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 Southern District of California

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

APPELLEES' RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF

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

OTHER AUTHORITIES

INTRODUCTION

As demonstrated in Defendants-Appellees' Supplemental Brief, California Penal Code section 27510's limited age-based restrictions on the sale or transfer of firearms through federally licensed firearms dealers to individuals under the age of 21 are consistent with the text of the Second Amendment, as it was originally understood at the time of ratification. Founding-era sources confirm that such individuals were considered infants without the full panoply of rights at the time, and consistent with that reality, jurisdictions have long restricted firearms access for individuals under the age of 21. The District Court did not abuse its discretion in finding—consistent with *every* other federal court to have examined the constitutionality of similar age-based regulations through the lens of history—that Plaintiffs were unlikely to succeed on the merits because California Penal Code section 27510 does not burden the Second Amendment as it was historically understood.

Plaintiffs sketch a distorted picture of how corpus linguistics works and discount its potential usefulness for future legal analysis, while also asserting that their own corpus linguistics analysis confirms their view that Section 27510 violates the Second Amendment. But Plaintiffs' searches do not appear to have been conducted according to a reliable methodology, and do

not support their attempt to override the District Court's denial of their motion. If anything, Plaintiffs' flawed analysis underscores the importance of conducting any corpus linguistics analysis through the adversarial process of discovery with the benefit of expert guidance or training.

In this interlocutory appeal, this Court assesses "only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand." *Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015). The District Court did so, and this Court should affirm.

ARGUMENT

I. THE SECOND AMENDMENT, AS ORIGINALLY UNDERSTOOD, DOES NOT FORECLOSE SECTION 27510'S LIMITED AGE-BASED REGULATIONS

A. A Well-Regulated Militia

Plaintiffs contend that, under *Heller*, the term "militia" in the prefatory clause was originally understood as referring to an "unorganized" body of "every able-bodied man" from which the organized militia would be called to muster. Pls.' Supp. Br. at 3. That may be so, but *Heller*'s distinction between the unorganized and organized militias has no effect on the scope of the right protected in the operative clause; *Heller* made clear that the prefatory clause "does not limit or expand the scope of the operative clause."

District of Columbia v. Heller, 554 U.S. 570, 578 (2008).

Further, Plaintiffs' argument still confuses *duties* with *rights*. *See* Defs.' Supp. Br. at 9-10. The fact that the first Militia Act included persons below the age of 21 in the organized militia—and imposed an actual duty to keep and bear arms in militia service—does not dictate that those individuals had a corresponding right to keep and bear arms, much less to purchase them rather than procuring them through their parents or guardians. *See Young v. Hawaii*, 992 F.3d 765, 819 (9th Cir. 2021) (en banc) (noting that a "*righ*t to carry . . . firearms" and a "*duty* to carry" are "quite different"). It follows that potential service of members of the "unorganized" militia in the "organized" militia—and any corresponding militia-related duties—does not translate into a freestanding right of those under 21, who were generally understood to live under the authority of their parents, to keep and bear arms. *See Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives* (*BATF*), 700 F.3d 185, 204 n.17 (5th Cir. 2012); Defs.' Supp. Br. at 9-10.[1] And as explained below, the Supreme Court has

[1] While Plaintiffs claim that "the States and Congress quickly coalesced around 18 as the standard" lower age limit for militia service, Reply Br. at 7, the fact remains that in the colonies and into the nineteenth century, some states set the age for militia service lower than 18, *see BATF*, 700 F.3d at 204 n.17; *Powell v. Tompkins*, 926 F. Supp. 2d 367, 388 n.18 (D.

recognized that even able-bodied men who might originally have been understood to be members of the unorganized militia can and are excluded from the Second Amendment right in some cases. *See infra* § I.B.

B. The Right of the People

While *Heller* briefly examined the phrase "the right of the people" in determining whether the right codified in the Second Amendment was collective or individual—and in doing so "presum[ed] that the Second Amendment right is exercised individually and belongs to all Americans," *Heller*, 554 U.S. at 581—it did not "conclusively determine" that the right extends to "all Americans." Pls.' Supp. Br. at 5. Rather, *Heller* made clear that the Second Amendment does not bar governments from prohibiting entire categories of persons—including, but not limited to, felons and the "mentally ill"—from keeping and bearing arms. *Heller*, 554 U.S. at 626-27 & n.26, 635.[2] And elsewhere, the Court alternately described "the people"

Mass. 2013) (noting that minimum age for militia service "varied wildly across the colonies and early states). This fact undermines Plaintiffs' argument that membership in the militia, organized or unorganized, bestowed infants under 21 with an unqualified right to keep and bear arms. Defs.' Supp. Br. at 9-10, 28 n.4.

[2] *See, e.g.*, *Mai v. United States*, 952 F.3d 1106, 1109 (9th Cir. 2020) (upholding federal "lifetime ban[]"prohibiting possession by individuals "whom a state court committed involuntarily to a mental institution"), *cert. denied*, No. 20-819, 2021 WL 1602649 (U.S. Apr. 26, 2021); *United States*

as "unambiguously refer[ring] to all members of the political community, not an unspecified subset," 554 U.S. at 580; "'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,'" *id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)); and "law-abiding, responsible citizens," *id.* at 635.

Nothing in *Heller*, then, supports the conclusion that the phrase "the people" in the Second Amendment was originally understood to include "all Americans" under 21. *See United States v. Huitron-Guizar*, 678 F.3d 1164, 1168 (10th Cir. 2012) (collecting cases and declining to decide whether non-citizens are categorically excluded from the Second Amendment right "because the question in *Heller* was the amendment's *raison d'être*—does it protect an individual or collective right?"—not who exactly was among "the people"); Note, *The Meaning(s) of "The People" in the Constitution*, 126 Harv. L. Rev. 1078, 1079, 1086-87 (2013). But the historical record demonstrates that the founding generation would have regarded those under 21 as infants who did not have an individual right to keep and bear arms. 1-ER-0008-0011; Answering Br. at 21-29.

---

v. Chovan, 735 F.3d 1127, 1140 (9th Cir. 2013) (upholding federal law prohibiting possession by domestic violence misdemeanants).

C. Shall Not Be Infringed

Plaintiffs are equally wrong in asserting that the Second Amendment's phrase "shall not be infringed" places governments "under a mandatory duty to not restrain, impede, hinder, or curtail in the smallest degree the individual right to keep and bear arms." Pls.' Supp. Br. at 8; *see also id.* at 1,7, 30-31. *Heller* itself confirmed that "the Second Amendment right is not unlimited." 554 U.S. at 626. And in *McDonald*, the Court reiterated that *Heller*'s holding recognizing an individual right neither "cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,'" *McDonald v. City of Chicago*, 561 U.S. 742, 785-86 (2010) (plurality opinion) (quoting *Heller*, 559 U.S. at 626-27), nor "eliminate[d]" the ability of states to "experiment[] with reasonable firearms regulations," *id.* (citation omitted).

Plaintiffs conflate the notions of proscribed *infringement* and permissible *regulation*. The Second Amendment analysis examines first whether a right exists at all, and if so, the scope of permissible regulation. *See Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). Where

regulations or restrictions find deep roots in English and American traditions, they "do not infringe what the Court called the 'historical understanding of the scope of the right'" and pass muster at step one of this Court's two-step framework for resolving Second Amendment challenges. *Young*, 992 F.3d at 826. This distinction is not novel, yet Plaintiffs ignore it. *See* Thomas M. Cooley, Treatise on Constitutional Limitations 429 (5th ed. 1883) (noting that "[t]he federal and State constitutions [] provide that the right of the people to bear arms shall not be infringed; but how far it may be in the power of the legislature to regulate the right we shall not undertake to say"); Pls.' Supp. Br. at 8, 30-31.

Nunn v. State, 1 Ga. 243 (1846), which Plaintiffs cite as evidence that there can be *no* intrusion on the individual right, Pls.' Supp. Br. at 7, demonstrates why Plaintiffs' characterization of the phrase "shall not be infringed" is incorrect. In *Nunn*, the Georgia Supreme Court struck down a portion of an act prohibiting "bearing arms *openly*," while *upholding* as "valid" and consistent with the constitutional right to keep and bear arms that portion of the act that "suppress[ed] the practice of carrying certain weapons *secretly*." 1 Ga. at 251.

Heller "did not undertake to explain how far the protection to bear arms extended." *Young*, 992 F.3d at 782. But, as explained at length in

Defendants' Answering and Supplemental Briefs, *every* federal court to have considered age restrictions on the ability of 18-20-year-olds to purchase, procure a license to carry, or even *possess* a firearm has answered that question by concluding that there is a longstanding history of regulating access to firearms by those under 21 that either places such regulations entirely outside Second Amendment protection, or permits them to survive intermediate scrutiny. *See* Answering Br. at 21-33 (collecting cases); Defs.' Supp. Br. at 7-15; *see also BATF*, 700 F.3d at 204.

Plaintiffs argue that "infringe" encompasses "more subtle" limitations than a "complete ban." Pls.' Supp. Br. at 6. But Defendants have not argued that the Second Amendment *only* proscribes absolute bans. Rather, Defendants have explained, and the District Court correctly concluded, that Section 27510—which applies only to the discrete category of individuals under 21, contains multiple exemptions, and *does not prohibit possession, use, inheritance, or acquisition of firearms*—is not a "complete ban." *See* Answering Br. at 6-12, 56-57; *see also* 1-ER-0011-0013. Federal courts considering similar age limitations have universally found that comparable exemptions support upholding age-related firearms regulations. *See, e.g.*,

Answering Br. at 31-33, 56-57.[3] Further, individuals below the age of 21 who choose not to invoke an available exemption to acquire a firearm automatically "age out" upon turning 21—as did all three individual plaintiffs here. Answering Br. at 62.

II. CORPUS LINGUISTICS IS UNLIKELY TO ASSIST IN RESOLVING THIS INTERLOCUTORY APPEAL AND SHOULD BE APPROACHED WITH CAUTION

The parties agree that corpus linguistics is unlikely to provide much assistance to the Court in its resolution of this appeal. *See* Pls.' Supp. Br. at 3; Defs.' Supp. Br. at 25. However, Plaintiffs' overstated criticisms of the methodology ignore its potential for usefulness as an additional tool for constitutional and statutory interpretation.[4] And myriad reliability concerns with Plaintiffs' corpus linguistics research confirm that corpus linguistics

[3] Similarly, *Young* upheld Hawaii's "good cause" open-carry licensing scheme, which includes exemptions for members of law enforcement, the armed forces, and certain federal agencies; for individuals outside those categories to use firearms in their homes, businesses, or sojourns; and for any person 16 or older to carry and use rifles and shotguns while hunting. 992 F.3d at 775.

[4] Indeed, Plaintiffs' objections to corpus linguistics appear to reflect more of a concern with the *direction* of corpus linguistics research in the Second Amendment context than with the *merits* of the methodology itself. *See* Defs.' Supp. Br. at 22 n.11 (discussing growing body of corpus linguistics scholarship re-examining *Heller*); *see* Pls.' Supp. Br. at 8 (referring obliquely to "recent efforts by some to use [corpus linguistics] to determine the Second Amendment's original public meaning").

analysis should be conducted in the trial court in the first instance, if at all, rather than in this interlocutory appeal.

A. Corpus Linguistics May Prove to Be a Useful Addition to the Jurist's Toolbox in Future Cases

Corpus linguistics is a relatively new and emerging interpretative technique, requiring further study and refinement; it may well become a useful tool in constitutional and statutory interpretation, including in the Second Amendment context. Nonetheless, the Court should be cautious in using corpus linguistics in the context of this interlocutory appeal. *See* Defs.' Supp. Br. at 18-20. And while the parties share some concerns, *see id.* at 18 (discussing potential bias in source material), Pls.' Supp. Br. at 13-17 (same), Defendants disagree with Plaintiffs' supposition that corpus linguistics will have *no* value in future cases assessing the Second Amendment's original public meaning. Corpus linguistics is not, as Plaintiffs contend, merely a "nose-count[ing]" tabulation exercise devoid of any examination of contexts in which words are used. Pls.' Supp. Br. at 10-11 (claiming corpus linguistics seeks to resolve semantic ambiguity "by *stripping away* the context"). To the contrary, as Justice Lee of the Utah Supreme Court, a leading proponent of using corpus linguistics by the judiciary, explains,

> Our contention is not that corpus linguistics will provide push-button answers to difficult questions of legal interpretation simply by highlighting the most common sense of a word. Instead, language evidence from linguistic corpora can . . . provid[e] evidence of the way words and phrases are used in particularized contexts, in particular speech communities or linguistic registers, and at particular times.

Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. Chi. L. Rev. 275, 345 (2021); *see also Bright v. Sorensen*, 463 P.3d 626, 638 & n.18 (Utah 2020) (Lee, J.) (noting importance of examining the use of a term "in the context of relevance" to the case because "the meaning of a term or phrase may be affected by the pragmatic or linguistic context in which it is used" (citation omitted)). Plaintiffs' characterization of corpus linguistics as a mere arithmetical exercise, Pls.' Supp. Br. at 8-13, is a "straw man" argument, Lee & Mouritsen, *The Corpus and the Critics*, *supra* at 342.

On the contrary, corpus linguistics employs several methods to examine the context of word usage in a database. Concordance-line analysis, for example, enables a researcher to conduct "computer-aided searches" to gather and analyze a large set of examples in which "a particular word or phrase [was] used in a particular grammatical and topical context." Lee & Mouritsen, *The Corpus and the Critics*, *supra* at 292; Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127

Yale L.J. 788, 832 (2018) (noting that concordance-line analysis "allows a corpus user to evaluate words *in context* systematically" (emphasis added)). But, like computer-aided legal research, corpus linguistics still requires interpretation in evaluating search results. *See Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 441 (6th Cir. 2019) (Thapar, J., concurring in part and concurring in the judgment) (noting that judges "will still need to exercise judgment").

And in applying corpus linguistics techniques to constitutional or statutory interpretation, courts would still need to interpret the text "'as a whole,'" *Jones v. Gov. of Fla.*, 975 F.3d 1016, 1103 (11th Cir. 2020) (Jordan, J., dissenting) (quoting Antonin Scalia & Bryan A. Garner, Reading Law 167 (2012)), and not simply "through the amalgamation of the meaning of the words" in the text, *id.* at 1104 (citation omitted). Thus, courts would not be free to simply "add up" the meanings of discrete phrases without harmonizing them in context.

B. Plaintiffs' Corpus Linguistics Research Raises Reliability Concerns that Underscore the Need for Caution Here

Despite devoting much of their supplemental brief to criticisms of corpus linguistics, *see* Pls.' Supp. Br. at 8-20, Plaintiffs provide the results of corpus linguistics searches they conducted in BYU's Corpus of Founding

Era American English ("COFEA"). *See* Pls.' Supp. Br. at 21-30, App. (compiling concordance lines and providing frequency analysis results). Their analysis is fundamentally flawed on multiple fronts.

First, it is not clear that Plaintiffs selected an appropriate or statistically significant sample of concordance lines to make any definitive assertions about the results of their analysis. *See* Lee & Mouritsen, *The Corpus and the Critics*, *supra* at 333 (emphasizing that "a limited evidence set could produce" unreliable results). Plaintiffs do not explain why they sampled 150 results for each query, which account for only 0.7 percent of the total number of concordance lines returned for the term "militia," *see* Pls.' Supp. Br. at 22 & n.28 (150/20,680), and just 0.3 percent of the total number of concordance lines returned for the term "the people," *see id.* at 26 n.34 (150/57,000). Nor do they explain how they identified their sample sets. Such decisions bearing on methodological rigor likely require the assistance of someone trained in corpus linguistics research.

Second, Plaintiffs do not explain their methodology for "coding" the results of their COFEA searches. Plaintiffs differentiate between four "categories" for each of the searches, *see* Pls.' Supp. Br. at 22, 25-26, 29, but they fail to disclose any specific criteria used to sort the results among those categories (or to exclude results as irrelevant). Plaintiffs' appendix of

underlying data sheds little light on how Plaintiffs made their coding decisions. For example, Plaintiffs fail to explain when or how a word "unambiguously" refers to a specific characteristic (*e.g.*, a reference to the term "right" that "unambiguously includes people under the age of 21"). *See id.* at 25.[5] This information is necessary to any "meaningful analysis"; without it, Plaintiffs' reporting of concordance-line data lacks the "'*qualitative aspect* of corpus linguistics analysis'" that "'usually provides the best and most important data' about how [a] word or phrase is being used." *Salt Lake City Corp. v. Haik*, 466 P.3d 178, 184 n.29 (Utah 2020) (quoting James C. Phillips et al., *Corpus Linguistics and 'Officers of the United States'*, 42 Harv. J.L. Pub. Pol'y 871, 880 (2019)).

Third, Plaintiffs' searches are unsound. Their search related to the phrase "A well regulated Militia" was limited to a search for the word "militia" without any connection to the phrase "well-regulated." *See* Pls.' Supp. Br. at 21-25.[6] For the term "right," Plaintiffs did not exclude

[5] Plaintiffs also appear to include irrelevant results without explanation. *See* Pls.' Supp. Br. at App6 (concordance line 13) (referring to "the *right* owner thereof").

[6] Plaintiffs searched for collocates with the term "body," *see* Pls.' Supp. Br. at 24, but did not search for any collocates with the phrase "well-regulated," which would be more relevant to the phrase being examined. In

irrelevant usages clearly referring to rights of sovereigns rather than individuals.[7] And Plaintiffs' analysis of the term "infringe" plainly does not provide "powerful confirmation" that lesser restrictions than "an absolute ban" violate the Second Amendment. Pls.' Supp. Br. at 30; *see supra* § I.C.

CONCLUSION

This Court should affirm the District Court's denial of the preliminary injunction.

---

fact, it does not appear that Plaintiffs conducted any search for the phrase "well-regulated" standing alone.

[7] Plaintiffs coded "Britain shall still have the right" as being "used in a way that could include people under the age of 21." Pls.' Supp. Br. at App6 (concordance line 15), 26. Similarly, Plaintiffs included references to other sovereign rights and coded them as having "no way to determine what ages are referenced." *See id.* at App7 (concordance lines 25 and 28), 26.

Dated: May 3, 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 3,248 **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 March 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** May 3, 2021
*(use "*s/[typed name]*" to sign electronically-filed documents)*