



No. 18-280

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**In the Supreme Court of the United States**

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NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC. ET  
AL.,  
*Petitioners,*  
v.  
CITY OF NEW YORK ET AL.,  
*Respondents.*

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

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**Brief of Neal Goldfarb as *Amicus Curiae*  
in Support of Respondents, Arguing that  
as to the Second Amendment Issue,  
the Petition Should Be Dismissed  
as Improvidently Granted**

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### Interest of *Amicus*<sup>1</sup>

*Amicus* Neal Goldfarb is an attorney who has an interest and expertise in linguistics and in applying the lessons of linguistics to legal interpretation. He has written extensively about the latter topic, in journal articles,<sup>2</sup> *amicus* briefs,<sup>3</sup> and blog posts at LAWnLinguistics.<sup>4</sup> He is currently a Dean's Visiting Scholar at Georgetown University Law Center, but he files this in his personal capacity.

*Amicus* has conducted performed a wide-ranging and in-depth linguistic analysis of the key language in the Second Amendment's operative clause: "the right of the people to keep and bear Arms." That analysis draws primarily on linguistic resources and evidence that were unavailable when this Court decided *District of Colum-*

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1. No party's counsel authored this brief in whole or in part. No monetary contribution intended to fund the preparation or submission of this brief was made by any party, any party's counsel, or anybody other than *amicus* or his counsel. Letters evidencing all parties' blanket consent to the filing of *amicus* briefs are on file with the Clerk.
  2. Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. Rev. 1359 (2018); Neal Goldfarb, "Always Speaking"? *Interpreting the Present Tense in Statutes*, 58 Can. Rev. Ling. 63 (2013) (ms. available at [bit.ly/AlwaysSpeaking](http://bit.ly/AlwaysSpeaking)). See also Neal Goldfarb, *Corpus Linguistics in Legal Interpretation: When Is It (In)appropriate?* (2019), available at [bit.ly/WhenCorpLing](http://bit.ly/WhenCorpLing). All internet locations cited in this brief were last visited August 11, 2019.
  3. See *Briefs*, LAWnLinguistics, [bit.ly/GoldfarbBriefs](http://bit.ly/GoldfarbBriefs) (providing links to briefs).
  4. [LAWnLinguistics.com](http://LAWnLinguistics.com).



*bia v. Heller*,<sup>5</sup> and it provides evidence that as to almost every important conclusion about the meaning of that phrase, *Heller* was mistaken.

*Amicus* files this brief in order to bring his analysis to the Court's attention, and to urge that the Court decline to decide the Second Amendment issue in this case. He argues that the issue should not be decided unless *Heller* is revisited first, but that this case is not an appropriate vehicle for the such a reexamination. *Amicus* therefore argues that the petition here should be dismissed (solely as to the Second Amendment issue) as improvidently granted.

### Introduction and Summary of Argument

This brief is to a large extent about originalist methodology.

In speaking of "originalist methodology," we refer, not to originalism as a methodology of legal interpretation, but to the methodology by which originalism is practiced. More specifically, this brief deals with corpus linguistics, an interpretive tool that has emerged within the past decade, and that can, in appropriate cases, provide deeper and more reliable insights into the original public meaning of constitutional provisions than has previously been possible.

In an article published four years before *Heller* was decided, law professor Randy Barnett described in broad terms the kind of methodology that original-public-meaning (OPM) originalism calls for.<sup>6</sup> What is needed, he wrote, is an "examination of linguistic usage among

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5. 554 U.S. 570 (2008).

6. Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237, 239–40 (2004).

those who wrote and ratified the text as well as the general public to whom the Constitution was addressed.”<sup>7</sup> If a word or expression had more than one meaning, “it becomes necessary to establish which meaning was dominant.”<sup>8</sup> The inquiry “is an empirical one that requires actual evidence of usage to substantiate.”<sup>9</sup> And “if possible, one should undertake a quantitative assessment to distinguish normal from abnormal usage.”<sup>10</sup>

Those specifications perfectly describe corpus linguistics.

Barnett’s article has a special relevance to Second Amendment jurisprudence, and not only because the Second Amendment was its topic. The article is significant because it informed the Court’s methodology in *Heller* (for example, *Heller*’s statement about “secret or technical meanings” appears to have been adapted from a statement in the article<sup>11</sup>), and because the Court’s methodology in *Heller* was essentially the methodology that Barnett advocated.<sup>12</sup>

It is therefore ironic that when that methodology is pursued using corpus linguistics, it provides powerful evidence that *Heller* was mistaken about the Second Amendment’s original public meaning.

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7. *Id.* at 240.

8. *Id.*

9. *Id.*

10. *Id.* (cleaned up).

11. Compare *Heller*, 554 U.S. at 577, with Barnett, *supra* note 6, 83 Tex. L. Rev. at 240.

12. See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. Rev. 923, 952 (2009).

*Amicus's* analysis of the Second Amendment is based mainly on two corpora (plural of *corpus*) that were made publicly available in May 2018 by the BYU Law School. These corpora are designed specifically for doing research into Constitutional original public meaning. Since being made available, these corpora have been used in three investigations into the meaning of the Second Amendment. One study was done by Dennis Baron, who was one of the amici who joined in the linguists' brief in *Heller*, another was done by Josh Blackman and James Phillips, and the third was done by the present *Amicus*.

The studies by both Baron and *Amicus* concluded that in the overwhelming majority of the uses of *bear arms* in the corpus data, the phrase conveyed a military-related sense, not the sense that *Heller* described as its "natural meaning."<sup>13</sup> The results reported by Blackman and Phillips are consistent with that conclusion.

In addition to dealing with the issue considered by Baron and Blackman & Phillips, the study by *Amicus* addresses various other issues and concludes that in multiple respects, the corpus data not only fails to support *Heller's* linguistic analysis but flatly contradicts it. Those conclusions will be summarized in this brief.

The corpus data provides the best available evidence of how the text of the Second Amendment was understood by founding-era Americans. It is far more extensive and reliable than the evidence the Court relied on in *Heller*, and it points toward the conclusion that *Heller's* textual analysis was fundamentally flawed. In light of that evidence, it is reasonable to conclude that the right to bear arms that the Second Amendment protects is a right that doesn't merely relate to military service, but rather *consists of* the right to serve in the

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13. 554 U.S. at 584.

militia. *Amicus* believes that the right to bear arms was more likely to have been understood that way than as a right to carry weapons in order to be prepared for confrontation. But even if one views the strength of the evidence differently, *Amicus's* interpretation is a reasonable one. Thus, under the framework stated in *Heller* itself, it is appropriate to consider the prefatory clause in order to resolve any ambiguity. And at that point, *Heller's* interpretation becomes untenable.

However, our purpose in making this argument is not to ask that *Heller* be reexamined in this case. While we believe that such a reexamination is warranted, this is not the case in which it should be conducted. In the current posture of the case, the issue could not be adequately litigated, and speaking more broadly, reexamining *Heller* should wait until scholars and other interested parties have had time in which to review and analyze the corpus data, to challenge the corpus analyses that have been done so far, and to debate what should be done if it is ultimately held that *Heller's* interpretation of the Second Amendment was mistaken. In the meantime, given that *Heller* has been called in question, it would be a mistake for the Court to continue applying *Heller*, because that would further entrench a rule that could turn out to be bad law.

In short, the most appropriate way for the Court to handle the Second Amendment issue here would be to punt. There are several ways in which that result could be achieved, but only one of them doesn't depend on what happens in the course of proceedings: dismissing the petition, as to the Second Amendment issue only, as improvidently granted.

Statement<sup>14</sup>**A. The linguistic evidence in *Heller***

One of the things that is notable about *Heller* from the standpoint of interpretive methodology is that while the Court's analysis of *keep* and *arms* was based on both dictionary definitions and evidence of actual usage, and its analysis of *bear* relied on dictionary definitions exclusively, its analysis of *bear arms* did not cite any dictionary definitions.<sup>15</sup> Instead, the Court relied on (1) the dissenting opinion in a 1998 decision in a case that involved the interpretation of *carry a firearm*, not *bear arms*<sup>16</sup> and (2) evidence of actual usage.<sup>17</sup>

Although *Amicus* favors relying more on evidence of actual usage than on dictionaries, his analysis is critical of how *Heller* dealt with that evidence. And more importantly, he has conducted a study of late-18th-century usage that draws on evidence and resources that were unavailable when *Heller* was decided, and that provides a much larger sample of 18th-century usage than what was considered in *Heller*. In the remainder of this sec-

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14. Both this brief and *Amicus*'s analysis follow two typographic conventions generally followed by linguists:

- a. *Italics* are used to signal that a word or expression is being used to refer to itself as an expression. E.g., the word *linguistics* has 11 letters.
- b. 'Single quotation marks' are used to enclose descriptions of a word or expression's meaning.

Regular quotation marks are reserved for quotations.

15. *Heller*, 554 U.S. at 581-83 (*keep, arms*); *id.* at 584-92 (*bear arms*). *But cf. id.* at 586 (providing the citation "2 Oxford 21" with no explanation of what it referred to).

16. *Heller*, 554 U.S. at 584, *citing Muscarello v. United States*, 524 U.S. 125, 123 (Ginsburg, J., dissenting).

17. *Id.* at 584-92.

tion of our Statement, we will discuss the nature and extent of the evidence that *Heller* considered, and in the next section we will discuss the additional evidence that has emerged since *Heller* was decided, including the evidence on which *Amicus*'s analysis is based.

The Court in *Heller* quoted twelve 18th-century instances of *bear arms* that it read as denoting the carrying of weapons in a nonmilitary context.<sup>18</sup> One of those uses strikes us as ambiguous,<sup>19</sup> and in the others the sense in which the phrase is used is made clear by aspects of the context that are absent from the Second Amendment.

The Court also cited a law review article that it described as "identifying numerous nonmilitary uses of 'bear arms' from the founding period."<sup>20</sup> That article provided 21 quotations from documents dating from before the Constitution was ratified, but 6 of those did not use *bear arms* at all; instead they provided uses of *bear* in which the direct object was a word other than *arms*, such as *long-bow*, *sword*, *weapons*, *gun*, *poynard*, *whingar*, and *durk*.<sup>21</sup> But the use of such phrases provides no information about how *bear arms* was likely to have been used and understood. Focusing only on *bear arms* is important here because *bear arms* concededly had an idiomatic military use, and the issue to be

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18. 554 U.S. at 585 n.8, 587 n.10, 588.

19. We refer here to the sixth quote in footnote 10, 554 U.S. at 587.

20. *Id.* at 587 (citing Clayton E. Cramer & Joseph Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 Geo. J. L. & Pub. Pol'y 511 (2008)).

21. Cramer & Olson, *supra* note 20, 6 Geo. J. L. & Pub. Pol'y at 512-13 (text at note 10), 513 (text at note 13), 513-14 (text at note 15), 514 (text at note 16), 517 (text at note 33), 518 (text at note 35),

decided was whether that was its ordinary use or an outlier. We have found evidence that any idiomatic military meaning was ever associated with such phrases as *bear guns*, *bear swords*, *bear weapons*, or *bear poynards*, *whingars*, or *durks*.<sup>22</sup>

In addition to quoting and citing the materials we've been discussing, the Court referred unfavorably to two categories of documents that had been cited by the District of Columbia and its *amici* as examples of *bear arms* being used in a military sense. The first category consisted of records of congressional debates and other federal legal documents, which the Court discounted *en masse* on the theory that "those sources would have had little occasion to use [*bear arms*] *except* in discussion about the standing army and the militia."<sup>23</sup>

The second category consisted of documents that were the subject of a study discussed in the linguists' *amicus* brief: 115 documents, of which 110 were described as using *bear arms* "in the military sense."<sup>24</sup> Those 110 documents made up a more extensive body of evidence

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22. Of the other 15 quotations in the article, there were only three in which *bear arms* was unambiguously used to denote the carrying of weapons in nonmilitary contexts. See Cramer & Olson, *supra* note 18, 6 Geo. J. L. & Pub. Pol'y at 513, 514, 517 (text at notes 12, 17 & 34) The remaining 12 uses were in our view ambiguous between the two sense of *bear arms*, except for one, which when read in context is best understood as having to do with bearing *coats of arms*. *Id.* at 516 (text at note 26); see John Lingard, *The Antiquities of the Anglo-Saxon Church* 53 (3rd American ed., from 2nd London ed. 1851), available at [bit.ly/AngloSaxonChurch](http://bit.ly/AngloSaxonChurch).

23. 554 U.S. at 587 (cleaned up; emphasis in the original).

24. *Id.* at 588 (emphasis in the original); See Brief for Professors of Linguistics and English at 24, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

than the 27 uses that the Court relied on. But apparently the documents themselves were not provided to the Court, and that made it possible for the Court to dismiss the evidence without having seen it. The Court expressed skepticism about the accuracy of the linguists' conclusion: "Justice Stevens points to a study by *amici* **supposedly** showing that the phrase 'bear arms' was most frequently used in the military context."<sup>25</sup> And it gave the documents no weight in any event: "The study's collection appears to include (who knows how many times) the idiomatic phrase 'bear arms against,' which is irrelevant."<sup>26</sup> (The statement about the supposed irrelevance of *bear arms against* refers to the Court's conclusion earlier in the opinion that *bear arms* "*unequivocally* bore [its] idiomatic [military] meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities."<sup>27</sup>)

## ***B. The new linguistic evidence***

### ***1. Corpus linguistics***

Most of the new evidence that has prompted *Amicus*'s analysis of *Heller* and the Second Amendment has part become available as a result of the growing interest among judges and scholars in the use of corpus linguistics as a tool in legal interpretation.<sup>28</sup>

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25. *Heller*, 554 U.S. at 599 (boldfacing added).

26. *Id.*

27. *Id.* at 586 (emphasis in the original).

28. See, e.g., *Caesars Entm't Corp. v. Int'l Union of Operating Engineers Local 68 Pension Fund*, No. 18-2465, 2019 WL 348-4247, at \*2 (3d Cir. Aug. 1, 2019); *Wilson v Safelite Group, Inc.*, No. 18-3408, 2019 WL 3000995, at \*8-11 (6th Cir. July 10, 2019) (Thapar, J., concurring in part and concurring in the result); *People v. Harris*, 885 N.W.2d 832, 838-39 (Mich. 2016);



As the Court may recall from previous *amicus* briefs that have relied on it, corpus linguistics consists of the use of digitized collections of real-world texts as a tool in linguistic analysis.<sup>29</sup> Until recently there existed no publicly available corpus that included texts from the 18th century—the period most relevant to investigating constitutional original meaning.

That gap has now been filled by the BYU Law School, which has been a hub of activity relating to the nascent field of law and corpus linguistics. In May 2018 the law school released for public use beta versions of two corpora specifically designed to fill that gap: COFEA (the Corpus of Founding Era American English) and COEME (the Corpus of Early Modern English).<sup>30</sup>

Those corpora are the primary source of the new evidence that, *Amicus* believes, warrants a reexamination of *Heller* and the Second Amendment.

A linguistic corpus is similar to Westlaw and Lexis in that all three are electronic collections of texts, but more significant than the similarities are the features of that are unique to corpora.

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*id.* at 850-51 n.14 (Markman, J., concurring in part and dissenting in part); *State v. Rasabout*, 356 P.3d 1258, 1275-90 (Utah 2015) (Lee, A.C.J., concurring in part and concurring in the judgment); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L. J. 788 (2018); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. Rev. 1621, 1643-49 (2018).

29. *E.g.*, Amicus Brief of Scholars of Corpus Linguistics, *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019) (No. 17-1625); Brief for Project on Government Oversight et al. as Amici Curiae 13-20, *FCC v. AT&T, Inc.*, 562 U.S. 397 (2011) (No. 09-1279).

30. The corpora are available at [lawcorpus.byu.edu](http://lawcorpus.byu.edu).

When Westlaw and Lexis were new on the scene, what we now think of as simply “legal research” was sometimes referred to as “CALR”: Computer Assisted Legal Research. Corpus linguistics makes possible a different kind of CALR: Computer Assisted *Lexicographic* Research.

That’s because the use of corpus linguistics in legal interpretation (1) is based on an assumption underlying lexicography (that how words are used determines what the mean), (2) takes advantage of the methodology of lexicography, and (3) makes it possible to draw on insights about word meaning that arisen from the use of corpora in lexicography.<sup>31</sup>

The ability to use a corpus in this way results from two aspects of how corpora are designed and set up.

First, the individual words in a corpus are often tagged to indicate their part of speech, which makes it possible to conduct linguistically-motivated searches that would otherwise be impossible. For example, the meaning of *personal* can be investigated by looking at the nouns occurring one word to its right, which are the nouns that it modifies.<sup>32</sup>

Second, a corpus interface is designed to facilitate linguistic analysis. The kind of search we’ve just described (called a collocate search) yields a list of the relevant nouns, listed in order of frequency. And if one wants to look at how the relevant word or expression is used, the corpus can provide a KWIC (Key Word In Context) concordance—a table similar to a spreadsheet,

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31. See generally Neal Goldfarb, *A Lawyer’s Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. Rev. 1359 (2018).

32. Brief for Project on Government Oversight et al. as Amici Curiae at 18-20, *FCC v. AT&T, Inc.*, 562 U.S. 397 (2011) (No. 09-1279).

in which the key word appears in a column of its own, along with the 10-20 words that appear to its left and its right.

This format makes it possible to quickly review many individual uses, and the amount of context shown above is usually enough to decide how each use should be categorized with respect to the question at issue. This makes it possible to see patterns of repeated use that would be difficult if not impossible to recognize by reading the underlying texts one at a time.

## 2. *The analyses by Dennis Baron and Blackman & Phillips*

Before discussing *Amicus's* analysis, we want to briefly describe a study that was published before *Amicus* began his analysis, and another that was reported while *Amicus's* analysis was in an early phase.

The first person to investigate the corpus data on *bear arms* seems to have been Dennis Baron, who was one of the linguistics *amici* in *Heller*. Shortly after COFEA and COEME were made publicly available, Baron wrote an op-ed based on the corpus data, and it appeared in the *Washington Post*. It stated, "Two new databases of English writing from the founding era confirm that 'bear arms' is a military term. Non-military uses of 'bear arms' are not just rare—they're almost nonexistent."<sup>33</sup> Out of 1,500 nonduplicative occurrences of *bear arms* from the 17th and 18th centuries, Baron said, "only a handful don't refer to war, soldiering or organized, armed action. These databases confirm that the natural meaning of 'bear arms' in the framers' day was mil-

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33. Dennis Baron, *Antonin Scalia was wrong about the meaning of 'bear arms,'* *Washington Post* (May 21, 2019), available at [tinyurl.com/Baron2AmWaPo](https://www.washingtonpost.com/news/energy-environment/wp/2019/05/21/dennis-baron-antonin-scalia-was-wrong-about-the-meaning-of-bear-arms/).

itary.”<sup>34</sup> (A more complete writeup of Baron’s research was recently published in the *Hastings Constitutional Law Quarterly*.<sup>35</sup>)

In the 14 months since Baron’s op-ed appeared, his conclusions about the corpus data have, as far as we’ve been able to determine, not been challenged by a single gun-rights advocate, or indeed, by anyone.

Apart from the analysis by Amicus, the only people to study the data on *bear arms* from COFEA and COEME have been Josh Blackman and James Phillips, who in August 2018 posted a preliminary report about their study on the Harvard Law Review Blog.<sup>36</sup>

Their post briefly discussed Baron’s op-ed, expressing no disagreement or criticism. Moreover, Blackman & Phillips described their results in terms indicating that their findings were consistent with Baron’s. After noting the statement in *Heller* that *bear arms* was used in an unambiguously military sense only in the construction *bear arms against*, they said, “According to our research, even when we exclude the phrase ‘bear arms against,’ the overwhelming majority of instances of “bear arms” was in the military context.”<sup>37</sup>

In February 2019, Blackman and Phillips presented a paper on their study at the annual Law and Corpus Linguistics Conference at the BYU Law School (at which Amicus also presented a paper) and at the Originalism Works in Progress Conference at the University

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34. *Id.*

35. Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 *Hastings Const. Law. Q.* 509 (2019).

36. Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, *Harv. L. Rev. Blog* (Aug. 7, 2018), [bit.ly/BlackmanPhillipsHLRBlog](http://bit.ly/BlackmanPhillipsHLRBlog).

37. *Id.*

of San Diego Law School. The paper was in draft form and is not publicly available (nor, apparently, has it been finalized). Blackman has asked *Amicus* not to discuss the draft's contents or to make it available and we are honoring that request. However, videos of the presentations are publicly available.<sup>38</sup> At the BYU conference, Blackman spoke immediately after a presentation by Baron (also on the video), and said that with respect to *bear arms*, he and Phillips were “largely on the same page” as Baron.<sup>39</sup>

### 3. *Amicus's analysis*

#### *Introduction.*

*Amicus's* analysis of the Second Amendment has been published as a series of blog posts on LAWnLinguistics and Language Log, under the overall title “Corpora and the Second Amendment.” Links to all the posts are available at [bit.ly/Corpus2dAmGuide](http://bit.ly/Corpus2dAmGuide) (click on the “Download” button at the top right of the screen). Shortly after this brief is filed, a compilation of all the posts will be available at [bit.ly/Corpus2AmCompilation](http://bit.ly/Corpus2AmCompilation).

*Amicus's* analysis is primarily corpus-based, although it also draws on other aspects of linguistics. The analysis also relies on information from the *Oxford English Dictionary* (OED), part of which is from revisions made after *Heller* was decided,<sup>40</sup> and on research con-

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38. BYU: Video, *Corpus Linguistics and the Second Amendment*, YouTube (posted Feb. 8, 2019), [bit.ly/BlackmanBYUvideo](http://bit.ly/BlackmanBYUvideo); USD: Video, *Corpus Linguistics and the Second Amendment* (posted May 16, 2019), [bit.ly/BlackmanOWIPvideo](http://bit.ly/BlackmanOWIPvideo)

39. BYU Video, *supra* note 38, [bit.ly/BlackmanBYUvideo](http://bit.ly/BlackmanBYUvideo) (statement starting at 59:20). Baron's presentation starts at 26:50 and Blackman's at 51:40.

40. *arms*, *n.*, OED Online (3rd ed. 2016), [oed.com](http://oed.com).

ducted by the OED's chief etymologist, which was similarly published post-*Heller*.<sup>41</sup>

The data that *Amicus* reviewed was limited to publications from the period 1760-1799. That is the period covered by COFEA, and although COEME goes back further in time, *Amicus* limited his COEME searches to the time period that is within the scope of COFEA. But note that the relevant date in compiling the corpora is the date of publication or edition of the book from which the text happens to be taken, and both corpora include texts written before their nominal dates.

Even though *Heller*'s search for evidence was not limited to the same 40-year period as COFEA, the amount of evidence relied on in *Heller* was dwarfed by the volume of evidence obtained from COFEA and COEME. The two corpora between them provided a quantity of evidence exceeding what *Heller* relied on by more than a factor of ten.

All of the data that is the subject of *Amicus*'s analysis is available in the form of spreadsheets that include the complete details of *Amicus*'s decisions in categorizing each line (e.g., as to which sense of the key word was conveyed). Those spreadsheets can be downloaded at [bit.ly/Corpus2AmData](http://bit.ly/Corpus2AmData) (click on the "Download" button at the top right of the screen). In addition, COFEA and COEME are accessible online at [lawcorpus.byu.edu](http://lawcorpus.byu.edu).

The members of the Court will therefore be able to review and evaluate the corpus data for themselves, and perform their corpus searches, as will everyone else with access to a computer. The analysis can therefore be tested and challenged by anyone who wishes to do so, such as gun-right advocates having an incentive to rebut or discredit the analysis, and scholars (both legal

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41. Philip Durkin, *Borrowed Words: A History of Loanwords in English* (2014).

and linguistic) who are less motivated to advance a policy agenda.

*Amicus's* analysis works within the same interpretive framework as *Heller*: it attempts to determine how the Second Amendment's text is likely to have been understood by members of the public at the time it was framed and ratified. In addition, the analysis is structured in much the same way as *Heller's* textual analysis. It begins by looking at the individual words in *keep and bear arms* and then examines the various phrases that are built from those words. Thus, the analysis proceeds as follows:

*keep*

*bear*

*arms*

*bear arms* (including a detour to consider *the right of the people*)

*the right to bear arms* (both on its own and as part of *the right of the people to bear arms*)

*keep and bear arms*

### *Summary and discussion of findings.*

*Amicus's* most important conclusions can be summarized as follows:

1. The use of *bear arms* in the corpus data was overwhelmingly dominated by the use of the phrase in a military-related sense. Such uses represented roughly 95% of the total. In all likelihood, therefore, *bear arms* was ordinarily understood to convey such a sense.

2. As a general matter, *the right to bear arms* was most likely understood to mean 'the right to serve in the militia.'

3. There is reason to think that *the people* as used in the Second Amendment was understood in a collective sense rather than in an individual sense (or, to use the terminology of linguistics, a distributive sense) and that

the class of people who constitute “the people” for purposes of the Second Amendment was understood as being coextensive with the class of people eligible to serve in the militia.

4. Contrary to what the Court said in *Heller*,<sup>42</sup> there is reason to think that in the Second Amendment, *bear arms* was used in its idiomatic military sense and that it would have been understood as conveying that sense. Moreover, such an interpretation is not ruled out by the fact that *bear arms* appears as part of the phrase *keep and bear arms*.

We turn now to a more detailed look at *Amicus*’s analysis.

*keep*:<sup>43</sup> The corpus data for *keep* is consistent with how the word was interpreted in *Heller*. Nevertheless, *Amicus*’s analysis includes an extended examination of the data for *keep*, which presented as an introduction to corpus analysis and to an approach to word meaning that was developed as a result of the use of corpora in lexicography.

*bear* and *arms* (an introductory comment): As previously noted, *Heller*’s discussion of *bear* and *arms* relied solely on dictionary definitions.<sup>44</sup> While those definitions were accurate as far they went, they merely recorded various ways that the words had been used, without purporting to say which senses were the most common or to reflect ways in which their use might have changed over time. Thus the definitions were in-

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42. 554 U.S. at 586-87.

43. Neal Goldfarb, *Corpora and the Second Amendment: “keep” (parts 1 and 2)*, LAWnLinguistics (Aug. 11 & Oct. 21, 2018), [bit.ly/keep1LnL](http://bit.ly/keep1LnL) and [bit.ly/keep2LnL](http://bit.ly/keep2LnL).

44. 554 U.S. at 581-83



capable of providing the kind of reliable view of 18th-century usage that OPM originalism requires. That shortcoming becomes clear when one considers the corpus data and other historical evidence, as is shown below in the separate discussions of *bear* and *arms*.

*bear*.<sup>45</sup> The data shows that although *bear* was sometimes used to mean ‘carry,’ it was not generally synonymous with *carry*, and the ways that it was used—i.e., the meanings that it was used to convey—were quite different from *carry*’s. While *carry* was often used to denote the physical carrying of tangible objects (e.g., *carry provisions*, *carry goods*, *carry baggage*, *carry supplies*), *bear* was seldom used that way.

In fact, in a book published in 2014, six years after *Heller* was decided, the chief etymologist for the OED reported on a study in which, among other things, he tried to determine when *carry* took over from *bear* as the verb generally used to mean ‘carry.’ He concluded that “in the ancestor of modern standard English,” it was “very likely that *carry* was the basic word in this meaning by the seventeenth century (at least).”<sup>46</sup> Thus, the transition from *bear* to *carry* appears have been complete long before the Second Amendment was proposed and ratified. That fact alone casts serious doubt on *Heller*’s conclusion that the “natural meaning” of *bear arms* was essentially a variation on ‘carry weapons.’<sup>47</sup>

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45. Neal Goldfarb, *Corpora and the Second Amendment: bear*, LAWnLinguistics (Dec. 16, 2018), [bit.ly/bearLnL](http://bit.ly/bearLnL).

46. Philip Durkin, *Borrowed Words: A History of Loanwords in English* 407-08 (2014).

47. 554 U.S. at 584.

*arms*.<sup>48</sup> The definitions for *arms* did not present the same problem of changed meanings as did those for *bear*, but they didn't adequately reflect the range of the word's usage and they gave no indication of the relative frequency with which varying uses occurred.

Samuel Johnson's dictionary listed four potentially relevant senses for *arms* (of which *Heller* discussed only the first):

1. Weapons of offence, or armour of defence
2. A state of hostility.
3. War in general.
4. Action; the act of taking arms.<sup>49</sup>

But Johnson included no idiomatic phrases using *arms*, despite the fact that there existed many phrases in which *arms* was used figuratively, in a variety of military-related meanings.<sup>50</sup> Sixty such phrases can be found in the corpus data, including these:

appeal to arms, appear in arms, arise in arms, call to arms, carry arms against, clash of arms, companions in arms, enter into arms, exercise of arms, feats of arms, glory of arms, in arms (against), inequality of arms, lay down arms, lay/lie on arms, men at arms, profession of arms, resort to arms, rise (up) in arms, rouse [somebody] to arms, rush to arms, science of arms, sound of arms, stand (forth) in arms, stand to (their) arms, stimulate [some person or entity] to arms, take arms (against), taken in arms, terror of arms, throw down (their) arms, thunder of arms, to arms, train[ed] to arms, try my right by arms, under

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48. Neal Goldfarb, *Corpora and the Second Amendment: arms*, LAWnLinguistics (Feb. 20, 2019), [bit.ly/armsLnL](http://bit.ly/armsLnL).

49. *Arms*, 1 Dictionary of the English Language (no page number) (4th ed. 1773).

50. See, e.g., *arms*, *n.*, OED Online (3rd ed. 2016), [oed.com](http://oed.com).

arms, up in arms (against), urge [somebody] to arms, victorious arms

Moreover, idiomatic uses such as these accounted for about 54% of the corpus data, overall. Within COFEA, the results vary depending which collections one looks at. In the combined results from the collections consisting of government documents and documents from the papers of John Adams, Benjamin Franklin, Thomas Jefferson, Alexander Hamilton, James Madison, and George Washington, literal uses predominated, while in the remainder of the data, the results were the opposite.

This information enables one to view *bear arms* in a new light, especially when considered together with the fact that *bear* was not ordinarily used to mean ‘carry.’ What it suggests is that even before looking at the corpus data for *bear arms*, there is reason to think that the phrase was ordinarily used in an idiomatic rather than literal sense; after all, *bear* didn’t generally mean ‘carry’ and *arms* was very often used figuratively rather than literally. But the Court’s starting point in *Heller* was the complete opposite of that.

In addition to providing this specific insight into the 18th-century meaning and use of *bear arms*, the new linguistic evidence about *bear* and *arms* provides a reminder that although it is sometimes obvious that the meaning of a word or expression has changed since the late 1700s (for example, because from a 21st-century perspective, its 18th-century use doesn’t make sense in the context in which it appears), changes can also occur that are less obvious. When that happens, we might read a historical text and think we understand it, when in fact we don’t.

*bear arms*.<sup>51</sup> The corpus data on *bear arms* was fully consistent with what one would expect from *Amicus*'s findings as to *bear* and *keep*. The search looked for all instances of the noun *arms* occurring within four words of any form of the verb *bear* (*bear*, *bears*, *bearing*, etc.). After duplicating the results and filtering out lines that did not involve either of the senses that are relevant here, there remained, between COFEA and COEME, 531 concordance lines. Of those, *Amicus* categorized 503 lines (almost 95% of the total) as conveying the idiomatic military sense.<sup>52</sup> *Amicus* categorized only 11 lines (2%) as unambiguously using *bear arms* to mean 'carry weapons,' and only seven of those as arguably using the phrase to convey what *Heller* said was its "natural meaning": essentially, 'carry weapons in order to be prepared for confrontation.' Going by *Amicus*'s categorization, therefore, only 1.3% of the concordance lines can reasonably be thought of as supporting the *Heller* interpretation.

In addition to categorizing the concordance lines according to which sense of *bear arms* they conveyed, *Amicus* grouped them based on commonalities that the concordance format makes it possible to discern:

- Perhaps the most important of these groups was a network of constructions relating, directly or indirectly, to there being a duty to bear arms. Some of these focused directly on that duty (e.g., *duty to bear arms*, *compel to bear arms*, *be liable to bear arms*, and *shall bear arms*). Others had a more indirect

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51. Neal Goldfarb, *Corpora and the Second Amendment "bear arms"* (parts 1-3), *LAWnLinguistics* (April 29, 30 & July 10, 2019), [bit.ly/BearArms1LnL](http://bit.ly/BearArms1LnL), [bit.ly/BearArms2LnL](http://bit.ly/BearArms2LnL) & [bit.ly/BearArmsLnL3](http://bit.ly/BearArmsLnL3).

52. *Corpora and the Second Amendment "bear arms"* (part 3), *supra*, [bit.ly/BearArmsLnL3](http://bit.ly/BearArmsLnL3).

relationship to that duty: e.g., *exempted from bearing arms*, *conscientiously scrupulous of bearing arms*, and *refuse to bear arms*.

This group comprised 121 concordance lines, all of which were categorized as conveying a military sense. More specifically, *Amicus* believes that in these uses, *bear arms* was understood to mean ‘serve in the militia.’ That belief is based on the historical fact that there existed a duty to serve in the militia, but no duty to carry weapons that was unrelated to militia service and that was referred to as a duty “to bear arms.”

- There are 151 concordance lines that are categorized under the heading “able to bear arms, capable of bearing arms, fit to bear arms, etc.” *Amicus* believed that these uses, to are likely to have been understood to mean ‘serve in the militia.’
- The next group (132 concordance lines) consists of uses of *bear arms against* (which *Heller* recognized as being unambiguously military<sup>53</sup>), together with similar constructions such as *bear arms in defense of our country*. These represent semantic mirror-images of *bear arms against*, and they use *bear arms* in the same way.
- The final group, consisting of 83 concordance lines, are categorized as “miscellaneous military.”

There is a final point we’d like to make here about *bear arms*. The first post on the phrase consists of a detailed critique of *Heller*’s analysis of *bear arms*.<sup>54</sup> This critique is not based on corpus data except in one respect. The post discusses the conclusion in *Heller* that in various

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53. 554 U.S. at 586.

54. *Corpora and the Second Amendment “bear arms”* (part 1), *supra*, [bit.ly/BearArms1LnL](http://bit.ly/BearArms1LnL).

state constitutional provisions protecting gun rights, formulations such as “the people have a right to bear arms in defence of themselves and the state” were examples of *bear arms* being used to unambiguously convey a nonmilitary meaning. *Amicus* disputes that conclusion, largely on the basis of corpus data on constructions such as *the people have a/the right*, *the people’s right*, and *the right of the people*.

*the right (of the people) to bear arms*.<sup>55</sup> This post begins by addressing the question of how *the right to bear arms* was likely to have been understood, without dealing with the possible effect of the fact that the right to bear arms is described in the Second Amendment as a “right of the people.” After answering the first question, the post goes on to answer the second one.

*Amicus’s* answer to the first question is that the right to *bear arms* was probably understood in a military sense, and specifically as meaning ‘serve in the militia.’ The latter conclusion was based on apparently undisputed fact that during the founding era, bearing arms was regarded as both a right and a duty. When that fact is considered together with *Amicus’s* conclusion that the duty to bear arms was probably understood as a *duty* to serve in the militia, it follows that the right to bear arms was probably regarded as a *right* to serve in the militia.

*Amicus’s* analysis takes issue with the conclusion in *Heller* that interpreting the right to bear arms as a right to serve in the military would be “an absurdity that no commentator has ever endorsed.”<sup>56</sup> The analysis

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55. Neal Goldfarb, *Corpora and the Second Amendment: “the right (of the people) to bear arms,”* LAWnLinguistics (July 16, 2019), [bit.ly/RightBearArmsLnL](http://bit.ly/RightBearArmsLnL).

56. 554 U.S. at 587.

provides evidence contradicting both parts of that statement, but the more important evidence is the evidence showing that this interpretation would not be an absurdity. That evidence includes, in addition to the fact that bearing arms was regarded as a duty as well as a right, four founding-era instances of *bear arms* being used in precisely the way that the Court ridiculed in *Heller*. One of those uses was by Samuel Adams and another was by a congressman during the Congressional debate over a bill to establish a “provisional army.”

*keep and bear arms*.<sup>57</sup> Finally, *Amicus*’s analysis considers *Heller*’s argument that *bear arms* can’t possibly be interpreted as having been used idiomatically to convey its military meaning:

[If *bear arms* were given its idiomatic meaning,] the phrase “keep and bear arms” would be incoherent. The word “Arms” would have two different meanings at once: “weapons” (as the object of “keep”) and (as the object of “bear”) one-half of an idiom. It would be rather like saying “He filled and kicked the bucket” to mean “He filled the bucket and died.” Grotesque.<sup>58</sup>

*Amicus* provides reasons why the *filled-and-kicked-the-bucket* analogy is inapt and why *keep and bear arms* could have been understood to mean ‘keep arms and serve in the militia.’ Those reasons are not amenable to being summarized in the space available here.

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57. Neal Goldfarb, *Corpora and the Second Amendment: “keep and bear arms” (parts 1 & 2)*, LAWnLinguistics (July 29, 2019), [bit.ly/KeepBearArms1LnL](http://bit.ly/KeepBearArms1LnL). Part 2 is in preparation and will be posted shortly after this brief is filed, at which point a link to it will be available at [bit.ly/Corpus2dAmGuide](http://bit.ly/Corpus2dAmGuide).

58. *Heller*, 554 U.S. at 587.

We will therefore close this discussion by noting that to the extent the *filled-and-kicked-the-bucket* argument is valid, it applies not only to interpreting *bear arms* to mean ‘serve in the militia,’ but also to the Court’s interpretation in *Heller* (albeit with less force). That is because under the Court’s interpretation, *bear arms* is not entirely literal, but rather is somewhat idiomatic.

Under a purely literal interpretation, *bear arms* would mean simply ‘carry weapons.’ But *Heller* interpreted it to mean ‘carry weapons in order to be prepared for confrontation.’ Where does ‘in order to be prepared for confrontation’ come from? Not from the separate meanings of *bear* and *arms*. Rather, it could only be a meaning that is associated, by convention, with the phrase as a whole, and that is the defining characteristic of an idiom.<sup>59</sup>

### Argument

#### I. The new linguistic evidence shows that *Heller’s* analysis and conclusion are untenable.

As the discussion above shows, *Amicus’s* analysis of *Heller* provides powerful evidence that *Heller’s* treatment of the Second Amendment’s text was mistaken in several important respects—and there are parts of *Amicus’s* analysis that we have not touched on.

Even if one assumes that our analysis is not conclusively show that *Heller’s* interpretation is wrong, it seems undeniable that it does conclusively show that the right to bear arms that the Second Amendment protects could reasonably have been understood as a right to serve in the militia. That means, of course, that *the right to bear arms* is ambiguous. And under the

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59. David Crystal, *A Dictionary of Linguistics and Phonetics* 236 (6th ed. 2008); *Webster’s New International Dictionary* 1237 (2d ed. 1934).



interpretive framework established by *Heller* itself, if the operative clause is ambiguous, the ambiguity may be resolved by consulting the prefatory clause.

At that point, it seems to us, *Heller*'s reasoning, and therefore its holding, become untenable.

It is true that the Court read the prefatory clause as being consistent with its interpretation of the operative clause. But that can't save the Court's holding, because the prefatory clause is also consistent—indeed, *more* consistent—with interpreting *bear arms* to mean 'serve in the militia.'

Nor does it matter that the Court regarded its interpretation as being confirmed by various other considerations: history, state bills of rights, post-ratification commentary, and so on. While such factors are potentially relevant in determining original public meaning, *Heller*'s originalism is very much a textualist originalism, so under the interpretive approach that *Heller* followed, those other factors cannot take precedence over the text.

Furthermore, *Heller*'s view of those factors is hotly disputed, and more importantly, those views themselves would have to be revisited in light of the new evidence about the meaning of *bear arms*. In short, the need to reexamine *Heller* cannot be avoided.

## **II. As to the Second Amendment issue, the petition should be dismissed as improvidently granted.**

The fact that *Heller* should be revisited does not mean that the reexamination should be undertaken in this case. On the contrary, there are compelling reasons not to do so. But at the same time, it would not be appropriate for the Court to decide any Second Amendment issues while *Heller*'s continuing validity is under a cloud of uncertainty. We submit that the appropriate course of

action would be to dismiss the petition, solely as to the Second Amendment issue, as improvidently granted.

A. There are several reasons why this is not the case in which to reexamine *Heller*. To begin with the obvious, Petitioners would not have an adequate opportunity to litigate the issue.

Putting aside the merits of Amicus's analysis and conclusions, responding to the analysis would present Petitioners with unusual challenges that would be exacerbated by the posture of the case. The use of corpus linguistics as an interpretive tool is new, and Petitioners' counsel, like most lawyers, are probably unfamiliar with corpus methodology and analysis. The corpus data is voluminous, and disputing Amicus's interpretation of the data could require a review of many individual concordance lines. The task of preparing a response would therefore be demanding even if Petitioners were not limited by the constraints applicable to reply briefs. Subjecting Petitioners to these difficulties would, in the current posture of the case, be unfair.

The posture of the case is also problematic in that there would be no possibility for *amicus* briefing with respect to the issues we have raised. That would be especially unfortunate given that such briefing would be more important than usual here, given the high stakes, the novelty of corpus linguistics as an interpretive tool, and potentially (depending on one's approach to *stare decisis*) the complexity of issues that might relate to whether *Heller* should be overruled if the Court were to hold that it was wrongly decided.

In addition, if *Heller* were to be revisited in this case, there would not be an adequate opportunity for scholars on all sides of the Second Amendment issue to test, dispute, and debate Amicus's analysis and conclusions or to consider the legal implications that would arise from a determination that his conclusions are well

founded. As is hinted at above, it would probably be necessary to reexamine all prior scholarship that treated *bear arms* meaning ‘carry weapons, whether or not in the military’ or ‘carry weapons in the military.’ (Which is just another way of saying, “most if not all prior scholarship.”)

It would also be necessary to consider those aspects of the Second Amendment that *Amicus*’s analysis did not address, including most importantly issues relating to the prefatory clause. One obvious issue would be what if any effect the that clause should have on the interpretation of *keep arms*. Another would be what *well regulated militia* means—a question that dictionaries are inadequate to answer. That becomes clear once one recognizes that laws regulating the militia were often titled, unsurprisingly, acts “for regulating the militia.”<sup>60</sup>

An additional consideration is that if the Court were to reach the Second Amendment issue here, and to decide it in favor of Petitioners, it would create precedent further entrenching *Heller* and potentially giving rise to new reliance interests that might constrain the decision whether *Heller* should be overruled if it is later held to have been wrongly decided. (Of course, such constraints would be relevant only for Justices who believe that the interest in correcting an erroneous decision does not always overcome the interest in respecting *stare decisis*.)

Depending on the further course of proceedings, there are several ways in which deciding the Second Amendment issue here might prove to be unnecessary. The Court could decide that the case is moot, or it could reverse the Second Circuit based on the commerce-clause or right-to-travel issue. But the only way to avoid

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60. See, e.g., Google results for the search <“act for regulating the militia” OR “act for the regulation of the militia”>.

deciding the issue that would not depend on what otherwise happens in the case would be to dismiss the petition, as to Second Amendment issue only, as improvidently granted.

That action would be entirely appropriate. As we have shown, there are multiple prudential reasons not to decide the Second Amendment issue here. And the issue *Amicus* raises could not have been foreseen at the petition stage. The new linguistic evidence was presumably not known to the Court at the time, given that the Brief in Opposition not only did not refer to it, but explicitly accepted *Heller*'s interpretation as correct.<sup>61</sup>

B. The points we have raised apply not only to whether the Court should decide the Second Amendment issue presented in this case, but also to whether it should decide *any* Second Amendment issues so long as the issues raised here remain unresolved. Although that question need not be decided here, we bring it up in the hope that the Court will keep it in mind when acting on future petitions.

### Conclusion

The petition should be dismissed, solely as to the Second Amendment issue, as improvidently granted.

Respectfully submitted,

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61. Brief in Opposition 19.