No. 20-843

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC. et al.,

Petitioners,

v.

KEITH M. CORLETT, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, et al.,

Respondents.

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

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

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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]

Of particular relevance to this case, amicus has conducted an in-depth linguistic analysis of the Second Amendment's operative clause ("the right of the people to keep and bear Arms"), based primarily on evidence of 18th-century usage—evidence significantly more extensive than what the Court considered in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Amicus interprets that evidence as showing that *Heller* was mistaken about the Second Amendment's original meaning. He submits this brief in order to bring his analysis to the Court's attention, and to argue that in light of this serious challenge to *Heller*, the Court should deny the petition, and should abstain for the time being from granting review in cases challenging asserted denials of Second Amendment rights, in order to allow an opportunity for the merits and implications of that challenge to be studied and debated.

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1. All parties were timely notified and have consented in writing to the filing of this brief. No part of this brief was authored by any party's counsel. Nobody other than amicus contributed any money intended to fund 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.

Introduction and Summary of Argument[3]

Petitioners contend that the constitutionality of the statute at issue should be decided on the basis of "text, history, and tradition"—implicitly invoking then-Judge Kavanaugh's dissent on remand in *Heller*. Pet. 1, 15; *see Heller v. District of Columbia*, 670 F.3d 1244, 1271–80 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting).

That argument understandably takes it for granted that "text" refers to the Second Amendment's text as interpreted in *Heller*, that "history" refers to history as understood in light of *Heller*'s interpretation of *bear arms*, and that "tradition" refers to the traditions that are relevant given *Heller*'s holding that the Second Amendment protects an individual right to possess and carry firearms for lawful purposes such as self-defense.

While this may seem so obvious as to go without saying, we point it out because textual evidence that was not before the Court in *Heller* provides powerful evidence that *Heller* was mistaken about the Second Amendment's original meaning. That evidence derives from corpus linguistics, a methodology that has been advocated by originalist scholars such as Randy Barnett and Larry Solum as an aid to determining the original meaning of constitutional provisions. And the evidence shows that the right to bear arms was most

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

likely understood as being closely linked to the existence of, and service in, the militia.

Heller's correctness has therefore been cast into grave doubt, and gun-rights advocates—who one would expect to have an incentive to defend *Heller* against this challenge—have made no serious attempt to do so. Given these circumstances, the Court should deny cert.

Indeed, the Court should for the time being decline to grant any petitions arguing that the lower court interpreted the Second Amendment too narrowly. The Court should not consider such claims without first dealing with the challenge to *Heller*, but doing so in this case, or within the near future, would be unwise.

If the Court were to conclude that the Second Amendment does not in fact protect an individual right to keep and carry weapons for purposes unrelated to militia service, there would remain a host of difficult issues, such as whether *Heller* should be overruled and if so how to give meaning to a militia-related right in an era when there exists nothing resembling the state militias of the 17th and 18th centuries.

Because revisiting *Heller* would be such a serious matter, the Court should defer going down that road until there has been a reasonable period during which scholars and advocates on all sides of the gun-rights issue have had ample opportunity to debate the interpretation and significance of the corpus evidence, as well as the issues that would follow from a conclusion that *Heller* was wrongly decided.

Statement

Corpus linguistics as an interpretive tool

Corpus linguistics is a methodology that has over the past decade begun to be used as a tool in legal interpretation. It involves the use of large digitized collections of texts (known as "corpora"), in combination with an interface designed for linguistic analysis, in order to identify and study patterns of word usage. Corpus linguistics makes it possible to perform what is in effect customized lexicographic research, and in appropriate cases it can provide a basis for determining the ordinary meaning of statutory language, or the original public meaning of constitutional provisions, that is clearer, more detailed, and more reliable than was previously possible.

This Court was introduced to corpus linguistics ten years ago, in *FCC v. AT&T, Inc.*, No. 09-1279, when an amicus brief was filed that was based in large part on corpus linguistics.[4] At oral argument, Justice Ginsburg commented favorably on the brief,[5] and when the case was decided, the Court's unanimous opinion seems to have drawn in part on the brief.[6]

The brief in *FCC v. AT&T* was, as far is amicus is aware, the first time a brief relying on corpus linguistics had been filed in any court. And by coincidence,

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4. Brief for Project On Government Oversight et al. as Amici Curiae ("POGO Brief"), *FCC v. AT&T, Inc.*, 562 U.S. 397 (2011) (No. 09-1279) (authored by the present amicus).

5. Transcript of Oral Argument at 36, *FCC v. AT&T*, *supra*.

6. Compare *FCC v. AT&T*, supra, 562 U.S. at 403-04 with POGO Brief, *supra*, at 13-20. *See* Ben Zimmer, *The Corpus in the Court: 'Like Lexis on Steroids,'* The Atlantic (March 4, 2011), bit.ly/LexisOnSteroids (noting the brief's apparent influence).

another law-and-corpus-linguistics "first" occurred a few months after *FCC v. AT&T* was decided: an opinion explicitly relying on corpus linguistics was issued by Utah Supreme Court Justice Thomas Lee.[7] And significantly, the opinion offered a detailed argument supporting Justice Lee's use of corpus linguistics and advocating its use in legal interpretation generally.

Three years later, Justice Lee again wrote an opinion in which he used corpus linguistics and argued in favor of its use.[8] That opinion attracted more attention than the previous one had, and one result of that attention was that in 2016, the BYU Law School held the first of what has become a series of annual conferences on Law and Corpus Linguistics.[9] That first conference was cosponsored by the Georgetown University Law Center, which was represented at the conference by professors Randy Barnett and Larry Solum, both of whom were among the speakers. Barnett and Solum are influential originalist scholars, and Barnett is an important gun-rights advocate.

This being a Second Amendment case, Barnett's attendance at the conference is significant, as is the topic of his talk: an article on the original meaning of the Commerce Clause that he had written more than a decade before. Although Barnett had never heard of

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7. *J.M.W. v. T.I.Z.* (*In re Baby E.Z.*), 266 P.3d 702, 724-29 (Utah 2011) (Lee, J., concurring in part and concurring in the result).

8. *State v. Rasabout*, 356 P.3d 1258, 1275-82 (Utah 2015) (Lee, A.C.J., concurring in part and concurring in the judgment).

9. The discussion here of this conference is based on personal knowledge resulting from amicus's having been one of the attendees.

corpus linguistics at the time, the article was based on what amounted to a corpus analysis of the use of *commerce* in 18th-century newspapers, albeit one in which the search was performed manually by research assistants rather than electronically by a computer.[10]

Shortly after Barnett's Commerce Clause article came out, he published an article on the Second Amendment, in which he outlined an approach to originalist analysis that was informed by his experience with the earlier article. He said that "[d]iscerning the original public meaning of the text requires an examination of linguistic usage among those who wrote and ratified the text as well as the general public to whom the Constitution was addressed."[11] If a word or expression had more than one meaning, he said, "it becomes necessary to establish which meaning was dominant" —an empirical inquiry that "requires actual evidence of usage to substantiate."[12] Finally, researchers should if possible perform "a quantitative assessment to distinguish normal from abnormal usage."[13] Corpus linguistics fully satisfies all of those recommendations.

Barnett and Solum were not the only originalist scholars at the 2016 conference. Also in attendance were Will Baude, John McGinnis, Mike Rappaport, Steven Sachs, and (if amicus is remembering correctly) Jennifer Mascott and Lee Strang. As Rappaport wrote

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10. Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857–58 (2003).

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

12. *Id.* at 240.

13. *Id.* (cleaned up).

later, "Much of the conference focused on how [corpus linguistics] could be used to engage in originalist research."[14]

But at the time of the conference, there was no publicly available corpus covering the period that is most important in doing such research: the second half of the 18th century. The BYU Law School decided to fill that gap, and undertook to create the corpus, that is now known as COFEA (the Corpus of Founding Era American Usage). After a period of time in which the corpus data was made available to individual scholars, the corpus was opened up for public beta-testing in May 2018.[15]

In the time since the first BYU conference, there has arisen a body of scholarship advocating the use of corpus linguistics in researching constitutional original meaning, using corpus linguistics for that purpose, or both. For example:

James C. Phillips, Daniel M. Ortner, & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 Yale L.J. F. 21 (2016).

Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus*

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14. Mike Rappaport, *Corpus Linguistics and the Misuse of Dictionaries*, Law & Liberty (May 12, 2016), https://lawliberty.org/corpus-linguistics-and-the-misuse-of-dictionaries/.

15. See Neal Goldfarb, *The BYU Law corpora*, LAWnLinguistics (May 6, 2018), https://lawnlinguistics.com/2018/05/06/the-byu-law-corpora/. For general information about COFEA, see BYU Law School, *Corpus of Founding Era American English (COFEA)*, https://lcl.byu.edu/projects/cofea/.

Linguistics to Reveal Original Language Conventions, 50 U.C. Davis L. Rev. 1181 (2017).

Lee J. Strang, *The Original Meaning of "religion" in the First Amendment: A Test Case of Originalism's Utilization of Corpus Linguistics*, 2017 BYU L. Rev. 1683.

Jennifer L. Mascott, *Who Are "Officers of the United States*, 70 Stan. L. Rev. 443 (2018).

Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. Rev. 1621 (2018).

Stephanie H. Barclay et al., *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505 (2019).

Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. Penn. L. Rev. 261 (2019).

In recent years, individual members of this Court have relied on corpus analyses, or directly on corpus data, in cases raising constitutional issues. In *Lucia v. SEC*, Justice Thomas (joined by Justice Gorsuch) relied on the article by Mascott that is cited above.[16] And in *Carpenter v. United States*, Justice Thomas cited data from COFEA.[17]

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16. 585 U.S. ___, ___, 138 S. Ct. 2044, 2056-57 (2018) (Thomas, J., concurring).

17. 585 U.S. ___, ___ n.4, 138 S. Ct. 2206, 2238 n.4 (2018) (Thomas J., dissenting).

More recently, in *Bostock v. Clayton County* (a statutory case), Justice Kavanaugh relied on a corpus analysis by James Phillips.[18]

Although amicus is unaware of corpus linguistics having been used by any lower courts as to an issue of constitutional original meaning, it has been endorsed and relied on by a growing number of courts and individual judges in statutory cases.[19]

Amicus's corpus analysis

Amicus's argument in this brief is based on an in-depth linguistic analysis of the Second Amendment's operative clause that he has performed. That analysis relies on COFEA and the Corpus of Early Modern English (COEME), a separate corpus that has also been created by the BYU Law School. The data from these corpora provides evidence about founding-era English that is more extensive and reliable than the evidence that was relied on in *Heller*. For example, the

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18. 140 S. Ct. 1731, 1767 n.22 (2020) (Kavanaugh, J. dissenting) (citing James C. Phillips, *The Overlooked Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality* (May 11, 2020) (unpublished manuscript) (archived at https://www.supremecourt.gov/opinions/URLs_Cited/OT2019/17-1618/17-1618-3.pdf).

19. E.g., *Caesars Entertainment Corp. v. Int'l Union of Operating Engineers Local 68 Pension Fund*, 932 F.3d 91 (3d Cir. 2019); *Wilson v Safelite Group, Inc*., 930 F.3d 429 (6th Cir. 2019) (6th Cir. July 10, 2019) (Thapar, J., concurring in part and concurring in the result); *Murray v. BEJ Minerals, LLC*, 464 P. 3d 80, 95-96 (Mont. 2020) (McKinnon, J., concurring); *State v. Lantis*, 447 P.3d 875, 880–81 (Idaho 2019); *People v. Harris*, 885 N.W.2d 832, 838–39 (Mich. 2016); *Bright v. Sorenson*, 463 P.3d 626, 638-39 (Utah 2020).

data on which amicus based his analysis included the following:

- 504 uses of the verb *bear* (or grammatical variants such as *bearing*, *bore*, and *borne*);
- 2,098 uses of the noun *arms*;
- 531 uses of the verb *bear* (or grammatical variants) appearing within four words of the noun *arms*; and
- 223 uses of phrases such as *the right of the people*, *the people have a right*, and *the people's right.*

To state the obvious: this volume of data (which accounts most but not all of what amicus reviewed) dwarfs the amount of evidence that the Court relied on in *Heller.*

Amicus's analysis originally took the form of a series of posts on his blog LAWnLinguistics and the linguistics blog *Language Log*.[20] Most of those posts have been compiled (with some revision) into a document entitled *A (Mostly Corpus-Based) Linguistic Reexamination of* D.C. v. Heller *and the Second Amendment* (hereinafter, "Goldfarb Analysis"), which is available at bit.ly/Goldfarb2dAmAnalysis.

Amicus's data is collected in a set of spreadsheets, and it is presented in a way that discloses amicus's interpretation of each line of data. Those spreadsheets are available at bit.ly/Corpus2AmData. Amicus's analysis is therefore fully transparent: anyone wishing to challenge his conclusions can do so, line by line.

When amicus's analysis was completed, law professor Michael Ramsey described it, in a post on the

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20. Links to each post are available at bit.ly/Corpus2dAm Guide.

Originalism Blog as "an extraordinarily insightful and challenging project."[21] More recently, on Twitter, Larry Solum linked to amicus's analysis, with the comment that if the corpus evidence had been available when *Heller* was decided, it "might well have swung the court the other way."[22]

Argument

I. The corpus data shows that the Court in *Heller* was mistaken about the Second Amendment's original meaning.

A. *Heller* was mistaken about 18th-century linguistic usage.

The corpus data points to the conclusion that *Heller* was wrongly decided. Specifically, the data shows that in almost every respect, *Heller* was mistaken about the facts of 18th-century usage, and therefore about how *the right of the people to keep and bear Arms* was likely to have been understood.

As discussed in detail in amicus's complete analysis, the evidence points toward the conclusion that *Heller*'s textual analysis was fundamentally flawed. Amicus's analysis concludes that the Second Amendment is best read as protecting a right to serve in the militia, not an individual right to carry weapons that was unrelated to militia service.

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21. Michael Ramsey, *More from Neal Goldfarb on Corpus Linguistics and the Second Amendment*, The Originalism Blog (Aug. 27, 2019), https://bit.ly/Ramsey OriginalismBlog.

22. Lawrence Solum (@lsolum), Twitter (Oct. 14, 2020, 6:10 PM), https://twitter.com/lsolum/status/1316501583354572800.

The broad outlines of amicus's analysis are set out below.

bear. The corpus data shows that although *bear* was sometimes used to convey the meaning 'carry,' that sense was infrequent and out of the ordinary, and the two words weren't generally synonymous. Rather the ways in which *bear* was used differed substantially from those for *carry*, and vice versa While *carry* was often used to denote the physical carrying of tangible objects (e.g., *carry baggage*), *bear* was seldom used that way.

The differences in how the two words were used can be explained by linguistic history. A study of the use of both words was conducted by one of the top-level editors of the *Oxford English Dictionary*, and he reported that by the end of the 1600s, *carry* had replaced *bear* as the verb generally used to convey the meaning 'carry.'[23] By the time the Second Amendment was framed and ratified, therefore, the use that *Heller* treated as *bear*'s ordinary or natural meaning was in reality a remnant of the past.

arms. Although *arms* was often used to mean 'weapons,' it was also used roughly as often to convey a variety of figurative meanings relating to war, combat, and the military.

bear arms. The corpus data for *bear arms* (and grammatical variants) was overwhelmingly dominated by uses of the phrase in its idiomatic military sense. (This is no surprise, given amicus's conclusions regarding *bear* and *arms*.) *Heller* was therefore mistaken in declaring that the "natural meaning" of *bear arms* was

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

essentially, 'carry weapons in order to be prepared for confrontation.' The fact is that the phrase was ordinarily used to convey meanings such as 'serve in the military' (specifically, 'in the militia') or 'fight in a war.'

the right of the people to…bear arms. Consistent with how *bear arms* was ordinarily used, *the right to bear arms* was most likely understood as conveying its idiomatic military sense, and in particular as meaning 'the right to serve in the militia.' That conclusion is based to a large extent on the fact that there is reason to think that *bear arms* was understood to mean the same thing as to the **right** to bear arms as it meant with respect to the **duty** to bear arms—and the duty to bear arms was understood as a duty to serve in the militia.

In addition, there is reason to believe, contrary to what the Court said in *Heller*, that as used in the Second Amendment, *the people* referred to those who were eligible for militia service.

keep and bear arms. The interpretation described above is not ruled out by the fact that *bear arms* appears as part of the phrase *keep and bear arms*. Although that interpretation requires that *arms* be understood as being simultaneously literal (as part of *keep arms*) and figurative (as part of *bear arms*) there is reason to believe that that was in fact how *keep and bear arms* was understood at the time of the Second Amendment's framing and ratification.

Before moving on from this summary, an additional point must be made. Amicus's analysis does not rule out the possibility that on certain of the issues it deals with, *Heller* was correct. But that does not affect the

ultimate conclusion that *Heller* was mistaken about the Second Amendment's original meaning.

An essential part of *Heller*'s analysis was the holding that unless the Second Amendment's operative clause was ambiguous when considered by itself, it is inappropriate to invoke the prefatory clause for the purpose of contradicting that putatively unambiguous meaning (at least so long as the prefatory clause can be interpreted in a way consistent with that meaning).[24] This means that the mere possibility of *Heller*'s being correct as to some issues is not enough to preserve the Court's holding. If *Heller* might or might not be correct as to some issue, it is by definition ambiguous on that point. And in this regard, recall the statement by Larry Solum that if the corpus data had been available to the Court in *Heller*, it "might well have swung the court the other way."[25] That statement is tantamount to a recognition that in light of the corpus data, the Second Amendment does not unambiguously mean what *Heller* interpreted it to mean.

Under the framework established by *Heller*, this opens the door to considering the prefatory clause in order to resolve the ambiguity. 554 U.S. at 577-78. And doing so, amicus submits, would virtually compel that *bear arms* was used in the Second Amendment in its idiomatic military sense.

That is the case even though the Court in *Heller* viewed that clause as being consistent with its interpretation of the operative clause. 554 U.S. at 599-600.

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24. 554 U.S. at 578-79, 598-600.

25. Lawrence Solum (@lsolum), Twitter (Oct. 14, 2020, 6:10 PM), https://twitter.com/lsolum/status/1316501583354572800.

Because the Court was mistaken about 18th-century usage, it was mistaken about to how the operative clause standing alone was likely to have been understood. So even if the prefatory clause could be read as being consistent with the operative clause under the Court's interpretation of the latter, there would remain the possibility that the two clauses are consistent with one another under amicus's interpretation as well. Indeed, there is historical support for such a conclusion.[26] And although *Heller* rejected that view of the relevant history, that conclusion is undermined by the Court's misunderstanding of 18th-century usage.

B. Other corpus analyses of the Second Amendment are consistent with amicus's conclusions.

Amicus is not the only person to have conducted a corpus analysis of terms used in the Second Amendment. In fact, he was not the first person to have done so, but his analysis is the broadest in its scope. In any event, the results of the other analyses are fully consistent with his.

The first corpus analysis of the Second Amendment was carried out by Dennis Baron, who conducted his search soon after COFEA and COEME were made publicly available, and shortly afterward published an op-ed in the Washington *Post* op-ed, in which he wrote, "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

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26. *See, e.g.*, Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (2006).

rare—they're almost nonexistent."[27] He based that conclusion on "1,500 separate occurrences of 'bear arms' in the 17th and 18th centuries," of which he said that "only a handful don't refer to war, soldiering or organized, armed action."[28]

The next corpus analysis to be performed is important because of who authored it: Josh Blackman (a well known gun-rights advocate) and James Phillips (co-author with Justice Lee of two of the articles cited above, and the person is credited with coming up with the idea of creating a corpus intended for use in doing original-meaning research). Blackman and Phillips published a preliminary account of their analysis on the Harvard Law Review Blog, and although they were somewhat tentative in their conclusions, they said that "the overwhelming majority of instances of 'bear arms' was in the military context," even after excluding uses of the *bear arms against [someone]*. [29]

A year and a half later, Blackman and Phillips published a piece in *The Atlantic* in which they said, "In roughly 90 percent of our data set, the phrase *bear arms* had a militia-related meaning, which strongly im-

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27. Dennis Baron, *Antonin Scalia was wrong about the meaning of 'bear arms,'* Washington *Post* (May 21, 2018), http:wapo.st/2Vw75e9 ("*Baron Op-ed*") *See also* Dennis Baron, *Corpus Evidence Illuminates the Meaning of* Bear Arms, 46 Hastings Const. Law. Q. 509 (2019).

28. *Baron Op-Ed*, supra.

29. Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, Harv. L. Rev. Blog (Aug. 7, 2018), https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/ (cleaned up).

plies that *bear arms* was generally used to refer to collective military activity, not individual use."[30]

They also reported on the results of a search through which they sought to obtain insight into the 18th-century understanding of *the right of the people*: "We conducted another search in COFEA for documents that referenced *arms* in the context of *rights*. About 40 percent of the results had a militia sense, about 25 percent used an individual sense, and about 30 percent referred to both militia *and* individual senses."[31] Although those results are mixed, they are on balance consistent with amicus's criticisms of *Heller*. (It's worth noting, however, that if one wants to determine how *the right of the people* was used in the 18th century, searching for uses of *right* in proximity to *people* seems like it would be more appropriate than searching for *right* in proximity to *arms*. Amicus's analysis included such searches (specifically, searches for *the right of the people*, *the people's right*, and *the people have a right*), and his results tilted toward collective uses even more strongly than those obtained by Blackman and Phillips.[32])

Although it has been 2½ years since Blackman and Phillips's original post on the Harvard Law Review Blog, and almost a year since their piece in The At-

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30. James C. Phillips & Josh Blackman, *The Mysterious Meaning of the Second Amendment*, The Atlantic (Feb. 20, 2020), https://www.theatlantic.com/ideas/archive/2020/02/big-data-second-amendment/607186/.

31. *Id.*

32. Goldfarb Analysis at 30.

lantic, they haven't yet published their complete analysis. And although they have been aware of amicus's analysis for at least a year and a half, they have not said anything about it.

The only corpus analysis to date that *has* discussed amicus's analysis is one by Josh Jones, entitled *The "Weaponization" of Corpus Linguistics: Testing* Heller*'s Linguistic Claims*.[33] Jones does not deal with the full range of issues that amicus has addressed, and as to those that he does deal with (all having to do with *bear arms*), he agrees with amicus in some respects but disagrees in others. But the zone of agreement is bigger than the zone of disagreement—by a long shot. On Jones's reading of the data, *bear arms* is used in its idiomatic military sense three times as often as it is used in the sense that *Heller* described as its "natural meaning."[34] So even if one agrees with all of Jones's readings, his results provide scant support for *Heller*'s interpretation.

C. Gun-rights advocates have not seriously disputed amicus's analysis (or any of the other corpus analyses showing *Heller* to have been mistaken).

The corpus data showing *Heller* to have been mistaken has been a matter of public knowledge for a long time. Baron's op-ed in the Washington *Post* appeared two years and nine months before the filing of this brief, and Blackman and Phillips's initial publication appeared only three months later. As far is amicus is

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33. 34 BYU J. Pub. Law. 135 (2020).

34. *See id.* at 161.

aware, not a single gun-rights advocate has disputed either Baron's findings or those of Blackman and Phillips. Similarly, the compilation of amicus's analysis has been available for roughly a year and a half, and with only trivial exceptions, the silence from gun-rights advocates has, been deafening.

This lack of response is remarkable. Advocates of gun rights have an obvious incentive to defend *Heller* against arguments challenging the holding that the Second Amendment protects an individual right to carry weapons without regard to militia membership. It is reasonable to think that they would do so if they could muster up even a half-decent argument. Their almost total failure to take up *Heller*'s defense therefore suggests that they've tried to develop valid arguments but have come up short.

To the best of amicus's knowledge, there have been only two attempts by gun-rights advocates to respond to his analysis (other than a tweet or two). One was an amicus brief that was filed in *Young v. Hawaii*, a case now pending before the Ninth Circuit on rehearing en banc.[35] The brief was filed on behalf of ten law professors and seven advocacy organizations, all of them supporters of *Heller*'s interpretation of the Second Amendment. Among the law-professor amici is Randy Barnett, who (as previously noted) supports the use of corpus analysis in determining original meaning.

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35. Brief of Amici Curiae Professors of Second Amendment Law et al. in Support of Appellant and Reversal, *Young v. Hawaii*, No. 12-17808, Dkt. 265 (9th Cir. filed June 4, 2020) ("*Young* Brief").

But the *Young* Brief's attempt to challenge his analysis is devoid of substance. It disputes nothing in his analysis. Indeed, it fails to engage with amicus's analysis at all. Instead, as amicus has explained in an online commentary (to which the Court is referred), the brief offers nothing but red herrings.[36]

The only other attempt by an advocate of gun rights to address the corpus-based challenge to *Heller* consists of a single paragraph in an article about the filing of the petition in this case.[37] After saying vaguely that "some academics have purported to find strong evidence that [*bear arms*] overwhelmingly referred to military-related activity in Founding-era writings," the author declared himself to be unimpressed by corpus methods. He linked to a recent law review article that he described as offering "a good demonstration of the problem with counting a term's uses and pretending that's the same as *defining* the term[.]" That article is *Testing Ordinary Meaning*, by Kevin Tobia, and it claims to show (by means of survey evidence) that corpus linguistics is not a reliable method of determining ordinary meaning.[38] But in a reply to the article before

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36. Neal Goldfarb, *Comments on two responses to my (mostly corpus-based) analysis of the Second Amendment. Part 1: Gun-rights advocates' amicus brief*, LAWnLinguistics (June 25, 2020), bit.ly/NGCommentsOnAmicusBr. (Part 2 remains to be written.)

37. Robert VerBruggen, *Gun Groups Take Concealed Carry to the Supreme Court*, National Review (Dec. 18, 2020), https://www.nationalreview.com/corner/gun-groups-take-concealed-carry-to-the-supreme-court/.

38. 134 Harv. L. Rev. 726 (2020).

it was published, amicus has disputed that conclusion, arguing that Tobia's survey methodology was itself incapable of providing reliable information about the reliability of corpus linguistics.[39] And in a more recent draft paper, Tobia seems to have back away from the extreme position he had originally staked out. Whereas *Testing Ordinary Meaning* asserted flatly that corpus linguistics is inaccurate and unreliable as a methodology for determining ordinary meaning, the newer paper is more measured in its evaluation: "in *some hard cases*," it says, corpus linguistics "*may* reflect a distorted picture of how ordinary people understand language."[40]

II. The petition should be denied, and the Court should temporarily abstain from hearing claims under the Second Amendment.

If the arguments set out above and in amicus's analysis are taken seriously, and *a fortiori* if they are accepted as showing that *Heller* was probably mistaken about the Second Amendment's original meaning, that issue should be reopened for consideration *de novo*. And that being the case, the Court should not take up

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39. Neal Goldfarb, *Varieties of Ordinary Meaning: Comments on Kevin P. Tobia,* "*Testing Ordinary Meaning,*" (rev. Nov. 12, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3553016 (emphasis added).

40. Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism* (Nov. 12, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729629.

the question presented by the petition until that examination has been completed.

But this case is not an appropriate vehicle for such an undertaking, and the factors supporting that conclusion will, for the time being, apply equally to other cases presenting the same issue, or indeed, to any other claim that rights under the Second Amendment have been infringed.

First, amicus's analysis has not yet been subjected to public scrutiny and debate. To be sure, that is due in part to the almost complete failure on the part of gun-rights advocates to acknowledge the existence of the analysis, much less to grapple with the issues it has raised. While it is reasonable to infer from that failure that gun-rights advocates haven't been able to come up with any valid arguments, they should have an opportunity to rebut that inference, if they think they can do so.

Second, even if the Court were to ultimately agree with amicus's argument that *Heller* was wrongly decided, there would remain some very important issues that amicus has not addressed.

Perhaps the most obvious of these is the issue of *stare decisis*, as to which there exists a diversity of views on the Court. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405, (2020); *id.* at 1411-16 (Kavanaugh, J., concurring in part); *Gamble v. United States*, 139 S. Ct. 1960, 1981-88 (2019) (Thomas, J., concurring). And note that even for Justices who believe that precedent can sometimes take priority over original meaning, the latter issue necessarily precedes the former: under that view of *stare decisis*, the factors relevant to whether an

erroneous decision should be overruled include "the quality of the decision's reasoning."[41]

Unresolved questions also exist with respect to the Second Amendment's proper interpretation. What amicus's analysis shows is that when the Second Amendment was framed and ratified, *the right of the people to…bear arms* would not have been understood to protect an individual right that is unconnected with service in the militia. However, the analysis does not deal with the interpretation of *well regulated militia*—an issue that cries out to be reopened in light of what the corpus data shows about *bear arms*.

As Justice Stevens noted in his *Heller* dissent, the language of the Second Amendment's prefatory clause "closely tracks" that of the preambles of contemporaneous militia statutes from three states, two of which use the phrase *well regulated militia* and the other uses *well ordered and disciplined militia*. 554 U.S. at 641 n.6. Justice Stevens argued that "these state militia statutes give content to the notion of a 'well-regulated militia.'" *Id*. (cleaned up). In amicus's view Justice Stevens was right, but at a minimum the fact that *Heller* was mistaken about so many other things suggests that it is worth taking another look at this issue.

Finally, any reexamination of the Second Amendment would have to deal with an overarching issue potentially affecting every aspect of Second Amendment analysis. Starting from the conclusion that *bear*

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41. *Ramos*, 140 S. Ct. at 1405; see also *id*. at 1414 (Kavanaugh, J., concurring in part) (stating that overruling is warranted only if "the prior decision [is] not just wrong, but grievously or egregiously wrong").

arms was generally understood in its idiomatic military sense, rather than as meaning 'carry weapons,' it follows that much of the existing scholarship on the Second Amendment is upended. Specifically, all work in which *bear arms* was understood in the literal sense is based on a mistaken view of 18th-century American usage. Such work will be invalidated, unless it can somehow be reconciled with the evidence of how *bear arms* was actually used and understood. And while that might not raise serious problems as to work supporting a militia-centric interpretation, the same cannot be said of the scholarship on which *Heller* relied. Unless amicus's analysis is refuted, therefore, all of that work will have to be treated as presumptively invalid, and anyone wishing to defend *Heller*'s interpretation will have to go back to square one. So if the Court were to use this case as a vehicle to reexamine *Heller*, Petitioners would—if they failed to refute amicus's analysis—be left without the benefit of reliable scholarship in their support.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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