20-56174

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Matthew Jones, *et al.,*

Plaintiffs-Appellants,

v.

Rob Bonta, in his official capacity as Attorney General of the State of California, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of California

No. 3:19-cv-01226-L-AHG
The Honorable M. James Lorenz, Judge

APPELLEES' SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S MARCH 26, 2021 ORDER

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
JOHN D. ECHEVERRIA
Deputy Attorney General

JENNIFER E. ROSENBERG
Deputy Attorney General
State Bar No. 275496
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6617
Fax: (916) 731-2124
Email:
Jennifer.Rosenberg@doj.ca.gov
Attorneys for Defendants-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

CORPORA

AMICUS BRIEFS

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

Defendants-Appellees submit this brief responding to the Court's supplemental briefing order.[1]

Part I addresses the first question: "What is the original public meaning of the Second Amendment phrases: 'a well regulated Militia'; 'the right of the people'; and 'shall not be infringed'?" Following this Court's methodology for assessing whether a regulation "'impinge[s] on the Second Amendment right as it was historically understood,'" *Young v. Hawaii*, ___ F.3d ___, 2021 WL 1114180, at *11 (9th Cir. Mar. 24, 2021) (en banc) (citation omitted), the District Court properly concluded that the age-based restriction at issue here—which prohibits licensed firearms dealers from selling or transferring firearms to persons under the age of 21, with exceptions—does not burden conduct protected by the Second Amendment as it was originally understood.

Parts II and III address the second and third questions: "How does the tool of corpus linguistics help inform the determination of the original public meaning of those Second Amendment phrases?" and "How do the data

[1] Under Federal Rule of Appellate Procedure 43(c)(2), Attorney General Rob Bonta is automatically substituted in his official capacity for his predecessors, former Acting Attorney General Matthew Rodriquez and former Attorney General Xavier Becerra.

yielded from corpus linguistics assist in the interpretation of the constitutionality of age-based restrictions under the Second Amendment?" Corpus linguistics is an emerging data analytics tool that may broaden the universe of sources jurists can consult in examining the original public meaning of constitutional or statutory texts. But it remains a relatively new tool with certain challenges in application, and any corpus linguistics analysis should be approached with caution. In light of these concerns, Defendants respectfully submit that any corpus linguistics analysis should be conducted in the first instance in the context of discovery in the trial court. Nevertheless, in an effort to provide a complete response to the Court's supplemental briefing order, Defendants ran preliminary searches to assess whether corpus linguistics might shed light on the question presented by this case. Those initial results suggest that a corpus linguistics analysis would likely be of limited utility in answering that question.

In any event, the results of a corpus linguistics analysis should not change the outcome of this interlocutory appeal from the denial of a preliminary injunction. The District Court properly analyzed the relevant historical materials and concluded that the Second Amendment, as originally understood, did not protect the right of individuals under the age of 21 to purchase or receive transfer of firearms. Even if the District Court erred on

that score, it properly determined that intermediate scrutiny applies; that the State satisfied that test; and that the remaining equitable considerations do not support the "extraordinary remedy" of a preliminary injunction here. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH PRECEDENT EXAMINING THE ORIGINAL PUBLIC MEANING OF THE SECOND AMENDMENT

In denying Plaintiffs' motion for preliminary injunction, the District Court examined the long history and tradition of age-based firearm restrictions and held that California Penal Code section 27510 is a presumptively constitutional longstanding regulation. 1-ER-0008-0011. That conclusion is consistent with the original understanding of the Second Amendment.

A. The Governing Approach for Determining the Original Public Meaning of the Second Amendment

The Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and this Court's precedents, including its recent decision in *Young*, 2021 WL 1114180, provide the governing two-step framework for determining whether a firearms restriction is among those that States may adopt

consistent with the Second Amendment. At step one, courts begin with the text of the Second Amendment and analyze relevant history and tradition in interpreting that text. *See Heller*, 554 U.S. at 592 (concluding that the Second Amendment protects an individual right based on analysis of "textual elements" of the operative clause and history of the Second Amendment); *Young*, 2021 WL 1114180, at *11 (explaining that courts first "ask if the challenged law affects conduct that is protected by the Second Amendment," based on the "historical understanding of the scope of the right" (quoting *Heller*, 554 U.S. at 625)). The purpose of this inquiry is to determine whether the challenged law "'impinge[s] on the Second Amendment right as it was historically understood'"—*i.e.*, the original public meaning of the Second Amendment. *Young*, 2021 WL 1114180, at *11 (citation omitted).

The "original public meaning" of a text "is normally thought to be the meaning that a knowledgeable and reasonable interpreter would have placed on the words at the time that the document was written." John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public*

Meaning, 113 Nw. L. Rev. 1371, 1376 (2016).[2] As the Supreme Court explained in *Heller*, "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." 554 U.S. at 576 (citation omitted). Thus, the words and phrases in the Second Amendment are to be accorded their "normal meaning," and not any "secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Id.* at 556-57.

To be sure, the task of identifying the original public meaning of a constitutional phrase is not always straightforward. Words or phrases in any text (legal or otherwise) may be susceptible to different interpretations, and it is often not possible to discern a universally shared understanding of their meaning, let alone one that can be discovered centuries after the text was written. *See, e.g.*, *McDonald*, 561 U.S. at 907 (Stevens, J., dissenting)

[2] *Accord* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 435 (2012) (defining "original meaning" as "[t]he understanding of a text, esp. an important text such as the Constitution, reflecting what an informed, reasonable member of the community would have understood at the time of adoption according to then-prevailing linguistic meanings and interpretive principles"). The original public meaning of a text may be different from the original intent of the author of the text. *See* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. Penn. L. Rev. 261, 269 (2019).

("Even when historical analysis is focused on a discrete proposition, such as the original public meaning of the Second Amendment, the evidence often points in different directions. The historian must choose which pieces to credit and which to discount, and then must try to assemble them into a coherent whole."); *Young*, 2021 WL 1114180, at *35 ("History is messy[.]"). The process of determining the original public meaning of the Second Amendment invariably requires judgment and selection in determining which meanings to credit and which to discount.

To answer these questions, courts have relied on a variety of sources, including the words of the constitutional phrase, how that phrase was used in other texts during relevant historical periods, and other laws and customs. *See, e.g.*, *Heller*, 554 U.S. at 592 (the Court's interpretation of the operative clause "is strongly confirmed by the historical background of the Second Amendment"); *Young*, 2021 WL 1114180, at *12 ("*Heller* relied heavily on history[.]"). As this Court recently explained, that process requires a careful review of the "historical record, starting with the English tradition, and then review[ing] the Colonial era and post-Second Amendment era." *Young*,

2021 WL 1114180, at *12.[3] The review of American history focuses on "state laws and cases." *Id.* When conducting this historical analysis, courts must be cognizant that they are "jurists and not historians," *id.*, and avoid "pick[ing] [their] friends" to arrive at a "fore-ordained conclusion," *id.* at *42.

B. Section 27510 Is Consistent With the Original Public Meaning of the Second Amendment

The District Court properly determined that Plaintiffs were unlikely to succeed on the merits of their challenge to Section 27510 because it does not burden Second Amendment conduct. 1-ER-0008-0011. That conclusion is consistent with the holdings of other appellate courts addressing questions similar to the one presented here. For example, after conducting an extensive review of the historical record, the First and Fifth Circuits held that "the founding generation would have regarded" laws restricting firearm possession by minors under the age of 21 "as consistent with the right to keep and bear arms." *United States v. Rene E.*, 583 F.3d 8, 16 (1st Cir. 2009); *see also Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco,*

[3] *See also Heller*, 554 U.S. at 605 (noting that the "examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification"—including the "century after [the Second Amendment's] enactment"—"is a critical tool of constitutional interpretation").

Firearms, & Explosives (*BATF*), 700 F.3d 185, 200-04 (5th Cir. 2012) (similar); *cf. Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013) (adopting *BATF*'s historical analysis in a public carry case). That same record demonstrates that the original understanding of the Second Amendment—including each of the phrases identified in the Court's supplemental briefing order—did not protect a right to firearm possession by individuals under the age of 21, let alone a right to purchase or receive firearms from a commercial dealer. *See* Answering Br. at 21-29.[4]

1. "A Well Regulated Militia"

In *Heller*, the Supreme Court examined the original meaning of the phrase "[a] well regulated Militia" in the prefatory clause of the Second Amendment. 554 U.S. at 595-96. The Court explained that the term "Militia" referred generally to "all males physically capable of acting in concert for the common defense," *id.* at 596 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)), and that this definition "comports with founding-era sources," including Noah Webster's dictionary and the Federalist Papers, *id.* at 595; *see also id.* at 596 (noting that the broader definition of "militia"

[4] Section 27510 does not prohibit *possession* of firearms by individuals under 21; it restricts sale or transfer of firearms to those individuals by licensed firearms dealers. *See* Answering Br. at 9 & n.2.

"is fully consistent with the *ordinary definition* of the militia as all able-bodied men" (emphasis added)). The Court also noted that the adjective "well-regulated" referred to "the imposition of proper discipline and training." *Id.* at 597 (citations omitted).

Individuals during the founding era—including some under the age of 21—might have been required to "'keep' arms in connection with militia service." *Heller*, 554 U.S. at 582-83. But it does not follow that the phrase "[a] well-regulated Militia" conferred upon those individuals a right to possess or purchase firearms for use in their individual capacities. On the contrary, *Heller* "decoupl[ed]" militia service from the individual right to keep arms. *BATF*, 700 F.3d at 204 n.17. The Court emphasized that the prefatory clause of the Second Amendment "does not limit *or expand* the scope of the operative clause," *Heller*, 554 U.S. at 578 (emphasis added)—*i.e.*, the "right of the people to keep and bear arms, shall not be infringed," U.S. Const. amend. II. And the historical record here demonstrates that the Second Amendment does not create a right for individuals who are over 18 but under 21 to receive a firearm by sale or transfer through a dealer. *See* Answering Br. at 21-29.

Nor does the fact that founding-era statutes imposed militia-related *duties* on certain individuals considered to be minors or "infants" mean that

those individuals were granted *rights* to perform those duties. *See BATF*, 700 F.3d at 204 n.17. "[T]he right to arms is not co-extensive with the duty to serve in the militia," and founding-era militia service requirements did not "vest" persons under 21—who were considered "infants" at the time—with a corresponding right to keep arms. *Id.*; *see also id.* (noting that several states "required parental consent for persons under 21" to serve in the militia as evidence that militia service requirements did not establish a right for infants to keep and bear arms).[5]

Indeed, this Court recently cautioned against relying on early American statutes that imposed firearms-related *duties* when determining the scope of the Second Amendment *right*. *Young*, 2021 WL 1114180, at *38. In evaluating whether the Second Amendment affords individuals a right to carry arms in public spaces under certain circumstances, this Court explained:

[5] *Accord Powell v. Tompkins*, 926 F. Supp. 2d 367, 388 n.18 (D. Mass. 2013) (rejecting as "preposterous" argument that the Militia Act supported finding right to firearm possession by minors under 21); *State v. Callicutt*, 69 Tenn. 714, 716 (1878) (in upholding a conviction under statute criminalizing sale or loan of a pistol to any minor under 21, court rejected an argument that because "'every citizen who is subject to military duty has the right 'to keep and bear arms,'" that "right necessarily implies the right to buy or otherwise acquire, and the right in others to give, sell, or loan" a pistol to a minor under the age of majority).

> Although it might be argued that [the existence of mandatory carry statutes] demonstrates that early Americans had a *right* to carry their firearms, the statutes impose a *duty* to carry, which is quite different. When the government imposes such a duty it assumes that it has the power to regulate the public carrying of weapons; whether it forbids them or commands them, the government is *regulating* the practice of public carrying.

Id.

The District Court's decision properly invoked the distinction between rights and duties when it rejected Plaintiffs' argument that militia service in the Founding Era mandated invalidating modern regulations of firearms purchase or transfer to persons under the age of 21. It noted that "as far back as the Founding Era, firearm regulations were considered necessary and an individual's right to firearm possession came with obligations to ensure public safety." 1-ER-0011. And it concluded that "regulations applied to militia members support the *Heller* court's finding that an individual may not 'keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose' he or she chooses." *Id.* (quoting *Heller*, 554 U.S. at 626).

2. "The Right of the People"

Heller also examined the phrase "the right of the people" in determining whether the Second Amendment protects a collective or individual right. 554 U.S. at 579-81. In concluding that it protects both, the

Court noted other instances in the Constitution in which the term "the people" was used in articulating individual rights. *Heller*, 554 U.S. at 579-80. It further observed that the term "the people" "refers to all members of the political community, not an unspecified subset," and stated that the right "belongs to all Americans." *Id.* at 580-81.[6] At the same time, the Court stated that the Second Amendment protects only "the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home." *Id.* at 635 (emphasis added). And it emphasized that its decision did not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626.

Thus, while *Heller* decided that the Second Amendment protects an individual right to bear arms, it did not comprehensively resolve *which* individuals have Second Amendment rights, nor the scope of the right for all potential classes of rightsholders. Instead, the Court refrained from "undertak[ing] an exhaustive historical analysis of the full scope of the

[6] In support of this proposition, the *Heller* Court quoted a prior decision in which it stated that the term "the people" "'seems to have been a term of art employed in select parts of the Constitution'" and broadly "'refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.'" *Heller*, 554 U.S. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

Second Amendment," 554 U.S. at 626, and left the question of whether other firearms regulations were "historical[ly] justif[ied]" to future cases, *id.* at 635; *see also* Note, *The Meaning(s) of "The People" in the Constitution*, 126 Harv. L. Rev. 1078, 1086-87 (2013) (discussing ambiguities in *Heller*'s statements about the term "the people").

For purposes of this appeal, this Court need not decide the precise contours of who was originally encompassed within "the people" to whom Second Amendment rights extended, as there is considerable historical evidence demonstrating that the phrase "right of the people" was not originally understood to refer to individuals under 21. At the time of the founding, the age of majority was 21 and individuals under 21 were considered infants. *See BATF*, 700 F.3d at 201-02; *Mitchell v. Atkins*, 483 F. Supp. 3d 985, 992 (W.D. Wash. 2020); *see also* Answering Br. at 24-27.[7] And Thomas M. Cooley, who was credited in *Heller* as the author of "a massively popular 1868 Treatise on Constitutional Limitations," 554 U.S. at 616, agreed that "the State may prohibit the sale of arms to minors." Thomas M. Cooley, Treatise on Constitutional Limitations 740 n.4 (5th ed. 1883) (citing *Callicutt*, 69 Tenn. 714).

[7] Indeed, the age of majority remained 21 in most of the States until well into the 20th century. *BATF*, 700 F.3d at 201.

Consistent with this understanding, "U.S. law has long recognized that age can be decisive in determining rights and obligations," and laws prohibiting individuals younger than 21 from purchasing firearms have been in effect since the nineteenth century. *Mitchell*, 483 F. Supp. 3d at 992-93; *see also* Everytown Br. at 11-14 (cataloging states that restricted the purchase and transfer of firearms by individuals under 21 in the nineteenth century). The reason for this differential treatment "was that these groups were considered incapable of the trust required to ensure proper and safe use of firearms." 1-ER-0011. These longstanding age-based restrictions confirm that the Second Amendment did not originally apply to persons under 21. *See*, *e.g.*, *BATF*, 700 F.3d at 204 ("Modern restrictions on the ability of persons under 21 to purchase handguns . . . seem, to us, to be firmly historically rooted.").[8] Indeed, twelve years after *Heller* was decided, "the established consensus of federal appellate and district courts from around the country is that age-based restrictions limiting the rights of 18-20-year-old adults to keep and bear arms fall under the 'longstanding' and

[8] *See also Powell*, 926 F. Supp. 2d at 385 (explaining that case before it raised questions of "to whom the Founders referred when they conferred this fundamental right upon 'the people'" and, particularly, "whether the right to keep and bear arms can be properly said to vest at the age of eighteen"—and answering the latter question "no").

'presumptively lawful' measures recognized by the Supreme Court in *Heller* as" falling outside the Second Amendment's protection. *Lara v. Evanchick,* ___ F. Supp. 3d ___, 2021 WL 1432802, at *10 (W.D. Pa. Apr. 16, 2021) (surveying cases); *see also* Answering Br. at 21-29.

3. "Shall Not Be Infringed"

The phrase "shall not be infringed" was not originally understood to confer an absolute right to keep and bear arms. To the contrary, at the time of the founding, "the [Second Amendment] right was not unlimited, just as the First Amendment's right of free speech was not." *Heller*, 554 U.S. at 595; *see also id.* at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

Accordingly, while the Second Amendment "limits" States' ability to regulate firearms in certain ways, it "by no means eliminates" their "ability to devise solutions to social problems that suit local needs and values" or prevents them from "experiment[ing] with reasonable firearms regulations." *McDonald*, 561 U.S. at 785 (plurality opinion) (citation omitted).

II. CORPUS LINGUISTICS IS A NEW AND EMERGING TOOL THAT PRESENTS OPPORTUNITIES AND CHALLENGES IN THE SEARCH FOR ORIGINAL PUBLIC MEANING

Corpus linguistics is a field of study that examines "language through data derived from large bodies—*corpora*—of naturally occurring language" to identify "patterns in meaning and usage." Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 795 (2018). While corpus linguistics may be a promising tool for examining the original meanings of words in a text, no such analysis is necessary to resolve this appeal. *See supra* § I; *infra* § IV. Moreover, courts should be cautious in their use of corpus linguistics, especially where—as here—this emerging tool is raised for the first time in an interlocutory appeal.

A. The Emergence of Corpus Linguistics

Corpus linguistics research involves sophisticated searches of databases (the corpora) containing digitized compilations of real-world sources such as books, newspapers, speeches, and transcripts, "drawn from a particular speech community," to identify patterns in the ways in which certain words were used at the time they were written. *See* Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. Chi. L. Rev. 275, 291-93 (2021). Several such databases are available and in constant development, including several maintained by Brigham Young University ("BYU"), to

facilitate searches focused on particular periods or contexts. *See* BYU Law, Law & Corpus Linguistics, https://lawcorpus.byu.edu/.

Corpus linguistics enables searches of databases containing significantly more data than were available 10-15 years ago. Indeed, the BYU databases were not available when the Supreme Court decided *Heller*, which consulted a much more limited number of texts in determining that the Second Amendment protects an individual right. *See* Dennis Baron, *Corpus Evidence Illuminates the Meaning of* Bear Arms, 46 Hastings Const. L.Q. 509, 510 (2019) (examining the use of the phrase "bear arms" in two BYU databases that were not available when *Heller* was decided). Corpus linguistics can be an attractive analytical tool because, as with any research inquiry, having more data is often advantageous.[9] Moreover, the information contained in the databases can often be tailored to research the use of particular words during specified time periods, or even among particular groups during those periods. *See, e.g.*, Stephen C. Mouritsen, *Contract Interpretation with Corpus Linguistics*, 94 Wash. L. Rev.

[9] *See Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring) ("The strength and validity of an interpretive canon is an empirical question, and perhaps someday it will be possible to evaluate these canons by conducting what is called a corpus linguistics analysis, that is, an analysis of how particular combinations of words are used in a vast database of English prose." [citation omitted]).

1337, 1408 (2019) ("Corpus searches can be tailored to the timeframe in which a given text was drafted. And corpus evidence can take account of differences in genre, dialect, register, and speech community.").

Judges and academics have cautioned, however, that corpus linguistics is not always "the most helpful tool in the toolkit." *Wright v. Spaulding*, 939 F.3d 695, 701 (6th Cir. 2019) (citing *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 445-46 (6th Cir. 2019) (Stranch, J., concurring) (voicing practical reservations); *id.* at 440 (Thapar, J., concurring in part and concurring in the judgment) (agreeing that "corpus linguistics is one tool . . . but not the whole toolbox")). For example, "[h]ow often a term appears in newspapers, magazines, or other publications is a separate inquiry from how members of the public would understand that term when used in a statute" or the Constitution. Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 B.Y.U. L. Rev. 1503, 1509 (2017); *see also id.* (illustrating with an example of how the word "flood" would be "skewed" by news reports of Hurricanes Katrina and Harvey). And one recent experiment suggests that corpus linguistics sources and even dictionaries may not "reliably track ordinary people's judgments about meaning." Kevin P. Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726, 727 (2020).

In light of these and other concerns, any use of corpus linguistics requires the exercise of significant judgment and, most likely, expertise. *See Wilson*, 930 F.3d at 441-42 (Thapar, J., concurring in part and concurring in the judgment) (acknowledging that "judges who use corpora do not become automatons of algorithms" and "will still need to exercise judgment" in interpreting corpus linguistics data). "Corpus linguistics can yield results that are relevant to legal interpretation, but performing the necessary analyses is complex and requires significant training in order to perform them competently." Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 B.Y.U. L. Rev. 1417, 1422 (2017).

At the outset, a user must identify the relevant databases. *See* Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 Seton Hall L. Rev. 401, 419 (2019). There are "many different corpora"; each "contains a different mix of texts" that may yield different results. *Id.* And careful attention must be paid to which sources (and voices) are not included in a given database, which could skew the data away from the "ordinary" usage of the words being studied. The user must also choose appropriate search parameters, including "whether and how to customize the search to return results indicating only certain parts of speech, or results reflecting certain geography locations, speech communities, or time periods." *Id.*

Finally, because these searches often return irrelevant results, the user must make a decision about "which search results to evaluate and which results to exclude from evaluation." Zoldan, *supra* at 419. That process can be onerous when a search yields a large dataset to organize and analyze. *See Wilson*, 930 F.3d at 446 (Stranch, J., concurring) (noting that a "keyword search using a corpus linguistics database will likely result in dozens, if not hundreds or thousands, of examples of a term's usage").

B. Considerations for Using Corpus Linguistics Analysis to Evaluate the Original Public Meaning of the Second Amendment

The use of modern corpus linguistics analysis to assist in statutory and constitutional construction is still nascent, and U.S. Supreme Court and federal circuit court opinions have only recently begun to experiment with the subject—mostly in the context of statutory interpretation.[10] But as the

[10] *See, e.g.*, *Duguid*, 141 S. Ct. at 1174-75 (Alito, J., concurring); *United States v. Scott*, 990 F.3d 94, 129 n.8 (2d Cir. 2021) (Menashi, J. concurring in part and concurring in the judgment; *United States v. Woodson*, 960 F.3d 852, 855 (6th Cir. 2020); *Caesars Entm't Corp. v. Int'l Union of Operating Eng'rs Local 68 Pension Fund*, 932 F.3d 91, 95 & n.1 (3d Cir. 2019); *Wilson*, 930 F.3d at 438-45 (Thapar, J., concurring in part and concurring in the judgment); *id.* at 445-48 (Stranch, J., concurring). Corpus linguistics has been the subject of several amicus briefs filed in the U.S. Supreme Court and this Court by corpus linguistics experts in Second Amendment matters. *E.g.*, Br. of Neal Goldfarb as Amicus Curiae in Supp. of Resp'ts, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Corlett*, No. 20-843 (U.S.

databases have become more accessible—and as scholarship around their potential uses has grown—there has been increased interest in exploring whether review of relevant databases can further illuminate the original public meaning of the Second Amendment.

BYU maintains two databases that scholars and linguists have found to be particularly relevant to assessing the original public meaning of the Second Amendment: the Corpus of Founding Era American English ("COFEA"), which includes over 136 million words from 126,394 different texts written from 1760-1799, and the Corpus of Early Modern English ("COEME"), which includes over 1 billion words from 40,300 texts written between 1475-1800. *See* BYU Law, Law & Corpus Linguistics, https://lawcorpus.byu.edu/. The former focuses on English used in the colonies and United States, while the latter comprises a large number of British English sources. *Id.* When analyzed using properly crafted searches,

---

Feb. 12, 2021); Br. for Corpus Linguistics Professors & Experts as Amici Curiae Supporting Resp'ts, *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, No. 18-280 (U.S. Aug. 12, 2019); Br. of Corpus Linguistics Professors & Experts as Amici Curiae Supporting Appellees, *Young v. State of Hawaii*, No. 12-17808 (9th Cir. June 4, 2020).

each database might yield information that is useful in understanding the original public meaning of terms used in the Second Amendment.[11]

The Court's supplemental briefing order inquires about employing two databases to evaluate the Second Amendment's original public meaning:

---

[11] In recent years, scholars have used COFEA, COEME, the Corpus of Historical American English ("COHA"), and a Google Books corpus to evaluate *Heller*'s conclusion that the Second Amendment protects an individual right to "keep and bear arms." Most concluded that *Heller* was wrongly decided, because corpus linguistics analyses revealed that the term "bear arms" was "*overwhelmingly* used in a collective or military sense." Darrell A. H. Miller, *Owning Heller*, 30 U. Fla. J.L. & Pub. Pol'y 153, 160-61 (2020) (emphasis omitted) (collecting studies); *see also, e.g.*, Baron, *supra* at 510-11; 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/ (analyzing sample of fifty sources and finding "overwhelming majority" were in military context);
Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, The Panorama (Aug. 3, 2018), http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/; Kyra Babcock Woods, *Corpus Linguistics and Gun Control: Why* Heller *Is Wrong*, 2019 B.Y.U. L. Rev. 1401, 1424 (2019); Neal Goldfarb, *Corpora and the Second Amendment: "Bear Arms" (Part 1), Plus a Look at "The People",* LAWnLinguistics (Apr. 29, 2019, 2:19 PM), https://lawnlinguistics.com/2019/04/29/corpora-and-the-second-amendment-bear-arms-part-1-plus-a-look-at-the-people/. *But see* James C. Phillips & Josh Blackman, *The Mysterious Meaning of the Second Amendment*, The Atlantic (Feb. 28, 2020).

Relying on many of these studies, the Vermont Supreme Court also recently concluded that the state constitution's analogue to the Second Amendment was "most likely" originally understood as "a right to bear arms for the purpose of service in the state militia." *See State v. Misch*, ___ A.3d ___, 2021 WL 650366, at *7 (Vt. Feb. 19, 2021).

COHA and the Corpus of Contemporary American English ("COCA"). Those databases were formerly known as the "BYU Corpora." *See Wilson*, 930 F.3d at 440 (Thapar, J., concurring in part and concurring in the judgment). But they contain more modern texts, and as a result, they may be less useful than the COFEA and COEME databases discussed above. COHA covers the period from the 1820s through the 2010s, while COCA covers the period from 1990 to 2019. Nonetheless, nineteenth century sources in COHA can be considered to the extent they may reflect public understanding of the Second Amendment right (just like nineteenth century case law and statutes). *See supra* § I.

Importantly, while certain individual words or passages of the Second Amendment certainly *can* be processed through the databases and return some data about their meanings, a proper corpus linguistics analysis likely should review the entire Amendment in context. "Phrases are not always (though they are sometimes) mere sums of their parts. One cannot necessarily determine the meaning of *establishment of religion* by simply looking up the founding-era definitions of *establishment*, *of*, and *religion*, just as one cannot determine the communicative content of the phrases *at all* or *for good* through the amalgamation of the meaning of the words in those phrases." Stephanie H. Barclay et al., *Original Meaning and the*

Establishment Clause: A Corpus Linguistics Analysis, 61 Ariz. L. Rev. 505, 528-29 (2019). Similarly, in the Second Amendment context, it would not be enough to search for the phrases "[a] well-regulated militia," the "right of the people," and "shall not be infringed" to determine the scope of the right the Amendment articulates for a particular group. Instead, it would require a careful examination of those phrases in the contexts in which they appear. And any corpus linguistics analysis would have to be careful not to conflate "ordinary meaning" with "most common meaning." *See, e.g.*, Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 B.Y.U. L. Rev. 1359, 1379 (2018); *see also id.* ("[T]he meaning of a particular usage of a word is more likely to be determined by the immediate linguistic context in which it appears than by which sense of the word is the most frequent in general.").

III. A PRELIMINARY REVIEW OF RELEVANT CORPORA SUGGESTS THAT CORPUS LINGUISTICS MAY BE OF LIMITED VALUE, PARTICULARLY AT THIS STAGE OF THE CASE

In light of the challenges and considerations addressed above—including the fact that corpus linguistics is not currently in common usage by courts and lawyers conducting constitutional interpretation—any corpus linguistics analysis likely should be performed (if at all) by experts or lawyers trained in the tool, in the context of discovery in the trial court, and

with sufficient time to carefully craft relevant searches, analyze data, and apply the resulting information to the question presented. *See, e.g.*, *Wilson*, 930 F.3d at 447 (Stranch, J., concurring) ("I would leave this task [of using corpus linguistics] to qualified experts, not to untrained judges and lawyers."); Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, *supra* at 1415 (suggesting that lawyers could benefit from guidance and training in linguistic analysis). The parties have not had the opportunity to conduct that type of thorough analysis or to develop a corresponding record in the District Court in the first instance. Accordingly, it would be most prudent for this Court to defer consideration of how "the data yielded from corpus linguistics assist in the interpretation of the constitutionality of age-based restrictions under the Second Amendment" until it can address that question in the context of an appeal from a final judgment in light of a fully developed record.

Nevertheless, because the Court's supplemental briefing order has directed the parties to respond to that question, Defendants conducted preliminary searches of the relevant databases. Those searches suggest that corpus linguistics may be of limited utility in resolving the constitutional question presented by this case. For example, preliminary searches in COHA and COFEA for the phrase "right of the people" return a relatively

manageable number of hits: approximately 200 in each database.[12] They do not appear to provide clear evidence that this phrase, as used in the Second Amendment, was originally understood to protect an individual right for persons under 21 to keep or bear arms (much less to purchase or receive them from a commercial dealer), however. Many of the texts generally quote the Bill of Rights, debates from the Annals of Congress in the years preceding its adoption, or pre-and post-ratification discussions of various constitutional rights and enumerated powers.[13] But they appear to provide little insight about whether any persons under 21 were originally considered to be part of "the people" to whom Second Amendment rights were accorded.[14]

---

[12] *See* COHA, *right of the people*, https://bit.ly/2QL7c7g (214 hits); COFEA, *right of the people*, https://bit.ly/3ve6cY8 (199 hits).

[13] *See, e.g.*, COFEA, *right of the people*, concordance line 30, https://bit.ly/3gFfuZ4 (citing Jedidiah Morse, *The American Universal Geography, or, A View of the Present State of All the Empires, Kingdoms, States, and Republics in the Known World, and of the United States of America in Particular* 223 (1793)).

[14] For example, concordance line 17 in Defendants' COFEA search quotes portions of President George Washington's 1796 Farewell Address, in which he referenced "the whole people['s]" power to amend the Constitution and stated that "the right of the people to establish government presupposes the duty of every individual to obey the established government." COFEA, *right of the people*, concordance line 17, https://bit.ly/3gxaDsZ (citing 6 Annals of Cong., Appendix, 2873 (1796-1797)).

A complete analysis would likely require a search of not only the phrases identified by the Court, but also *individual words* within those phrases. But a search in COCA for the term "infring*" (*i.e.*, any form of the root word, including nouns, verbs, and other word forms) produces 7,257 results.[15] A search for the term "the people" in COHA returned 87,906 results.[16] And a search for the term "militia" in COFEA returned 20,649 results.[17] To prove useful in answering the question before the Court, a proper analysis would seem to require carefully reviewing the texts, as well as popular neighboring words (called *collocates*) that appear across the searches, in order to sort results into clusters that can be further analyzed. And while sampling might make this process more manageable, a linguistics expert or advocate trained in use of the databases likely would be needed to determine statistically significant sample sizes, group results into appropriate clusters, and construct tailored keyword and collocate searches to focus the analysis.

[15] *See* COCA, *infring**, https://bit.ly/2RZJxAD.
[16] *See* COHA, *the people*, https://bit.ly/32HvqlI.
[17] *See* COFEA, *militia*, https://bit.ly/3dKE3SG.

IV. IN ANY EVENT, THE DISTRICT COURT'S DENIAL OF THE MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE AFFIRMED

For the reasons discussed, corpus linguistics may have a role to play in helping courts determine the meaning of certain constitutional phrases. But it should not change the outcome of this interlocutory appeal. At step one of the Second Amendment framework, this Court focuses on the "English tradition" and American "state laws and cases." *Young*, 2021 WL 1114180, at *12. A search of relevant databases certainly may yield some additional data informing original public meaning. As noted, however, there is already "'persuasive historical evidence,'" *Young*, 2021 WL 1114180, at *11 (citation omitted), that individuals under 21 were not originally understood to have a Second Amendment right to buy or receive firearms from dealers, *see* Answering Br. at 21-29; 1-ER-0008-0011. Because that evidence demonstrates that the regulations challenged here are "part of our legal tradition," *Young*, 2021 WL 1114180, at *13, this Court may affirm the District Court's denial of the preliminary injunction "'without further analysis,'" *id.* at *44 (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)).

Even if this Court were to conduct an analysis of relevant databases and conclude that corpus linguistics research casts doubt on the existing

historical record, the Court would still proceed to step two. *See Young*, 2021 WL 1114180, at *11. The District Court properly determined that Plaintiffs are unlikely to succeed on the merits at that step because intermediate scrutiny is the most demanding standard of review that could apply here, and Section 27510 satisfies it. *See* Answering Br. at 29-54; 1-ER-0012-0016.

Even assuming Plaintiffs could establish a likelihood of success on the merits, they failed to demonstrate entitlement to the "extraordinary remedy" of a preliminary injunction because they failed to show irreparable harm, that the balance of the equities tips in their favor, and that an injunction would be in the public's interest. *Winter*, 555 U.S. at 24. To the contrary, those factors weigh heavily against a preliminary injunction here. *See* 1-ER-0019 ("The potential harm of enjoining a duly-enacted law designed to protect public safety outweighs Young Adults' inability to secure the firearm of their choice without proper training."); *see also* Madeline Holcombe & Dakin Andone, *The US Has Reported At Least 50 Mass Shootings Since the Atlanta Spa Shootings*, CNN (Apr. 20, 2021), https://www.cnn.com/2021/04/18/us/mass-shootings-since-march-16/index.html.

CONCLUSION

The Court should affirm the District Court's denial of Plaintiffs' motion for preliminary injunction on the existing appellate record.

Dated: April 23, 2021

Respectfully submitted,

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
JOHN D. ECHEVERRIA
Deputy Attorney General

/s/ Jennifer E. Rosenberg
JENNIFER E. ROSENBERG
Deputy Attorney General
Attorneys for Defendants-Appellees Rob Bonta, in his official capacity as Attorney General of the State of California, and Luis Lopez, in his official capacity as Director of the Department of Justice Bureau of Firearms

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-56174

I am the attorney or self-represented party.

This brief contains 6499 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[X] complies with the length limit designated by court order dated 03/26/2021.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/ Jennifer E. Rosenberg* **Date** 04/23/2021
*(use "*s/[typed name]*" to sign electronically-filed documents)*