id.* at 121-40.

and indeed from the entire discussion of the absolute rights of individuals.

The first mention of any right relating to arms appears in a discussion of five "auxiliary subordinate rights," which immediately follows the discussion of the three absolute rights.[50] As described by Blackstone, these auxiliary rights were structural protections "which serve principally as outworks or barriers, to protect and maintain [the three primary rights] inviolate."[51] They consisted of (1) "the constitution, powers, and privileges of parliament," (2) "the limitation of the king's prerogative," (3) the right "of applying to the courts of justice for redress of injuries," (4) "the right of petitioning the king, or either house of parliament, for the redress of grievances," and, most importantly for present purposes, (5) "the right of the subject…of having arms for their defence suitable to their condition and degree, and such as are allowed by law."[52]

Blackstone described the fifth auxiliary right as "a public allowance, under due restrictions, or the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[53] Thus, the right of "having arms for their defence" was a last line of defense against "the violence of oppression," to be exercised only when all other social and legal safeguards (i.e., the first four auxiliary rights) had failed.

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50. *Id.* at 140-44.

51. *Id.* at 141 (cleaned up).

52. *Id.* at 141-44 (cleaned up; footnotes omitted).

53. *Id.* at 143-44.

As is clear from the fact that Blackstone regarded the right of having arms as an auxiliary right, the right of having arms did not amount to a right to use weapons for individual self-defense. Indeed, the latter right was not an auxiliary right at all. As previously stated, it was, rather, an aspect of the absolute right of personal security, which in turn was one of the "great and primary rights" whose protection was the function of the five auxiliary rights.[54]

What has been said so far is indisputably clear from reading Book First, Part Second, Chapter 1 of Tucker's edition of Blackstone.[55] But that leaves open the question of what exactly the "right of having arms for their defence" amounted to. And the answer, consistent with the right's providing the last line of defense against "the violence of oppression" is that it was a right of *collective* "resistance and self-preservation": a right of lawful revolution, or at least rebellion.[56]

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54. *Id.* at 140-44.

55. *Id.* at 121-45.

56. *See, e.g.,* Charles, *The Right of Self-Preservation and Resistance*, 2010 Cardozo L. Rev. De Novo 18; Charles, *"Arms for their Defence"?*, 57 Cleve. State L. Rev. 351; Schwoerer, *To Hold and Bear Arms,* 6 Chi.-Kent L. Rev. 27.

Heller's description of the Blackstonian right of arms as a right to use weapons for personal self-defense is the most significant inaccuracy in the passage quoted above on page 16. The other inaccuracy is minor in the scheme of things, but it is discussed here because it may give rise to an erroneous impression.

The Court stated that Tucker "made clear in the notes to the description of the arms right, Americans understood the 'right of self-preservation' as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf,

This characterization of the right of Englishmen to have arms for their defense brings to mind the fact that (as seems to be accepted by those on both sides of the Second Amendment debate) the purpose of the Second Amendment was to "prevent elimination of the militia."[57] That parallel was not lost on St. George Tucker, who treated the Second Amendment as the American analogue of Blackstone's fifth auxiliary right: he added a footnote to Blackstone's discussion of that right, and in the footnote he set out the operative clause of the Second Amendment—"The right of the people to keep and bear arms shall not be infringed"—and then added, " and this without any qualification as to their condition or degree, as is the case in the British government"[58] Referring to that footnote, the Court in *Heller* said that Tucker "equated" the Second Amendment with what it called "the Blackstonian arms right

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may be too late to prevent an injury.'" 554 U.S. at 595-96 (quoting 2 *Tucker's Blackstone* 145-146, n.42 [mistakenly cited as 1 *Tucker's Blackstone*]). But the footnote cited by the Court was not a note "to the description of the arms right." It was, rather, appended to a page-long discussion consisting of a summary of the entire chapter (one line of which referred to the right of having arms) and a paean to the rights protected by the English constitution. *Tucker's Blackstone* 143-44. The footnote itself was a nine-page essay on the various kinds of rights: natural, social, civil, and political. The language quoted by the Court about the right of self-preservation appeared in a discussion of natural rights, which made no mention of any right to use arms. In fact, the subject of arms does not come up anywhere in the footnote.

57. *Heller*, 554 U.S. at 599.

58. 2 *Tucker's Blackstone* at 143 & n.41).

…absent the religious and class-based restrictions."[59] That statement is more or less correct—provided one keeps in mind that the only "Blackstonian arms right" that existed was the fifth auxiliary right of *collective* self-preservation, and not (as *Heller* concludes) a right to use weapons for *individual* self-defense.

With that background in mind, it seems clear that Tucker understood the Second Amendment as using *bear arms* in its idiomatic military sense, just as the corpus data would lead one to expect.

B. Rawle

William Rawle's discussion of the Second Amendment begins with the observation that "few will dissent" from the proposition that "a well regulated militia is necessary to the security of a free state," and then immediately offers the following short reflection on the virtues of such militias, in which the italicized sentence is the most important part, for present purposes:

> Although in actual war, the services of regular troops are confessedly more valuable; yet, while peace prevails, and in the commencement of a war before a regular force can be raised, the militia form the palladium of the country. They are ready to repel invasion, to suppress insurrection, and preserve the good order and peace of government. That they should be well regulated, is judiciously added. A disorderly militia is disgraceful to itself, and dangerous not to the enemy, but to its own country. *The duty of the state government is, to adopt such regulations as will tend*

59. 554 U.S. at 606.

> *to make good soldiers with the least interruptions of the ordinary and useful occupations of civil life*. In this all the Union has a strong and visible interest.[60]

The emphasized sentence, with its reference to regulation of the militia by state governments, strongly suggests that Rawle understood a "well regulated militia" to be one that was organized and regulated by the state. That, in turn, points toward the conclusion that he understood the right to bear arms as being linked to militia service. As with Tucker, that would be consistent with the fact that the military sense of *bear arms* was accounted for the phrase's overwhelmingly predominant use. And there is certainly in Rawle's discussion to suggest that he viewed the Second Amendment as protecting an individual right, unrelated to militia service, to use arms for personal self-defense.

This is not to suggest that Rawle's discussion is inconsistent with *Heller*'s individual-rights interpretation of the Second Amendment, given the Court's account of how such a right would have the effect of preserving the militia. But on that account, the link between that goal and the right to bear arms is far more attenuated than under an interpretation in which *bear arms* is understood in its idiomatic military sense. The latter interpretation, in short, is by far the better interpretation.

C. Story

Joseph Story's discussion of the Second Amendment prompts comments similar to those, above, re-

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60. William Rawle, *A View of the Constitution of the United States of America* 121-22 (1825) (emphasis added).

garding Rawle. Like Rawle, Story says nothing to suggest that he understood the Second Amendment to mean what *Heller* said it means, and what he does say, with its narrow focus on the militia, strongly supports the opposite conclusion:

> The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers.
>
> It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.
>
> And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How

> it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.[61]

Perhaps the most important part of Story's discussion is the final paragraph, where he laments "a growing indifference [among the American people] to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations." It is a virtual certainty that in talking about the "system of militia discipline" and the "regulations" that system imposed, he was referring to the regulation by the several states of their respective organized militias. It is unclear what else he might have been referring to, and it is hard to see how his remarks would have been relevant under an individual-rights interpretation of the kind adopted in *Heller*.

As support for that interpretation, the Court in *Heller* pointed to Story's statement that the English right to have arms was similar to the right to bear arms under the Second Amendment.[62] But for the reasons previously discussed with regard to St. George Tucker and the fifth auxiliary right, the Court's reliance on that statement is misplaced. And given what has been said regarding Tucker and Rawle, the same is true of

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61. 3 Joseph Story, *Commentaries on the Constitution of the United States* 746-47 (1833) (footnote omitted) (hereinafter, *Story's Commentaries*).

62. *Heller*, 554 U.S. at 608 (citing 3 *Story's Commentaries* at 747).

the Court's reliance on Story's citation of those authors.[63]

Conclusion

The petition for certiorari should be denied.

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63. *Id.* at 6-8 (citing 3 *Story's Commentaries* at 746-47).