No. 20-843

In the Supreme Court of the United States

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

Petitioners,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS
SUPERINTENDENT OF NEW YORK STATE POLICE, et al.,

Respondents.

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

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

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Interest of Amicus[1]

Amicus Neal Goldfarb is an attorney with an interest and expertise in linguistics, and in applying the insights and methodologies of linguistics to legal interpretation.

Amicus's interest in this case stems from his having conducted an in-depth textual analysis of the Second Amendment, based primarily on corpus data regarding 18th-century usage.[2] That data, which is much more extensive than what the Court considered in *District of Columbia v. Heller*, 554 U.S. 570 (2008), shows *Heller* to have been mistaken about the Second Amendment's original meaning.

Amicus submits this brief in order (1) to inform the Court of his analysis, and (2) to urge the Court to call for supplemental briefing on the issues his analysis raises and to hold the case over to next Term for argument on those issues. In addition, the brief responds to

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

   This brief follows two typographic conventions generally followed in linguistics. (a) *Italics* signal that a word or phrase is being used to refer to itself as an expression. E.g. "The word *language* has eight letters." (b) 'Single quotation marks' are used to enclose statements of the meaning of a word or phrase. E.g., "*Closed* means 'not open.'"

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

criticism of corpus linguistics in the *amicus* brief filed by the NRA Civil Rights Defense Fund.

Introduction and Summary of Argument

In challenging New York's restrictions on publicly carrying firearms, Petitioners frame their argument in terms of "text, history, and tradition." (Pet. Br. 2, 3, 22, 24, 40, 48.) They understandably take it for granted that "text" refers to the Second Amendment's text as interpreted in *Heller*, that "history" refers to history as understood in light of the interpretation in *Heller*, and that "tradition" refers to those traditions that are relevant given that interpretation.

But textual evidence not before the Court in *Heller* shows that *Heller* was mistaken about the Second Amendment's original meaning. That evidence derives from corpus linguistics, a methodology that has been endorsed by originalist judges and scholars, and has been relied on by two Justices of this Court.[3] The corpus data that will be discussed here is from two corpora compiled by the BYU Law School for the purpose of facilitating research into constitutional original meaning: COFEA (the Corpus of Founding Era American English) and COEME (the Corpus of Early Modern English).

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3. See the discussion in Brief of Neal Goldfarb as *Amicus Curiae* at 5-9, *New York State Rifle & Pistol Assn. v. Corlett*, No. 20-843 (U.S. filed Feb. 12, 2021) ("Goldfarb *Cert.*-Stage Amicus Brief"), *cert. granted sub. nom. New York State Rifle & Pistol Assn. v. Bruen* (April 26, 2021).

The data from those corpora thoroughly undermines *Heller*'s original-meaning analysis.

To start with, the data shows that the definitions of *bear* and *arms* that the Court relied on, and on which it based its interpretation of *bear arms*, provided a misleading impression of how the two words were used during the founding era. *Bear* was not generally synonymous with *carry*, and only about half the uses of *arms* in the corpus conveyed the literal meaning 'weapons.' The other half consisted of figurative uses having to do with war and the military.

Thus, *Heller*'s interpretation of *bear* didn't reflect how the word was ordinarily used, and its interpretation of *arms* is called into question by the Court's unawareness of a major ambiguity. So it is unsurprising that the Court interpreted *bear arms* to mean 'carry weapons.'

However, the corpus data provides powerful evidence that that wasn't how *bear arms* was ordinarily used. *Amicus* concluded that the data was overwhelmingly dominated by uses of *bear arms* that conveyed an idiomatic military meaning. Other researchers have with one exception come to essentially the same conclusion,[4] and even the researcher constituting the ex-

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4. Dennis Baron, *Antonin Scalia was wrong about the meaning of 'bear arms,'* Washington *Post* (May 21, 2018), *available at* tinyurl.com/Baron2AmWaPo; *see also* Dennis Baron, *Corpus Evidence Illuminates the Meaning of* Bear Arms, 46 Hastings Const. Law. Q. 509 (2019); Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, Harv. L. Rev. Blog (Aug. 7, 2018), bit.ly/BlackmanPhillipsHLRBlog; Neal Goldfarb, *Corpora and the Second Amendment: "bear*

ception concluded that idiomatic military uses were about three times as common as literal uses.

The corpus data is at odds with *Heller* in other ways as well. For example, the data provides reason to believe that *the right of the people* as used in the Second Amendment would have been understood to denote a right that was collective in nature rather than individual. For the reasons above, among others, *Amicus* concluded that such an interpretation reflects the way in which the Second Amendment was most likely to have been understood when it was framed and ratified.

With the one exception mentioned above, *Amicus*'s reading of the corpus data has not been disputed. That is striking, because gun-rights advocates have had an obvious incentive to challenge *Amicus*'s analysis, and the analyses by the other researchers referred to above. And they have had more than enough time to study the corpus data for themselves. Findings regarding the data for *bear arms* were first made public roughly 3½ years before *cert.* was granted in this case.[5] And *Amicus*'s analysis, which deals with issues in addition to *bear arms*, was completed roughly two years ago, and has been publicly available since then.[6] Yet despite having both an incentive and an opportunity, gun-rights advocates have failed to offer a competing

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arms" (part 1), plus a look at "the people," LAWnLinguistics (April 29, 2019), bit.ly/BearArms1LnL; Neal Goldfarb, *Corpora and the Second Amendment: "bear arms" (part 2)* (April 30, 2019), bit.ly/BearArms2LnL.

5. See sources cited in note 4, *supra.*

6. *Goldfarb Analysis*, *supra* note 2.

interpretation of the data. Instead, their response has been to criticize the use of corpus linguistics as an interpretive methodology. [7]

Such criticism has shown up in this case, primarily in the *amicus* brief of the NRA Civil Rights Defense Fund ("the NRA Fund" or "the Fund"). But as *Amicus* will show, that criticism is unfounded. Under this Court's precedents, corpus linguistics is an appropriate interpretive tool, both in legal interpretation generally and in connection with the Second Amendment in particular.

Argument

I. The corpus data undermines *Heller*'s interpretation of the Second Amendment.

A. The data shows Heller *to have been mistaken about founding-era usage.*

1. bear and *arms*

Heller's interpretation of *bear arms* as meaning 'carry weapons' was based in large part on dictionary entries defining *bear* as 'carry' and *arms* as 'weapons.' 554 U.S. at 581, 584. Given that starting point, it's not

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7. *E.g.,* Robert VerBruggen, *Gun Groups Take Concealed Carry to the Supreme Court*, National Review Online (Dec. 18, 2020), bit.ly/VerBruggen2AmCarry; Plaintiffs-Appellants' Supp. Br. 8-20, *Jones v. Bonta*, No. 20-56174 (9th Cir. filed April 23, 2021); E. Gregory Wallace, *Legal Corpus Linguistics and the Meaning of "Bear Arms*," Second Thoughts Blog (July 16, 2021), bit.ly/WallaceSecondThoughts.

surprising that the Court interpreted *bear arms* as it did.

But as to both words, the corpus data shows that the definitions provided a view of 18th century linguistic usage that was incomplete, and that was therefore misleading. As a result, the Court was on shaky ground in relying on the dictionary definitions in interpreting *bear arms*.

bear. While the data shows that *bear* was sometimes used to convey the meaning 'carry [a physical object],' the overall pattern of use for *bear* and *carry* differed substantially.[8] For example, *carry* was used to denote the carrying of things such as guns, provisions, goods, letters, baggage, supplies, mail, boards, packs, and parcels. But for *bear*, comparable uses were much less common, as to both how many kinds of objects were described as being borne and the total number of times *bear* was used in that way.[9]

The differences between *bear* and *carry* can be explained in large part by changes in the use of *bear* after *carry* became part of English in (or before) the 14th century. A corpus-based study of both words has been conducted by Philip Durkin, the Deputy Chief Editor

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8. *Goldfarb Analysis* 18-23; for the underlying data, see Neal Goldfarb, *Corpus data: bear, carry - collocate lists* (Dec. 16, 2018), bit.ly/BearCarry_collocates, and Neal Goldfarb, *Corpus data: bear, carry - concordance data* (Dec. 16, 2018), bit.ly/BearCarry_concordances.

9. *Goldfarb Analysis* 18-19; *Corpus data: bear, carry - collocate lists*, *supra* note 8. For a discussion of other ways in which *bear* was used differently than *carry*, see *Goldfarb Analysis* 19-23.

and principal etymologist of the *Oxford English Dictionary*, and he reported that by the end of the 1600s, *carry* had largely replaced *bear* as the verb generally used to convey the meaning 'carry.'[10] So by the time the Second Amendment was framed and ratified, the use of *bear* to mean 'carry' was a remnant of the past.

arms. Although the use of *arms* to mean 'weapons' is more common in the data than the use of *bear* to mean 'carry,' it accounted for only about half of the relevant uses in the data. The remainder consisting of a variety of figurative meanings relating to war, combat, and the military.[11]

That fact, when coupled with the data regarding *bear*, gives reason to think (even before reviewing the corpus data for *bear arms*) that the idiomatic military sense was more common than the Court in *Heller* thought. In addition, the data regarding *bear* and *arms* suggests that in the roughly 220 years between the Second Amendment's ratification and the decision in *Heller*, the English language changed in ways that may not be obvious, and that as a result, one shouldn't assume that one's intuitions about the meanings of founding-era texts are reliable.

In thinking about the Second Amendment's original meaning, therefore, one must set aside preexisting assumptions when considering the linguistic evidence.

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

11. *Goldfarb Analysis* 23-27.

2. bear arms

The corpus data for *bear arms* confirms the wisdom of the recommendation above to keep an open mind. The idiomatic military meaning of *bear arms* appears in the data far more often than what *Heller* referred to as the phrase's "natural meaning," 554 U.S. at 584.[12]

Note that *Amicus* uses the phrase "military *meaning*" advisedly. His conclusion is not merely that *bear arms* was used most often in a military *context*. Rather, he has described the overwhelming majority of uses as conveying the phrase's "idiomatic military *meaning*."[13] (Note, too, that contrary to what *Heller* would lead one to think, 554 U.S. at 586, most of the military uses did not take the form of *bear arms against X*.)

Other scholars, including some who support *Heller*'s interpretation of the right to bear arms, have reached conclusions similar to Amicus's.[14] Only one researcher has expressed any disagreement with *Amicus*'s conclusions, and even by his count, uses of *bear arms* conveying the military meaning (147 uses) are roughly three times as frequent as those he categorizes as unambiguously literal (47 uses).[15] Moreover, when

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12. *Goldfarb Analysis* 34-52;

13. *Goldfarb Analysis* 38, 47 (emphasis added).

14. See citations to Baron and to Blackman & Phillips, *supra* note 4.

15. Josh Jones, Comment, *The "Weaponization" of Corpus Linguistics: Testing Heller's Linguistic Claims*, 34 BYU J. Pub. L. 135, 171 (2019). Jones refers to the military meaning as

one puts aside the uses categorized by this researcher as ambiguous, one sees that he categorized only 21% of the relevant uses as unambiguously literal.[16] Thus, everyone who has studied the corpus data (and publicly acknowledged doing so) agrees that the data does not support *Heller*'s interpretation of *bear arms*; the only disagreement concerns the *extent* of the inconsistency.

Not only that, not a single advocate of gun rights has disputed *Amicus's* conclusion as to the overwhelming predominance of idiomatic military uses in the data for *bear arms*. This is notable because gun-rights advocates have an incentive to try to discredit *Amicus*'s analysis (and the analyses of those who have reached similar conclusions). It is reasonable to think that at least some gun-rights advocates have downloaded *Amicus*'s data and studied it in an effort to find fault with it. Yet no one has come forward with any such argument.

3. keep arms

Amicus's original analysis (completed in 2019) had little to say about *keep arms,* but he has subsequently reviewed the data for the period 1760-1799 and concluded that most of the relevant uses involved the keeping of weapons in a military context, a collec-

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"figurative" rather than "idiomatic," but that difference is purely terminological.

16. *See Jones*, *supra* note 15, at 171:
Total unambiguous uses = 224
Total literal uses = 47
47/224 = .21

tive context, or both.[17] However, *Amicus* does not regard this as suggesting that *keep arms* had two meanings, one military and the other nonmilitary. He therefore does not think that the data for *keep arms* plays a role in interpreting "the right of the people to keep… arms."

Rather, *Amicus* believes that the important issue in interpreting that right is whether *the right of the people* was understood as denoting a collective as opposed to individual right (a question addressed in the next section). Under such an interpretation, the right to keep arms would have been understood as a right of the people to keep arms collectively—e.g., in arsenals.[18]

Although *Amicus* doesn't regard the data for *keep arms* as being helpful in interpreting the right to keep arms, he sees that data as being relevant for a different purpose: it suggests that the phrase *keep arms* was associated more with military and collective action than with individual self-defense. (In contrast, the data for *keep guns* includes more uses involving nonmilitary and noncollective contexts those for *keep arms*, in terms of both absolute numbers and percentage of total

17. Neal Goldfarb, *COFEA & COEME*: *keep arms*, (rev. Sept. 13, 2021, bit.ly/Goldfarb2dAmKeepArms.

18. *Cf.* Kevin M. Sweeney, *Firearms, the Militia, and the Second Amendment*, *in The Second Amendment on Trial: Critical Essays on* District of Columbia v. Heller 310, 327-63 (Saul Cornell & Nathan Kozuskanich eds. 2013) (discussing reliance on publicly-supplied weapons during the colonial, revolutionary, and post-revolutionary periods).

results.[19]) This pattern of results is consistent with the fact that uses in the corpus of *bear arms* predominantly conveyed an idiomatic military meaning, and as a result it provides additional support for the conclusion that *Heller*'s interpretation of *bear arms* was mistaken.

4. the right of the people

a. The Court in *Heller* based its interpretation of *the right of the people* on how that phrase (and the phrase *the people*) were used in the Constitution, without considering how *the right of the people* was used elsewhere. 454 U.S. at 579-80.

In an effort to answer that question, *Amicus* reviewed every use of *the right of the people* in the corpus data for the period 1760 through 1799. He found that uses in which the right in question was unambiguously collective (meaning that the right's exercise required the collective action of multiple people) were more than 11 times as frequent as those in which it was unambiguously individual.[20] The following are some examples of the collective uses:

> to amend, and alter, or annul their Constitution, and frame a new one
> to call a Convention at any time
> to change their government & give it the form they please

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19. Neal Goldfarb, *COFEA & COEME*: *keep guns* (revised Sept. 12, 2021), bit.ly/Goldfarb2dAmKeepGuns.

20. *See* Neal Goldfarb*, COFEA & COEME, right of the people, the people have a right, and the people's right* (April 29, 2019), Goldfarb2dAmRtPeople.

This evidence gives reason to think that the rights protected by the Second Amendment would have been understood as belonging to "the people" collectively rather than belonging individually to each person who was one of "the people."

Heller's conclusion to the contrary, 454 U.S. at 579-81, was tacitly based on what is referred to in Scalia & Garner's *Reading Law* as "the presumption of consistent use," which the authors describe as being "particularly defeasible by context."[21] They also note that Justice Story (who the Court repeatedly relied on in *Heller*) wrote that "'[it] is by no means a correct rule of interpretation to construe the same word in the same sense, wherever it occurs in the same instrument.'"[22] The corpus data supports the conclusion that the presumption has been overcome here,[23] but at a minimum it shows that *the right of the people*, as used in the Second Amendment, is ambiguous—a point whose significance is discussed below (at 18-20).[24]

b. The corpus data for *the right of the people* is relevant not only in interpreting the Second Amendment

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21. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170, 171 (2012).

22. *Id.* (quoting 1 Joseph Story, *Commentaries on the Constitution of the United States* § 454, at 323 (2d ed. 1858)).

23. *See Goldfarb Analysis* 56-59.

24. *Heller* relied not only on how *the right of the people* was used in the Constitution but also on the Constitution's use of *the people*. 454 U.S. at 580-81. *Amicus*'s analysis addresses the Court's discussion of that issue, arguing that the corpus data provides evidence supporting a conclusion different from the Court's. *Goldfarb Analysis* 56-59.

but also with regard to the state constitutional provisions that the Court described in *Heller* as being the uses of *bear arms* that were "[the] most relevant to the Second Amendment." 554 U.S. at 584; *see id.* at 584-86, 600-03.

(i) In seven of those provisions, the right to bear arms was described using language similar to *the right of the people*:

- "the people have a right to bear arms"[25] or "…to keep and bear arms"[26]

or

- "their [= *the people's*] right to bear arms"[27]

These phrases are ambiguous in much the same way as *the right of the people* is. As is true of the corpus data for *the right of the people*, uses of these phrases to denote collective rights substantially outnumber those denoting rights that were individual.[28] The right protected by each of these provisions can therefore reasonably be interpreted as having been inherently collective rather than individual.

In two of the provisions there is additional evidence that favors interpreting the right protected by

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25. Pa. Decl. of Rights § XII; N.C. Decl. of Rights § XVII; Vt. Decl. of Rights, ch. 1, Art. XII; Ohio Const., Art. VIII, § 20 (1802); Ind. Const., Art. First, § 20 (1816).

26. Mass. Const. Pt. First, Art. XVII.

27. Mo. Const., Art. XII, § 3 (1820).

28. Neal Goldfarb, *COFEA & COEME, right of the people, the people have a right, and the people's right* (April 29, 2019), Goldfarb2dAmRtPeople.

the provision as being collective (and therefore military) in nature. In the Massachusetts provision, the protected right is phrased as a right "to keep and to bear arms for the common defense," and in the North Carolina provision it is described as a right "to bear arms in defence of the State."[29] The Court recognized in *Heller* that this language could reasonably be read as limiting the Second Amendment's protection to bearing arms in connection with militia service. 554 U.S. at 601, 602. And the argument for such an interpretation becomes even stronger if *the right of the people* is interpreted in a collective sense.

In the other provisions using language similar to *the right of the people*, the protected right was defined as a right "to bear arms in defence of themselves and of the State[.]" While *Heller* interpreted the right of the people to bear arms "in defense of themselves" as unambiguously individual, the Court had no way of knowing about the evidence suggesting that *the people have a right* and *the people's right* could reasonably be interpreted collectively. That is important because under such a reading, the people's right to bear arms "in defense of themselves" could be understood as protecting the right of *collective* self-defense through service in the militia. Indeed, the Vermont Supreme Court, in a decision relying in part on corpus data, recently interpreted the Vermont provision as doing exactly that. [30]

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29. See citations *supra* notes 25 & 26.

30. *State v. Misch*, 2021 Vt. 10, ¶¶ 11-31. For historical support for interpreting *in defense of themselves* collectively, see, e.g.,

(ii) In addition to relying on the provisions discussed above, *Heller* relied on provisions that are distinguishable from the Second Amendment in that rather than describing the right to bear arms as a right of "the people," they describe it as a right of "the citizens,"[31] of "every citizen,"[32] or (in one case) of "the freemen of this state."[33] The effect of that difference is to reduce these provisions' relevance to the interpretation of the Second Amendment, but to the extent that they are in fact relevant, they don't support *Heller*'s interpretation.[34]

In contrast to the corpus data relevant to *the right of the people* the data relevant to the corresponding language in these provisions is weighted toward uses in which the right in question is individual rather than collective.[35] That subset of the data supports the conclusion that these provisions don't shed much light on

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Nathan Kozuskanich, *Pennsylvania, the Militia, and the Second Amendment*, 133 Penn. Mag. of Hist. & Biog. 119 (2009).

31. Ky. Const., Art. XII, § 23 (1792).

32. Conn. Const., Art. First, § 17 (1818); Ala. Const., Art. I, § 23 (1819); Me. Const., Art. I, § 16 (1819), Miss. Const., Art. I, § 23 (1817).

33. Tenn. Const., Art. XI, § 26 (1796).

34. The discussion here also applies to the 15 additional state right-to-bear-arms provisions that are cited by *Amicus* FPC American Victory Fund and its fellow amici (Br. at 4; *see id.* at 5-8).

35. Neal Goldfarb, *COFEA & COEME (1760-1799) right - citizens, freemen* (Sept. 12, 2021), bit.ly/2Am_RightCitizensFreemen.

how *the right of the people* as was likely to have been understood.

But that said, the data here does include uses that *Amicus* interprets as collective or as having both collective and individual aspects. The existence of such uses suggests that some of the rights described as belonging to "the citizens," "every citizen," or "freemen" were sometimes understood as being collective at least in part. To that extent, therefore, these provisions are at least somewhat relevant to the interpretation of the Second Amendment, but not in a way that supports *Heller*'s analysis.

5. the right of the people to…bear arms

Given that the idiomatic military sense of *bear arms* dominates the corpus data, it is likely that the use of the phrase in the Second Amendment was understood as conveying an idiomatic military meaning. However, what *Amicus* has for the sake of simplicity been referring to as "the military sense" (in the singular) is more accurately described as a range of meanings encompassing, at one extreme, merely serving in the military, and at the other extreme, actively fighting in combat. The question therefore arises as to which part of that range of conduct is protected by the Second Amendment.

Amicus concluded in his analysis that the right of the people to bear arms was probably understood as the a right to serve in the militia.[36] That conclusion was

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36. *Goldfarb Analysis* 52-56.

based on the fact that bearing arms was regarded as both a right and a duty. The corpus data, and other historical evidence, suggests that the duty to bear arms was understand to be a duty to serve in the militia, and *Amicus* thought that the corresponding right to bear arms was understood as having the same scope.[37]

After further reflection, however, *Amicus* believes that he may have given insufficient weight to the likelihood that *the right of the people*, as used in the Second Amendment, was understood in a collective sense. He therefore doesn't rule out the possibility that the right to bear arms was understood in terms even more strongly collective than what he previously thought. Further research and discussion is needed as to this issue, by both legal scholars and historians.[38]

6. Other issues

Amicus would like to call the Court's attention to two issues he has addressed elsewhere but does not have room to do more than mention here.

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37. *Id.* at 52-60. *Amicus* also concluded that contrary to what the Court said in *Heller* (554 U.S. at 580-81), *the people* as used in the Second Amendment can reasonably be interpreted as having referred to those who were eligible for militia service. *Goldfarb Analysis* 56-59.

38. The Court in *Heller* said that interpreting the Second Amendment to protect a "right to be a soldier or to wage war" was "an absurdity that no commentator has ever endorsed." 554 U.S. at 586. But such an interpretation has in fact been endorsed by commentators, and (more importantly) is supported by historical evidence. *See Goldfarb Analysis* 53-55.

First, he has argued that *Heller's* interpretation of *well regulated militia* is flawed in its reasoning and inconsistent with evidence that the phrase was likely to have been understood to denote a militia organized and regulated *by the relevant state*.[39]

Second, he has responded to *Heller*'s argument that the use of *bear arms* in the Second Amendment cannot be interpreted idiomatically because that would require reading *arms* as being simultaneously literal (as part of *keep arms*) and figurative (as part of *bear arms*), 554 U.S. at 586-87. Specifically, he has argued that *keep and bear arms* could in fact have been understood that way when the Second Amendment was framed and ratified.[40]

B. In light of the corpus data (*and the analytical framework in* Heller) *the Court's interpretation of the Second Amendment is untenable.*

1. The Court structured its analysis in *Heller* around the conclusion that the Second Amendment's prefatory clause plays no role in interpreting the operative clause unless the operative clause is ambiguous, in which event the ambiguity is be resolved by consulting the prefatory clause. 554 U.S. at 577-78. So in order for *Amicus* to show that the prefatory clause must be considered in interpreting the operative

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39. Brief of Neal Goldfarb as *Amicus Curiae* in Support of Respondents, *Folajtar v. Garland*, No. 20-812 (U.S. filed March 12, 2021), *cert. denied*, April 19, (2021).

40. *Goldfarb Analysis* 60-73.

clause, he need not establish that the Court's analysis of the operative clause is wrong in every respect, or that all of its conclusions are unreasonable. Rather, he need only show that the Second Amendment does not *unambiguously* mean what the Court held it to mean.

Amicus has satisfied that burden. He has shown that at a minimum, *bear arms* as used in the Second Amendment could reasonably have been understood as conveying an idiomatic military meaning. It is therefore appropriate to take the prefatory clause into account in interpreting the operative clause.

2. Once the prefatory clause is taken into account as part of interpreting the operative clause, it becomes clear that *bear arms* should be understood as having been used in an idiomatic military sense. *Amicus* has discussed that point in detail as part of his analysis,[41] but in this brief he can't do more than offer a bare-bones explanation.

For founding-era readers of the Second Amendment's text, the prefatory clause established the immediate context within which they would have understood the operative clause. What would have stood out as most important was the importance of having a well regulated militia—a concept that would have been more likely to bring the brought to mind the idiomatic military sense of *bear arms* than the literal sense. The idea of a well regulated militia is conceptually closer to the military sense than to the literal sense, given that militia service, and the militia itself, were central aspects of the military sense. And that, together with the

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41. *Goldfarb Analysis* 56-59.

much greater frequency of the military sense, means that the military sense would almost certainly have been what came to mind.[42]

This is true despite *Heller*'s conclusion that the prefatory clause is consistent with the operative clause, 554 U.S. at 598-60. That conclusion presupposes that the Court was correct in its interpretation of the prefatory clause, but that presupposition is unjustified.

As previously noted (pp. 17-18, *supra*), the Court's interpretation of *well regulated militia* (the most important part of the prefatory clause) doesn't hold up to scrutiny. And beyond that, *Heller*'s interpretation of the prefatory clause assumes that the Court was correct in its interpretations of *bear arms* and *the right of the people*. The discussion of the corpus data shows that assumption to have been unjustified. For both of those reasons, *Heller*'s interpretation of the prefatory clause is overdue for reconsideration.

II. The NRA Fund's criticism of corpus linguistics as an interpretive tool is unfounded.

Having found no significant flaws in *Amicus*'s conclusions about the corpus data, the NRA Fund (like gun-rights advocates more generally) falls back on criticizing the use of corpus linguistics in legal interpretation.[43] This move is ironic given that the first person to advocate the use of corpus linguistics as to the

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42. *Id.*

43. See, *e.g.*, sources cited in note 7, *supra.*

Second Amendment was the gun-rights advocate and originalist scholar Randy Barnett.[44]

Of course, what is more important than the irony of the NRA Fund's criticism is that, as shown below, it is baseless.

A. Frequency analysis is an appropriate methodology for legal interpretation generally.

Before dealing with the use of frequency analysis in connection with interpreting the Second Amendment, it will be helpful to explain why such analysis is appropriate with respect to legal interpretation more generally.

1. The starting point is the rule that the terms in a legal provision are to be interpreted as having their ordinary meaning. Although there is no single conception of ordinary meaning that is uniformly applied (as shown by the differing approaches to interpreting *use a firearm* followed by the majority and the dissent in *Smith v. United States*[45]), this Court has in a number of cases equated ordinary meaning with what the expression at issue "ordinarily means" and how it is "or-

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44. Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237, 239-40 (2004); *see* Goldfarb *Cert*.-Stage Amicus Brief, *supra* note 3, at 5-6. Barnett's article was written before any significant attention was paid to the idea of using corpus linguistics in legal interpretation, and he wasn't aware at the time that what he was advocating was, in effect, corpus linguistics.

45. 508 U.S. 223 (1993).

dinarily used."[46] The way an expression is *ordinarily* used is by definition the way it is *most often* used.[47] The same is true with respect to other formulations the Court has invoked, such as "normal and usual meaning"[48] and "normally means."[49] Indeed, the Court has equated the ordinary meaning of a word with its "most common meaning."[50]

Under cases such as these, corpus data about the relative frequencies of different senses of an expression is relevant to determining ordinary meaning: it is evidence as to what the expression ordinarily means, how it is ordinarily used, and what its most common meaning is. But two caveats must be kept in mind.

First, the cases cited above must be read in light of the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[51] There-

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46. *E.g.*, *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101 (2019); *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070–71, 2072 (2018); *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012); *United States v. Bestfoods*, 524 U.S. 51, 66 (1998); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 300–01 (1989).

47. *E.g.*, *American Heritage Dictionary of the English Language* 1238 (4th ed. 2006); *New Oxford American Dictionary* 1198 (2d ed. 2005).

48. *FTC v. Sun Oil Company*, 371 U.S. 505, 516 (1963).

49. *Deal v. United States*, 508 U.S. 129, 133 (1993).

50. *Mallard*, 490 U.S. at 301.

51. *Deal*, 508 U.S. at 132.

fore, contrary to what the NRA Fund seems to think (Br. at 15), the interpretive goal is not to determine the most frequent use of the word overall, without regard to context, but rather to determine the most frequent *contextually similar* use of the word.[52]

Second, using corpus data to determine which sense of a word is the most frequent requires that the word in question have more than one potentially relevant sense. Not all issues that are regarded as involving word meaning fit that description. For example, in the classic vehicles-in-the-park hypothetical, only one sense of *vehicle* is relevant; it would be strange to say that *vehicle* means something different with respect to cars than what it means with respect to trucks. But that problem doesn't arise here: the idiomatic military sense of *bear arms* conveys a meaning different from the sense that *Heller* found to be its natural meaning.

2. In addition to equating ordinary meaning with what the relevant word ordinarily means and how it is

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52. *E.g.*, Neal Goldfarb, *The Use of Corpus Linguistics in Legal Interpretation*, 7 Ann. Rev. Ling. 473, 475-76, 477-78 (2020), available at bit.ly/GoldfarbAnnRevLing; Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. Rev. 1359, 1362, 1366-68, 1379 2018); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L. J. 788, 795, 821-24, 826 (2018).

With respect to the Second Amendment, the most contextually similar uses of *bear arms* are the state constitutional provisions that are discussed above (at 12-16, *supra*). But as that discussion shown, those uses can't offer much guidance. That ultimately isn't important, however, because the military sense of *bear arms* is used uniform across almost all other contexts.

ordinarily used, the Court has equated it with how the word is "ordinarily understood."[53] And although corpus data cannot provide direct evidence of how words are ordinarily understood, it can provide indirect evidence of such ordinary understanding. On the assumption that people ordinarily speak and write in such a way as to make themselves understood, the way a word or phrase is ordinarily understood corresponds to how it is ordinarily used. (This is essentially what it means to say that words have conventional meanings.) Thus, ordinary usage can serve as a proxy for ordinary understanding.[54]

This conclusion is valid not only from a linguistic perspective, but also as a legal proposition. This Court has in a number of cases treated ordinary understanding and ordinary usage as two sides of the same coin—for example by referring in an opinion both to how the relevant word was "ordinarily understood" and how it was "ordinarily used";[55] by switching its focus in an opinion back and forth between usage and

53. *Wisconsin Central Ltd.*, 138 S. Ct. at 2070.

54. For further discussion, see *The Use of Corpus Linguistics in Legal Interpretation, supra* note 52, at 476-77, 478-79; Neal Goldfarb, *Varieties of Ordinary Meaning: Comments on Kevin P. Tobia, "Testing Ordinary Meaning*," 5-8 (2020), bit.ly/VarietiesOrdinaryMeaning.

55. *Wisconsin Central Ltd.*, 138 S. Ct. at 2072.

understanding;[56] and by talking about how the relevant word is "ordinarily used and understood."[57]

3. The NRA Fund cites the work of several commentators in support of its criticisms of frequency analysis (Br. at 14–15 & nn. 37-40), but none of that work supports its position.

Although three of the articles the Fund cites are critical of frequency analysis, they miss the mark because they don't recognize the conception of ordinary meaning as amounting to the way that the relevant word or expression is ordinarily used.[58] Another of the articles is cited for a proposition that does nothing to advance the Fund's argument, namely, that corpus linguistics can't resolve normative questions such as "what makes some permissible meaning the ordinary meaning."[59] That proposition is irrelevant because *Amicus* doesn't rely on linguistics to resolve that issue.

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56. *Wisconsin Cent. Ltd*., 138 S. Ct. at 2071-72; *Watson v. United States*, 522 U.S. 74, 79 (2007); *Lopez v. Gonzalez*, 549 U.S. 47, 53, 56 (2006). *See The Use of Corpus Linguistics in Legal Interpretation*, supra n. 52; *Varieties of Ordinary Meaning*, *supra* note 54 at 6-8.

57. *Lumbra v. United States*, 290 U.S. 551, 561 (1934).

58. Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law,* 2017 B.Y.U. L. Rev. 1503 (2018); Mark W. Smith & Dan M. Peterson, *Big Data Comes for Textualism: The Use and Abuse of Corpus Linguistics in Second Amendment Litigation* (July 14, 2021), bit.ly/2UQDpfz; Kevin Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726 (2020).

59. Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. Rev. 1417, 1421 (2018), *quoted in* NRA Fund Br. 15 n.39.

Rather, as previously discussed, *Amicus* relies on this Court's decisions equating ordinary meaning with the way in which the relevant term is ordinarily used and understood.[60]

4. The NRA Fund criticizes legal corpus linguistics for not living up to its supposed ideals: it says that "corpus linguistics analysis is as much art as it is science" and that "[a]s scientific as it might sound, discerning usage from database hits is full of judgment calls." (Br. 7.) But as applied to *Amicus*'s analysis, that criticism is misdirected.

Amicus has never suggested that corpus analysis doesn't involve making judgment calls. Nor has he ever suggested that a reason for using corpus linguistics is that doing so would make legal interpretation "scientific." Rather, his reason for using it and advocating its use is simply that it provides more and better information than dictionaries do.

The mere fact that corpus analysis requires the exercise of judgment therefore provides no reason to reject its use. Rather, the appropriate focus is on the substance of the judgment calls. And the circumstances here provide assurance that *Amicus*'s methodology and interpretation of the data are both sound. That assurance comes from the fact that his analysis has been fully transparent. The data underlying *Amicus*'s origi-

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60. The final article cited by the NRA Fund (Br. 15 n.39) is Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. Rev. 1311 (2018). As far as *Amicus* can tell, the portion of the article that is cited has nothing to do with the point the Fund seeks to make.

nal analysis (cited here as "*Goldfarb Analysis*") has been publicly available for at least two years, as has his evaluation of every one of the hundreds of individual data points contributing to his analysis.[61] During that entire time, gun-rights advocates have had an obvious incentive to challenge his analysis. Yet both his methodology and his findings have for the most part gone unchallenged.[62]

B. Frequency analysis is also appropriate in the context of Heller *and the Second Amendment.*

1. In its discussion of *bear arms*, *Heller* used different terminology than was used in the cases discussed in the preceding section: it spoke in terms of "natural meaning" rather than "ordinary meaning." 554 U.S. at 584. But that difference is superficial,

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61. Some of the data analyses discussed in this brief were conducted in 2021, and have not been generally available until now. *See* notes 17, 19, 35, *supra* and 67, *infra*, and accompanying text).

62. The NRA Fund's only criticism of *Amicus*'s methodology is that he limited his analysis to texts from 1760-1799. (Br. 9-10.) But at least as to *bear arms*, research by another scholar shows that the pre-1760 results would have been essentially the same as *Amicus*'s. *See* Baron, *Corpus Evidence Illuminates the Meaning of* Bear Arms, *supra* note 4. And while it is true that, as the Fund notes, *Amicus* did not consider materials from the Reconstruction era, such documents aren't reliable evidence of founding-era understandings.

The Fund's criticism of a categorization criterion used by researchers other than *Amicus* (Br. at 10-11) is irrelevant here because *Amicus* didn't rely on that criterion.

because the Court has treated the two formulation as synonymous.[63] And in at least three such cases, it equated "ordinary meaning" (and therefore "natural meaning") with how the word in question is "ordinarily used" and "ordinarily understood.[64]

Furthermore, the approach in those cases is similar in substance to the Court's stated approach *Heller*. The Court said at the outset that the Constitution "was written to be understood by the voters" and that "its words and phrases were used in their normal and ordinary as distinguished from technical meaning." 554 U.S. at 576 (cleaned up). While the Court's reference to "ordinary" meaning might have been meant only as a contrast to "technical meaning," its reference to "normal…meaning" implicitly invoked considerations of frequency (as did the reference to what *bear arms* "normally meant", *id. at* 586).

The Court also cited the passage in Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824), suggesting that the words in the Constitution should be interpreted in accordance with how they are "usually understood," and stating that the framers and ratifiers "must be understood to have employed words in their natural sense[.]" As with *Heller*'s allusion to "normal meaning," the reference in *Gibbons* to how words are "usually understood" supports the conclu-

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63. *E.g.*, *S.D. Warren Co. v. Maine Bd.*, 547 U.S. 370, 376 (2006); *Bestfoods*, 524 U.S. at 66; *Meyer*, 510 U.S. at 476; *Mallard*, 490 U.S. at 300–01.

64. *Bestfoods*, 524 U.S. at 66; *Meyer*, 510 U.S. at 476; *Mallard*, 490 U.S. at 300–01.

sion that the relative frequency of a particular sense of a word is relevant in determining original meaning. And given that point, the statement that the words in the Constitution were used "in their natural sense" suggests that a term's "natural meaning" amounts to the meaning that it is "usually understood" to convey.

Also relevant (though not cited in *Heller*) is Chief Justice Marshall's dissent in *Ogden v. Saunders*, 25 U.S. 213 (1827), where he said that the Constitution's words "are to be understood in that sense in which they are *generally used* by those for whom the instrument was intended[,]" *id.* at 332 (emphasis added)—a parallel with the cases discussed in the previous section that focus on how the term at issue is "ordinarily used."

2. In addition to criticizing the use of corpus linguistics in legal interpretation generally, the NRA Fund raises arguments against its use that are specific to the Second Amendment. But those arguments are baseless.

a. Contrary to what the NRA Fund contends (Br. at 14), *Heller* did not reject the use of frequency analysis. The discussion above has shown that frequency analysis is entirely consistent with *Heller*, and the portion of the opinion that the Fund cites (554 U.S. at 588-89) provides no reason to think otherwise.

b. The NRA Fund argues that because the corpus data overrepresents the writings of founding-era political and social elites, it "might not fully reveal commonly understood meaning when it comes to the Bill of

Rights."[65] This argument is speculative by its own terms, and the Fund offers no reason to think that the corpus results would differ significantly if the data included more texts from non-elite sources.

Even if the Fund had presented evidence backing up its argument, that wouldn't effectively defend *Heller* against the challenge posed by the corpus data. That's true for two reasons. First, the Fund's argument would prove too much, because its criticism of the corpus data applies equally to the texts on which the Court relied in *Heller*. Second, if there was substantial variation in how the terms in the Second Amendment were used, that would mean that those terms were ambiguous. And that, in turn, would provide an independent basis for consulting the prefatory clause in order to resolve the ambiguity, with the consequences that have already been discussed (pages 19-20, *supra*).

c. In addition to arguing that the corpus data is weighted toward elite usage, the NRA Fund contends that it is unduly slanted toward discussions of "newsworthy" topics and slights those about topics that are "more mundane." (Br. at 14-16.) As a result, the Fund contends, the data does not reflect day-to-day discussions in which *bear arms* may have been used in talking about carrying and using weapons in nonmilitary contexts. (*Id.* at 16-17.)

But that argument is based on an implicit assumption for which the Fund offers no justification and that is demonstrably unfounded. The assumption is that when people during the founding era wanted to talk

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65. NRA Fund Br. 12; *see also id.* at 13-14.

about carrying weapons in nonmilitary contexts, *bear arms* was the only expression in their vocabularies that would enable them to do so. Without that assumption, the Fund's argument would be invalid, because there would be no reason to think that the references to carrying weapons that are supposedly missing from the corpus data would have involved the use of *bear arms*.

But as the data shows, *bear arms* was not the only expression that was used to talk about carrying weapons. Among the available options was, unsurprisingly, *carry arms*.[66] And the additional options disclosed by the corpus data include the following:[67]

carry gun(s)	*carry rifle(s)*
carry weapon(s))	*carry fire-arms*
carry musket(s)	*carry sword(s)*
carry pistol(s)	*carry* dagger(s)

This evidence exposes the Fund's argument as a product of imagination.

d. The NRA Fund contends that corpus linguistics cannot account for the historical background that led up to the Second Amendment (Br. 19-22), and it's true that while corpus linguistics provides a tool for studying linguistic history, it is of limited use in dealing with social and political history. Nevertheless, it is entirely possible to rely on historical scholarship in addition to

66. Neal Goldfarb, *COFEA & COEME: bear arms & carry arms*, (rev. Sept. 12, 2021), bit.ly/Goldfarb2AmBearArmsCarryArms.

67. Neal Goldfarb, *COFEA*: *carry guns, carry weapons, etc.* (Sept, 12, 2021), bit.ly/CarryGunsWeapons_etc.

corpus linguistics. In fact, *Amicus* did exactly that in his analysis.[68]

The real issue relating to history is that the proper interpretation of the historical record is very much in dispute. The Court's treatment of history in *Heller* has been the subject of extensive criticism, as to both its conclusions and its methodology.[69] There is therefore an element of question-begging in accepting *Heller*'s interpretation as conclusive—especially now that *Heller*'s textual analysis has been shown without contradiction to be deeply flawed.

Conclusion

Amicus has shown *Heller*'s interpretation of the Second Amendment to be inconsistent with the Amendment's original meaning. While that doesn't necessarily mean *Heller* should be overruled,[70] the issue is too important to ignore.

But the case in its current posture is not an appropriate vehicle for revisiting *Heller*: respondents did not

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68. Goldfarb Analysis 53-56.

69. *See, e.g.*, Patrick J. Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* 41-121 (2018); Patrick J. Charles, *Historicism, Originalism and the Constitution: The Use and Abuse of the Past in American Jurisprudence* 2014); Lois G. Schwoerer, *English and American Gun Rights*, *in A Right to Bear Arms?: The Contested Role of History in Contemporary Debates on the Second Amendment* 139 (Jennifer Tucker et al., eds. 2019).

70. See *amicus*'s discussion of this point in his *cert*.-stage amicus brief in this case, cited supra note 3, at 22-23.

raise the issue in opposing *cert*., and Petitioners and their *amici* have already filed their briefs.

The Court could nevertheless call for supplemental briefing on the issues *Amicus* has raised, and hold the case over to next Term for argument on those issues. *Amicus* urges the Court to do so.

Respectfully submitted,

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