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DISTRICT OF COLUMBIA, *et al.*,
Petitioners,
v.

DICK ANTHONY HELLER,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF FOR PROFESSORS OF LINGUISTICS
AND ENGLISH DENNIS E. BARON, Ph.D.,
RICHARD W. BAILEY, Ph.D. AND
JEFFREY P. KAPLAN, Ph.D.
IN SUPPORT OF PETITIONERS**

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STATEMENT OF INTEREST

With the written consent of the parties, Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D., and Jeffrey P. Kaplan, Ph.D., submit this brief as *amici curiae* pursuant to Rule 37 of the Rules of the Supreme Court of the United States.¹

¹ Both parties have consented to the filing of *amicus* briefs in support of a party in this case and copies of their letters have been filed with this Court. Counsel of record for all parties received timely notice of the intention of *amici curiae* to file this

Amici curiae are scholars who teach, write and speak about English, linguistics and the principles of grammar. Dennis Baron is a Professor of English and Linguistics at the University of Illinois. Professor Baron has expertise in the history of the English language and has written extensively about language and grammar. Richard W. Bailey is the Fred Newton Scott Collegiate Professor of English Language and Literature at the University of Michigan. Professor Bailey has written extensively on the history and origins of English in America. Jeffrey P. Kaplan is a Professor of Linguistics and serves as Chair of the Department of Linguistics and Asian/Middle Eastern Languages at San Diego State University. Professor Kaplan studies grammar as it relates to discourse and has written on the application of linguistics in legal contexts.

Amici curiae file this brief on behalf of themselves as individuals, not as representatives of institutions, in an effort to assist the Court in understanding eighteenth century grammar and the historical meaning of the language used in the Second Amendment.

SUMMARY OF ARGUMENT

1. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Under longstanding linguistic principles that were well understood and recognized at the time the Second Amendment was

brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

adopted, the "well regulated Militia" clause necessarily adds meaning to the "keep and bear Arms" clause by furnishing the reason for the latter's existence. The first clause is what linguists call an "absolute construction" or "absolute clause." It functions by melding the sentence "A well regulated Militia is necessary to the security of a free State" together with the sentence "The right of the people to keep and bear Arms shall not be infringed" to express this thought: "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." On its face, the language of the Amendment tells us that the reason why the right of the people to keep and bear arms shall not be infringed is because a well regulated militia is necessary to the security of a free State. The purpose of the Second Amendment, therefore, is to perpetuate "a well regulated Militia."

2. The unmistakably military language employed throughout the Amendment informs us of two things: (i) that the right that is protected is the right of the people to serve in the military and keep military weaponry for such service (the meanings of the words "keep" and "arms" and of the idiom "bear Arms" in the second clause tell us that), and (ii) that the kind of military service that is protected is that which is in a "well regulated" militia (the modifier "well regulated" in the first clause tells us that).

Unlike the Constitution's reference to "the militia" in Article I, Section 8, the Second Amendment refers to "a well regulated Militia." The addition of the modifier "well regulated" informs the reader that the intent was to refer to a militia with particular attributes. The court of appeals held that the phrase "well

regulated Militia" in the Second Amendment meant citizens who were armed and "subject to organization by the states (as distinct from actually organized)." *Parker v. District of Columbia*, 478 F.3d 370, 389 (D.C. Cir. 2007) (emphasis in original). As established below, however, usage at the time was different: the term was used to refer to militia units that not only were subject to organization under the law, but also had achieved military competencies through regular training and discipline. If the intent had been to identify citizens who were "subject to" organization (as distinct from also being actually organized), then one would have expected the Amendment to refer to "a regulable" militia, or simply "the militia," as the state militias at the time were "subject to" organization under state law.

The term "bear arms" is an idiom that means to serve as a soldier, do military service, fight. To "bear arms against" means "to be engaged in hostilities with." The word "arms" itself has an overwhelmingly military meaning, referring to weapons of offense or armor of defense. In every instance we have found where the term "bear arms" (or "bearing arms" or "bear arms against") is employed, without any additional modifying language attached, the term unquestionably is used in its idiomatic military sense. It is only where additional language is tacked on, either to bend the idiom by specifying a particular type of fighting or to break the idiom by adding incompatible language, that the meaning of "bear arms" deviates. In the Second Amendment, the term is employed in its natural, unadorned state and, therefore, one must conclude, was used idiomatically to refer to military service. The court of appeals, however, defined the words "bear" and "arms" separately, then reconstituted them into a new,

ahistorical, expression meaning "the carrying of arms for private purposes such as self-defense [and hunting]." It did so based on instances in which the term "bear arms" was used with additional qualifying language, such as: "bear arms for the defense of themselves and the state," "bear arms for the defense of himself and the state," and, in one instance, "bear arms . . . for the purpose of killing game."

Considering the purpose of the Amendment as expressly articulated by the absolute clause, the reference in the absolute clause to a "well regulated Militia," and the use in the second clause of the idiom "bear Arms," it is evident that the Framers drafted an Amendment in two symmetrical halves that, together, protect the right of the people to serve in a well regulated militia and keep arms for such service.

ARGUMENT

I. THE SECOND AMENDMENT'S ABSOLUTE CONSTRUCTION FUNCTIONS AS A SENTENCE MODIFIER.

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend II. The Amendment's first and third commas signal a pause for breath and can be omitted without affecting the meaning.² The second comma, however, marks the

² In the eighteenth century, punctuation was not an important part of writing instruction, with some rules being specified but much left to the individual tastes of writers. Robert Lowth, *A Short Introduction to English Grammar* 155, 158 (1762) ("The doctrine of punctuation must needs be very imperfect: few precise rules can be given; which will hold without exception in all cases; but much must be left to the judgment and taste of the

customary separation of an adverbial clause (in this case, the phrase "A well regulated Militia, being necessary to the security of a free State") from a main clause ("the right of the people to keep and bear Arms, shall not be infringed").

In technical grammar parlance, the first clause is an "absolute construction" or "absolute clause." It functions to modify the main clause the way an adverbial clause does. In traditional grammar, absolute constructions are considered grammatically independent from the main clause,³ but they add meaning

writer."); see also Lindley Murray, *English Grammar, Adapted to the Different Classes of Learners* (1795) (to same effect). The rules that did exist allowed for commas to be inserted as deemed appropriate for breathing. For example, Article III, Section 1 of the Constitution provides: "The judicial power of the United States, shall be vested in one Supreme court." The comma in that sentence marks a pause for breath. The Constitution has other punctuation practices we would mark today as irregular. For example, Article I, Section 10 uses a possessive "it's" while modern practice would require "its": "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing *it's* inspection laws." Even twentieth-century constitutional amendments show irregular comma use. The Twenty-Sixth Amendment employs commas to set off what must be read as a restrictive relative clause (marked in italics), even though today such commas normally are used to set off nonrestrictive clauses: "The right of citizens of the United States, *who are 18 years of age or older*, to vote, shall not be denied or abridged by the United States or any state on account of age." U.S. Const. amend. XXVI, § 1. So does the even more recent Twenty-Seventh Amendment: "No law, *varying the compensation for the services of the Senators and Representatives*, shall take effect, until an election of Representatives shall have intervened." U.S. Const. amend. XXVII.

³ See Noah Webster, *Rudiments of English Grammar; Being an Introduction to the Second Part of the Grammatical Institute*

to the entire sentence. To explain how absolute constructions add meaning, or perform a modifying function, we start with their mechanics: absolute constructions effectively contract two sentences into one.⁴ In the sentence, "Mr. Jones being absent,

of the English Language 84 (1790). Grammatical dependence is the formal connection established between words, groups of words, or parts of sentences. For example, in English, prepositions "govern" the noun or pronoun following them in a prepositional phrase, and while this does not have much impact on modern English nouns, a pronoun following a preposition is typically in the object case: "Do not ask for *whom* the bell tolls." The pronoun "whom" is said to be in the object or objective case (in Latin, as in older forms of English, this would be the dative, the case of the indirect object). An absolute phrase can be said to be grammatically independent of the sentence's main clause because no word in the absolute phrase is marked as bearing a relation to any word in the main clause. Without such marking, there is no express indication that the absolute is *grammatically* dependent on or subordinate to the main clause. Historically, the nouns in absolute constructions appeared in the dative case in English or the ablative in Latin, on which the English absolute was modeled. Those cases overtly marked the absolute phrase as subordinate to the main clause of the sentence. George O. Curme, 3 *A Grammar of the English Language* 152-53 (1931).

⁴ See Webster, *Rudiments of English Grammar* at 84 (giving as examples of absolute constructions: "*The sun being risen, it will be warm*" and "*They all consenting, the vote was passed,*" and stating, "Note, this form of expression is a mere ellipsis; for *the sun being risen* is only a contraction of *when* or *after the sun was risen.*"); William Ward, 1 *A Grammar of the English Language (in Two Treatises)* 145-46 (1767) (explaining that the absolute construction implies "a whole Sentence" that has a logical relationship—if-then or cause-and-effect—to the rest of the utterance: "the most common Kind of absolute Construction . . . appears when a Series of Words, containing a *Participle in dependence on a Substantive in the Nominative Case*, is made equivalent to a whole Sentence depending on Conjunction or Relative Adverb"); Alexander Adam, *The Principles of Latin and*

nothing can be done," the absolute construction "Mr. Jones being absent" serves to compress the sentence "Mr. Jones is absent" together with the sentence "Because of that, nothing can be done" to express, "Because Mr. Jones is absent, nothing can be done." It is apparent that one way absolute constructions add meaning is by establishing the cause or reason for the thing expressed in the main clause. In the "Mr. Jones" sentence above, the absolute construction "Mr. Jones being absent" establishes the cause for the fact that "nothing could be done."

Absolute constructions also can establish relationships other than causation. For example, they sometimes establish the timing of events. In the sentence "The ship having arrived, we all embarked," the absolute construction *the ship having arrived* is equivalent to the prepositional phrase *on the arrival of the ship* and defines the time of the action

English Grammar 213 (4th ed. 1793) (stating in connection with the Latin ablative, from which the English absolute construction derives: "The ablative called absolute is governed by some preposition understood; as, *a*, *ab*, *cum*, *sub* or *in*."). As one modern text explains:

Absolute constructions consist of a noun and some kind of modifier, the most common being a participle. Because they often come at the beginning of a sentence, they are easily confused with dangling participles. But an absolute construction modifies the rest of the sentence, not the subject of the sentence (as a participial phrase does). You can use absolute constructions to compress two sentences into one and to vary sentence structure as a means of holding a reader's interest.

American Heritage Book of English Usage 1 (1996); see also Bergen Evans & Cornelia Evans, *A Dictionary of Contemporary American Usage* 354 (1957) (discussing the fact that absolute phrases have "the force of a condensed clause").

expressed by the verb *embarked*.⁵ Typically, absolute constructions that use verbs ending in “-ing” (*being*, *reaching*) show either causation or time. If the “-ing” verb is stative (e.g., *being*), it usually denotes causation; if the “-ing” verb is dynamic (e.g., *reaching*), it usually shows time. Quirk & Greenbaum et al., *A Comprehensive Grammar of the English Language* at 1124.

Absolute constructions that show causation also can be identified through a test in which one tries to deny the causal connection without contradicting oneself (or at least not sounding foolish). For example, it is contradictory to say “The sun being up,

⁵ This illustration and explanation was taken from George L. Kittredge & Frank Farley, *A Concise English Grammar with Exercises* 140 (1918). Absolute phrases also can establish the existence of a necessary condition. For example, in the sentence “We shall sail on Tuesday, weather permitting,” the absolute construction *weather permitting* is equivalent to the conditional clause *if the weather permits*. *Id.* Absolute clauses also can show a circumstance that attends the main clause. For example, in the sentence “He entered upon a new enterprise cautiously, his eyes wide open,” the absolute phrase *his eyes wide open* is equivalent to *with his eyes wide open*. Curme, 3 A *Grammar of the English Language* at 156. For more on absolute clauses, see, e.g., Murray, *English Grammar, Adapted to the Different Classes of Learners* at 162-63 (making clear cause-and-effect nature of absolute phrase with example: “His father dying, he succeeded to the estate.”); Webster, *Rudiments of English Grammar* at 84 (discussing time); Solomon Lowe, *A Grammar of the Latin Tongue* 33 (1726) (“Absolute sentences are put in the Ablative. The common signs are -ing, being, having: paraphras'd by when, while, if, as, etc.”); Evans & Evans, *A Dictionary of Contemporary American Usage* at 354 (giving examples); Curme, 3 A *Grammar of the English Language* at 154-57 (same); Randolph Quirk, Sidney Greenbaum, et al., *A Comprehensive Grammar of the English Language* 1123 (1985) (same).

it was warm; but the fact that the sun was up was not the reason it was warm.” This contradiction does not occur when one tries to deny causation for an absolute construction that shows some other relationship to the main clause, such as an attendant circumstance. Thus, this sentence is not contradictory: “Autumn leaves flying around them, the children rushed through the woods; but the fact that autumn leaves were flying around them is not the reason the children rushed through the woods.”

The Second Amendment’s absolute construction expresses the cause for the main clause’s prohibition, as it is contradictory (and foolish sounding) to say, “A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed; but the fact that a well regulated Militia is necessary to the security of a free State is not the reason that the right of the people to keep and bear Arms shall not be infringed.”⁶

⁶ Professor Lund argues that, because the Second Amendment’s absolute clause is grammatically independent, it does not and cannot qualify any word in the second clause, particularly since the second clause is “a command.” Nelson Lund, *D.C.’s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, __ Geo. Mason U. Civ. Rts. L.J. __ (forthcoming 2008) available at http://ssrn.com/abstract_id=1021356 (see pp. 12-13). In fact, he argues, because it is a command, “the Second Amendment has exactly the same meaning that it would have had if the preamble had been omitted, or indeed if the preamble is demonstrably false.” *Id.* at 13. Professor Lund’s position is at odds with the basic and long accepted linguistic principles we have discussed in the text and footnotes above. While it is true that absolute phrases are grammatically independent, it is and has been beyond debate for more than 200 years that absolute constructions function as adverbial phrases modifying the main clause. In the case of the Second Amendment, we have shown that the absolute clause affirmatively states the cause or reason

Absolute constructions have been used with declining frequency over the last two centuries, but they still occur naturally in English, and some are familiar: "that being the case," "all things being equal," "weather permitting," "present company excluded."

Eighteenth-century writers and speakers of English certainly were familiar with absolute phrases. Most grammar texts of Latin and of English during the period discussed the absolute construction,⁷ and from that we conclude that educated Americans such as the Framers were exposed to one or more lessons in absolute phrases, and perhaps even tested on them. Anyone studying Latin or English grammar in the eighteenth century would have understood how an absolute phrase works. And since the absolute phrase already had become a normal, naturalized English construction by then, any competent English writer at the time would have been able to use the absolute construction without having taken any formal grammar lessons.

for the Second Amendment's existence. That significantly affects the meaning of the main clause, for it gives us every reason to think that this Amendment never would have been adopted but for the fact that the Framers believed the absolute clause's statement that a well regulated militia is necessary to the security of a free state. And if we know why a provision is adopted, we surely know something about the intended scope of that provision. The Second Amendment's absolute construction was adopted as an integral part of the Amendment, and it cannot be "omitted" or wished away by trying to show that it no longer is true.

⁷ E.g., Adam, *The Principles of Latin and English Grammar* at 211-12 ("A substantive and a participle are put in the ablative when their case depends on no other word [and] [t]his ablative is called *Absolute*, because it does not depend upon any other word in the sentence."); Ward, 1 *A Grammar of the English Language* at 145-46; see *supra* notes 4-6.

Absolute constructions were present in eighteenth-century documents and writings, and James Madison, a key architect of the Second Amendment,⁸ certainly was a user of them: “*The right of suffrage being of vital importance*, and approving an extension of it to House keepers & heads of families, I will suggest few considerations which govern my judgment on the subject.” *Proceedings and Debates of the Virginia State Convention of 1829-30* (Richmond 1830) (emphasis added).⁹ They appear in the writ-

⁸ E.g., Saul Cornell, *A Well Regulated Militia* 58-62 (2006).

⁹ Other examples from Madison include: “*The conversation being at an end*, he took his leave with a cold formality, and I did not see him afterwards.” Memorandum as to Robert Smith (April, 1811), in 8 *The Writings of James Madison* 137 (Gaillard Hunt ed.), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD\(DOCID+@lit\(jm080054\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm080054))) (emphasis added); “*The Constitution of the U. S. being established by a Competent authority, by that of the sovereign people of the several States who were the parties to it*, it remains only to inquire what the Constitution is; and here it speaks for itself.” Letter from James Madison to Daniel Webster (March 15, 1833), transcribed in Notes on Nullification (December, 1834), in 9 *The Writings of James Madison* (Gaillard Hunt ed.), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD\(DOCID+@lit\(jm090163\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm090163))) (emphasis – added); “*The original draught being in possession of his family and their property, I have considered any publicity of it as lying with them.*” Letter from James Madison to W. A. Duer (June 5, 1835), in 9 *The Writings of James Madison* 557 (Gaillard Hunt ed.), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD\(DOCID+@lit\(jm090159\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm090159))) (emphasis added); “*The acquaintance then made with him was very slight; the distance between our ages being considerable, and other distances much more so.*” Letter from James Madison to Margaret H. Smith (Sept. 21, 1830), in 9 *The Writings of James Madison* 404 (Gaillard Hunt ed.), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD\(DOCID+@lit\(jm090115\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm090115))) (emphasis added); “*The four Comrs. being equally divided; the lot for the 5th.,*

ings of others too. See, e.g., Letter from John Hancock to Philip Schuyler (Feb. 6, 1777), in *6 Letters of Delegates to Congress, Jan. 1, 1777-April 30, 1777*, at 227 (Paul H. Smith et al. eds., 1976-2000) ("The enclosed Resolves of Congress being necessary for your Information, & Direction, & relative to the Department immediately under your Command, I do myself the Honor of transmitting the same") (emphasis added).¹⁰

Madison's original draft of the Second Amendment used a formulation of the "well regulated Militia" absolute construction similar to the one passed by Congress: "The right of the people to keep and bear arms shall not be infringed; *a well armed and well regulated militia being the best security of a free country*: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." 1 *Annals of Cong.* 451 (Joseph Gales ed., 1790) (emphasis added). Madison's absolute phrase saw several wording changes and its

provided by the Treaty for such a contingency, fell on Mr. Trumbull whose casting vote obtained for the American sufferers the large indemnity at stake." Letter from James Madison to Edward Everett (Feb. 18, 1823), in *9 The Writings of James Madison* 120 (Gaillard Hunt ed.), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD\(DOCID+@lit\(jm090038\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm090038))) (emphasis added); "I send you a copy as you request of what was published, and is in my possession, of the Debates in the Pennsylvania Convention. *These being on one side only*, it may be proper to search for the cotemporary publications on the other." Letter from James Madison to Jonathan Elliot (Feb. 14, 1827), in *9 The Writings of James Madison* 271 (Gaillard Hunt ed.), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD\(DOCID+@lit\(jm090086\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm090086))) (emphasis added).

¹⁰ This is available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@ field\(DOCID+@lit\(dg006212\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@ field(DOCID+@lit(dg006212))).

position moved from the middle of the sentence to the front (where absolute constructions, especially causal ones, appear more frequently), but none of these changes was material to the meaning of the absolute clause.

In the end, the final version of the Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Most American readers in the federal period, including those without formal grammar study, would have had no trouble understanding that the Second Amendment's absolute construction functioned to make the Amendment effectively read: because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

The question, then, is what does the specific language used in the Amendment mean? Meaning comes from the words of a text and, importantly, *how* they are used. As established below, the unmistakably military language used in the Second Amendment makes clear that what is protected is the right of the people to serve in a well regulated militia and keep arms for such service.

II. THE AMENDMENT'S UNMISTAKABLY MILITARY LANGUAGE PROTECTS THE RIGHT OF THE PEOPLE TO SERVE IN A WELL REGULATED MILITIA AND KEEP ARMS FOR SUCH SERVICE.

The "well regulated Militia" clause sets forth the cause-and-effect relationship between the Amendment's two halves: *Because X is necessary, Y shall not be infringed.* Because we need a well regulated militia, the right of the people to keep and bear arms

shall not be infringed. It is obvious from the way the Amendment is structured that Y is key to the existence of X. The purpose of the Amendment, therefore, is to preserve or perpetuate "a well regulated Militia."¹¹

A. Because a Well Regulated Militia Is Necessary....

The phrase "well regulated Militia" is overtly military. It is preceded in the Constitution by the commander-in-chief clause of Article II, which places "the Militia of the several States, when called into the actual Service of the United States" under the President's command, and by the Militia Clauses of Article I, which grant Congress the power to "provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States," and for "calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions." U.S. Const. art. II, § 2, cl. 1; art. I, § 8, cls. 15, 16.

The difference between the militia referenced in the original Constitution and the militia referenced in the Amendment is the participial adjective "well regulated." The use of the past participle "regulated" in that modifier suggests a militia that not only is "subject to" regulation under the militia laws, but also is in possession of the qualities that flow from participation in regular military exercises—orderliness, discipline, proficiency with arms, knowledge about maneuvers and so on. By contrast, "the militia" alone, without the "well regulated" modifier, appears to denote the military forces described in the

¹¹ See *United States v. Miller*, 307 U.S. 174, 178 (1939).

Militia Clauses of Article I, Section 8, which are subject to regulation by Congress and the states.

Considering how the modifier was used at the time, its appearance in the Second Amendment looks to have been intentionally meaningful, as a "well regulated" militia was said not to have attributes clearly differentiated from and clearly superior to those of a militia that was not said to be well regulated. Alexander Hamilton, for example, spoke of "the degree of perfection" through regular "military exercises" that militia members had to achieve before they could earn "the character of a well regulated militia." See *The Federalist No. 29* 184 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The language of the Amendment, therefore, tells us that the right of the people to keep and bear arms was protected not merely to safeguard the militia, but to safeguard a *well regulated* militia.

The court of appeals read the phrase "well regulated Militia" to mean citizens who were armed and "*subject* to organization by the states (as distinct from actually organized)." *Parker*, 478 F.3d at 389. It did so, it said, because "the existence of the militia preceded its organization by Congress" in the Second Militia Act in 1792, and because its existence preceded the states' implementation of Congress's organizing plan in that Act. *Id.* at 388-89 (citing Act of May 8, 1792, ch. XXXIII, 1 Stat. 271 ("Second Militia Act")).

Given the usage of the day, however, the court's conclusion appears not to follow. If the intent had been to refer merely to citizens *subject to* organization, as the court posited, then one would expect the drafters to have employed other language, such

as "a regulable militia."¹² Without regular training and discipline, the militias were not regarded as "well regulated":

You'l hear of the Dunmore Militia's behaviour when Order'd to Camp. Pray do not suffer them to Escape Reprehension, or their Example may be fatal to our Militia. They say they could not be provided on the Road. I enquir'd at Frederick town as I came down and their pretence is without any kind of foundation. A *well Regulated Militia* may be our Salvation and Officers who are not Attentive to their duty ought to be broke like Glass and certain I am the Dunmore Field Officers were not, two of whom are Delegates for that County.

Letter from John Harvie to Thomas Jefferson (October 18, 1777) in *8 Letters of Delegates to Congress, Sept. 19, 1777-Jan. 31, 1778*, at 140 (Paul H. Smith et al. eds., 1976-2000) (emphasis added).¹³ At the time, Virginia had in place a law subjecting militia members to organization. See An Act of Regulating and Disciplining the Militia (May 5, 1777), Va. Stat. at Large, 9 Hening 267-68 (1821); see also An Ordinance for Raising and Embodying a Sufficient Force, for the Defence and Protection of this Colony (July 17, 1775), Va. Stat. at Large, 9

¹² One might even expect the Framers to have used "a militia," as the militias of the states at the time apparently already were *subject to* organization under state law. See Brief for Petitioners at 13-14.

¹³ This is available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(dg008125\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(dg008125))). John Harvie was a Virginia delegate to the Continental Congress in 1777 and 1778. Dunmore County is now known as Shenandoah County.

Hening 10 (1821).¹⁴ Interpreting the phrase “a well regulated Militia” to refer to citizens who were merely enrolled in a militia and therefore “*subject* to organization by the states (as distinct from actually organized)” is inconsistent with the usage of the period.

B. . . . The Right of the People To Keep and Bear Arms Shall Not Be Infringed.

The term “bear arms” is an idiomatic expression that means “to serve as a soldier, do military service, fight.” *Oxford English Dictionary* (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (hereinafter *OED*) (arm, n.2, I.4.) available at <http://dictionary.oed.com>; *see also id.* (bear, v.1) (“6. To carry about with or upon one, as material equipment or ornament. a. To carry about with one, or wear, ensigns of office, weapons of offence or defence. *to bear arms against:* to be engaged in hostilities with”).¹⁵ Examples of

¹⁴ These are available at <http://vagenweb.org/hening/vol09-13.htm>, and <http://vagenweb.org/hening/vol09-01.htm>, respectively.

¹⁵ Its idiomatic usage has continued into modern times. See, e.g., Thomas H. Benton, *Theodore Roosevelt* 37 (1897) (quoting Roosevelt: “No man who is not willing to *bear arms* and to fight for his rights can give a good reason why he should be entitled to the privilege of living in a free community.”) (emphasis added); John F. Kennedy, 1 *The Public Papers of the Presidents of the United States: John F. Kennedy 1961, 1962, 1963* (GPO 1st ed. 1964) (Inaugural Address, Jan. 20, 1961) (“Now the trumpet summons us again—not as a call to *bear arms*, though arms we need—not as a call to battle, though embattled we are—but a call to bear the burden of a long twilight struggle, year in and year out, ‘rejoicing in hope, patient in tribulation’—a struggle against the common enemies of man: tyranny, poverty, disease and war itself.”) (emphasis added); John R. Green, *History of the English People, Attempt on the Five Members: Preparations for War* (1887), reprinted in 12 *Library of the*

historical usage include, in 1609, "He bure armes, and made weir against the King"¹⁶ and, in 1769, "An ample . . . pardon to all who had born arms against him."¹⁷

Since bearing arms inherently involves the use of weapons, it is not surprising that the term originates from the Latin *arma ferre*, which literally translates as "to bear [*ferre*] war equipment [*arma*]." At the time of the Second Amendment's adoption, the word "arms" had an overwhelmingly military meaning. For example, Samuel Johnson's eighteenth century dictionary defines "arms" as: "1. weapons of offence, or armour of defence. . . . 2. A state of hostility. . . . 3. War in general. . . . 4. Action; the act of taking arms. . . . 5. The ensigns armorial of a family." Samuel Johnson, 1 *A Dictionary of the English*

World's Best Literature Ancient and Modern 6682 (Charles D. Warner ed., 1902) (teachers' edition) ("Previous to the innovations introduced by the Tudors, and which had been already questioned by the Commons in a debate on pressing soldiers, the King in himself had no power of calling on his subjects generally to *bear arms*, save for purposes of restoring order or meeting foreign invasion.") (emphasis added). In modern times, "bear arms" additionally has been defined to mean "to carry or possess arms." Compare *Merriam-Webster's Second New International Dictionary* 238 (1934) (defining "bear arms" as "To serve as a soldier") with *Merriam-Webster's Third New International Dictionary* 191 (1961) ("bear arms 1: to carry or possess arms <the right of the people to keep and bear arms—U.S. Constitution> 2: to serve as a soldier"). The *OED* defines the expression "to carry arms" as meaning "to wage war." *OED* (arm, n2, II.6.).

¹⁶ Sir John Skene, *Regiam Majestatem, the Auld Lawes and Constitutions of Scotland Faithfullie Collected* (1609), cited in *OED* (bear, v.1, I.6.a.).

¹⁷ William Robertson, *The History of the Reign of the Emperor Charles V* (1769), cited in *OED* (bear, v.1, I.6.a).

Language (1755) (arms, *v.*). This definition was universal at the time.¹⁸ A linguistic authority at the time provided further refinements: "By *arms*, we understand those instruments of offence generally made use of in war; such as firearms, swords, etc. By *weapons*, we more particularly mean instruments of other kinds (exclusive of fire-arms), made use of as offensive on special occasions." John Trusler, 1 *The Distinction Between Words Esteemed Synonymous in the English Language* 37 (1794) (emphasis in original).

Examples of the idiomatic usage of "bear arms" during the time of the founding abound. In each instance where "bear arms" (or "bearing arms" or "bear arms against") is used without additional language modifying the phrase, it is unquestionably

¹⁸ See Nathan Bailey, *Dictionarium Britannicum (or A More Compleat Universal Etymological English Dictionary Than Any Extant)* (1730) (arms) ("all manner of Weapons made use of by Men either for defending themselves, or for attacking others"); Thomas A. Sheridan, *A Complete Dictionary of the English Language, Both With Regard to Sound and Meaning* (2d ed. 1789) (arms) ("Weapons of offence, or armour of defence; a state of hostility; war in general; the action of taking arms; the ensigns armorial of a family"); Noah Webster, *An American Dictionary of the English Language* (1828) (arms) ("1. Weapons of offense, or armor for defense and protection of the body. 2. War; hostility. . . . 3. The ensigns armorial of a family; consisting of figures and colors borne in shields, banners &c. . . . 4. In law, arms are any thing which a man takes in his hand in anger, to strike or assault another. . . ."); Samuel Johnson & John Walker, *A Dictionary of the English Language* 44 (1828) (arms) ("Weapons of offence or defence. In heraldry, The ensigns armorial of a family."); *OED* (arms, *n2*, I. *pl.*) ("Defensive and offensive outfit for war, things used in fighting. 1. Defensive covering or appendages for the body; armour, mail. Now only poet. . . . 2. a. Instruments of offence used in war; weapons. . . .").

used in its ordinary idiomatic sense. It is only in usages where additional specifying language is added, such as "bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game," that any intent to bend, even change (in the case of killing game), the idiom is apparent.

For example, the Declaration of Independence denounces the British monarch for "constrain[ing] our fellow Citizens taken Captive on the high Seas to *bear Arms against* their Country." The Declaration of Independence para. 28 (emphasis added). No one doubts that "*bear Arms against*" in that passage means "to be engaged in hostilities with." In a later echo, Thomas Jefferson, as Secretary of State, wrote in dissent from advice by Alexander Hamilton and Henry Knox to President Washington to establish a military battery on the Delaware River to prevent the brigantine *Little Sarah* from departing under French authority: "[A]nd if the suggestion be true (& as yet it is but suggestion) that there are 15. or 20. Americans on board the *Little Sarah*, who have gone with their own consent, it is equally true that more than ten times that number of Americans are at this moment on board English ships of war, who have been taken forcibly from our merchant vessels, at sea or in port wherever met with, & compelled to *bear arms against* the friends of their country." Cabinet Opinion on *Little Sarah*, in 7 *The Works of Thomas Jefferson* 437 (Paul Leicester Ford ed., 1904) (emphasis added).¹⁹

¹⁹ This is available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field\(DOCID+@lit\(tj070184\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj070184))). Jefferson's usage is notable because he generally favored broad protection of arms rights. During the debates over Virginia's Declaration of Rights, for example, Jefferson proposed language stating that "no free man shall be debarred the use of arms" and later that "no free

There is no question that the phrase there was used idiomatically. America's Chargé d'Affaires in Paris wrote in 1791 of the fleeing French nobility during the French Revolution: "In many of the provinces not a man of the nobility able to *bear arms* remains & many of them carry their whole families with them . . . to join the Princes [for] the counter revolution . . ." Letter from William Short to Thomas Jefferson (Oct. 22, 1791), in *Thomas Jefferson & William Short Correspondence* (Gerard W. Gawalt ed.) (emphasis added), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field\(DOCID+@lit\(ws01145\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(ws01145))) (emphasis added). Again, the usage was idiomatic.

In another example, the Maryland Convention to ratify the U.S. Constitution considered a number of amendments. One would have precluded the militia from being subject to martial law, except in time of war, invasion or rebellion. The reason for the proposed amendment was that "all other [constitutional] provisions in favour of the rights of men, would be vain and nugatory, if the power of subjecting all men able to *bear arms* to martial law at any moment, should remain vested in congress." William Paca, et al., *To the people of Maryland: The following facts, disclosing the conduct of the late Convention of Maryland, is submitted to the serious consideration of the citizens of the state* ¶ 13 (Annapolis, Frederick Green, 1788) (broadside pamphlet) (emphasis added).²⁰ The Maryland Convention also considered this proposed amendment: "That no person, conscientiously

man shall be debarred the use of arms [within his own lands or tenements]." 1 *The Papers of Thomas Jefferson* 344 (Julian P. Boyd ed., 1950).

²⁰ This is available at [http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field\(DOCID+@lit\(bdsdccc1101\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field(DOCID+@lit(bdsdccc1101))).

scrupulous of *bearing arms* in any case, shall be compelled personally to serve as a soldier." *Id.* ¶ 10 (second) (emphasis added). Both usages are plainly idiomatic.

Madison's original draft of the Second Amendment included a religious scruples clause that employed the term "bearing arms" as follows: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: *but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.*" 1 *Annals of Cong.* at 451 (emphasis added). There is no doubt that "bearing arms" in the scruples clause means anything other than "to serve as a soldier, do military service, fight." While that clause ultimately was deleted, there is nothing in the text of the Amendment or its history to suggest that the term "bear arms" in the "keep and bear arms" clause somehow was used differently, either before or after the deletion. The only reasonable conclusion, therefore, is that "bear arms" in the Second Amendment means "to serve as a soldier, do military service, fight."

As Petitioners point out, the term "bear arms" or "bearing arms" appears 30 times in the Library of Congress database containing all of the official records of debates in the Continental Congress and U.S. Congress between 1774 and 1821. See Brief for Petitioners at 16 (citing David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588, 618 (2000)). In each instance the usage was unquestionably the military usage. *Id.* Taking that research a step further, the historian Saul Cornell surveyed the use of the term "bear arms" (with and without qualifying language)

in books, pamphlets, broadsides and newspapers from the period between the Declaration of Independence and the adoption of the Second Amendment. He found 115 texts employing the term, all but five of which were used in the military sense. Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstone Critique*, 67 Md. L. Rev. ____ (forthcoming 2008). We have reviewed the “bear arms” language in the texts identified by Professor Cornell and concluded that in four of the five instances of non-military use, the use was expressly qualified by further language indicating a different meaning (e.g., “bear arms in times of peace” or “bear arms . . . for the purpose of killing game”). Of the 110 that were used in a clearly military context, 99 employed the idiom in its ordinary, unadorned state, “bear arms” or “bear arms against,” without any additional specifying language. The remaining 11 all used additional specifying language (e.g., “for the purposes of”). We otherwise have been unable to find unidiomatic uses of the phrase “bear arms” or “bearing arms” or “bear arms against” from the founding era in the United States. But even if one were to produce a few instances of actual non-idiomatic uses, that would not affect the meaning of the idiom in the Second Amendment.

Contrast the foregoing examples with the usages relied upon by the court of appeals. The majority believed it “evident from a survey of late eighteenth- and early nineteenth-century state constitutional [and declaration of rights] provisions that the public understanding of ‘bear Arms’ also encompassed the carrying of arms for private purposes such as self-defense.” *Parker*, 478 F.3d at 384 (citing *United States v. Emerson*, 270 F.3d 203, 230 n.29 (5th Cir. 2001)). But in each of the 11 relied-upon instances,

the provision in question employs additional language after "bear Arms" that restricts, or in one case stretches, the meaning of the idiom.

For example, seven of the cited provisions protect the right of the people "to bear arms for the defence of themselves and the state"; in the other four instances, the protection is for the right "to bear arms for the defense of himself and the state." *Emerson*, 270 F.3d at 230 n.29.²¹ The "for the defense of . . . the state" formulation is simply a bending of the idiom to specify a particular kind of fighting or military service: that which is undertaken to *defend* the state. Likewise, adding the "for the defense of themselves" language serves to bend the idiom to protect fighting to *defend* the community (e.g., from Indian attacks). Whether the "for the defense of themselves" formulation refers exclusively to collective self-defense or also to individual self-defense is unclear.

Pennsylvania's constitution was adopted in 1776 and is among those noted above employing the phrase "for the defense of themselves" in its declaration of rights. Just over a decade later, a group of dissenting delegates to the Pennsylvania convention to ratify the U.S. Constitution used the same turn of phrase, "for the defense of themselves," as part of a proposal to amend the Constitution to provide that "the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game." *Parker*, 478 F.3d at 385. The proposal was defeated, but proponents of a non-idiomatic reading of "bear Arms,"

²¹ Some of the provisions use the formulation "in defense of" rather than "for the defense of." This difference is immaterial to the meaning.

like the court of appeals, have pointed to the dissenters' use of the phrase "for the defense of themselves" as evidence that "bear arms" generally was understood to encompass personal uses of firearms, as when defending oneself. Of course the only way to arrive at such a conclusion is to assume that "bear arms for the defense of themselves" is the same as "bear Arms," an assumption that is at odds with the actual usage at the time. Moreover, new scholarship indicates that, at least as used in Pennsylvania then, the "defense of themselves" language reflected a desire to ensure a means of collective self-defense. Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 39 Rutgers L.J. 1041 (forthcoming 2008).²²

Adding the "in defense of himself" language bends the idiom even further to cover fighting in defense of oneself, individually.²³ And adding, as did the Pennsylvania dissenters, the "for the purpose of killing game" language bends the idiom so far that it no longer is recognizable. It is decidedly unidiomatic. As Garry Wills aptly has put it, one does not bear arms against a rabbit. See Garry Wills, *To Keep and Bear Arms*, N.Y. Rev. of Books, Sept. 21, 1995, at 63. The statement by the court below that "it would hardly have been unusual for a writer at the time (or now) to have said that, after an attack on a house by

²² Professor Kozuskanich suggests in the same article that the same collective self-defense concerns were foremost on the minds of citizens and colonists in at least some other states as well.

²³ Moreover, it is important to note that the four instances relied upon by the court of appeals all occurred in the Jacksonian era, well after the time the Second Amendment was adopted. See *Emerson*, 270 F.3d at 230 n.29.

thieves, the men set out to find them ‘bearing arms’” appears equally unidiomatic. *See Parker*, 478 F.3d at 384. Not only would it have been unusual, it would have been awkward and idiosyncratic.

The verb “to keep” means “to hold; to retain in one’s power or possession” and “to have in custody for security or preservation.” Webster, *An American Dictionary of the English Language* (keep, v.). One certainly can “keep” “arms” by retaining personal possession of them at home, as the drafters of the Second Amendment apparently had in mind with respect to most small arms, since the Second Militia Act and state militia acts required militia members to possess and bring specified arms with them when called to muster. *See Second Militia Act; An Act to Amend and Reduce Into One Act the Several Laws for Regulating and Disciplining the Militia and Guarding Against Invasions and Insurrections* 2 (Oct. 17, 1785). But arms also can be kept publicly, for example in the “public stores” that the Articles of Confederation specified for holding “field pieces” (cannons) and other equipment. Articles of Confederation art. VI. Given the Second Amendment’s purpose and use of the idiom “bear Arms,” the natural meaning of the adjacent word “keep,” when used in reference to “arms,” is the personal possession or public control of arms (weapons of offence, or armour of defense) for service in a well regulated militia.

C. Perpetuation of a “Well Regulated” Militia Is *the* Purpose of the Amendment.

The court of appeals read the two halves of the Second Amendment so that they became

asymmetrical. It began with the term “bear Arms” in the second clause, which it construed (contrary to its idiomatic usage at the time) to provide for a right to own and use guns for private purposes, including personal self-defense and hunting. *See supra* Section II.B; *Parker*, 478 F.3d at 384-85, 390 (finding that the Amendment protects a right of “ownership and use of weaponry beyond that needed to preserve the state militias”). The court then considered the Amendment’s first clause and read the language “well regulated Militia” to refer broadly to citizens who are armed and “subject to organization by the states (as distinct from actually organized).” *Id.* at 389. This construction had the effect of reading the modifier “well regulated” out of the Amendment, thereby expanding the scope of the Amendment’s purpose to protect not “a well regulated Militia” but rather all citizens subject to organization by the states. *See supra* Section II.A.²⁴

This reading results in a lopsided text, one in which the right construed far exceeds the purpose indicated by the Amendment’s express language, even after taking into account the extent to which the purpose is expanded when the words “well regulated” are read out. The court acknowledged the asymmetry but stated that “[i]t was quite common” in state constitutional provisions “for prefatory language to state a principle of good government that was narrower than the operative language used to achieve it.” *Id.* at 389 (citing Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev.

²⁴ See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect.”).

793, 801-07 (1998)).²⁵ The Second Amendment, the court held, articulates only a purpose, not its “exclusive” purpose, *Parker*, 478 F.3d at 386, 389, and the purpose actually articulated in the Amendment is only the Amendment’s “most salient political benefit,” which the court described as being the preservation of “the militia.” *Id.* at 390.

There is, of course, a much more natural reading of the Amendment, one that avoids the imbalance created by the court’s construction and avoids rendering the first clause (or a critical portion of it) superfluous. By simply (i) giving the idiom “bear Arms” the meaning it had at the time (to serve as a soldier, do military service, fight), (ii) reading the term “well regulated Militia” as it was used at the time (to refer to a militia that not only is subject to regulation under the militia laws, but also well functioning and disciplined), and (iii) looking to the absolute clause’s statement of causation (the right to “bear Arms” is protected to perpetuate “a well regulated Militia”) to determine the scope of military service covered by the right (that which is in a well regulated Militia), one finds a balanced text that protects the right of the people to serve in a well regulated militia and keep arms for such service.²⁶

²⁵ One of the fundamental problems with the article relied upon by the court is that it assumes without analysis an unidiomatic meaning of the phrase “bear Arms.” Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. at 803-04. Professor Lund does the same. Lund, *D.C.’s Handgun Ban and the Constitutional Right to Arms* — Geo. Mason U. Civ. Rts. L.J. ____.

²⁶ It is evident to us that “the people” at the time exercised their right “to keep and bear Arms” through the men of their country who served, just as “the People” at the time chose their

CONCLUSION

For all of the foregoing reasons, judgment of the court of appeals should be reversed.

Respectfully submitted,

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Representatives in the House through the men who voted. See U.S. Const. art. I, § 2, cl. 1.