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*.	No. 20-56174 Oral Argument: May 12, 2021 Expedited consideration requested On Appeal from the United States District Court for the Southern District of California D.C. No. 3:19-cv-01226-L-AHG District Judge M. James Lorenzo

Motion of Neal Goldfarb for Leave to File a 2.948- Word Reply Brief as Amicus Curiae Supporting Neither Party, and for Suspension of Circuit Rule 29.1 to Permit Such Leave to Be Granted

Neal Goldfarb, having previously been granted leave to file an *amicus* brief addressing the issues on which the Court has ordered supplemental briefing, now moves for leave to file a 2,948-word reply brief as amicus curiae supporting neither party, and for the Court to suspend the operation of Circuit Rule 29.1 in order to permit such leave to be granted.

As discussed below, much of information about corpus linguistics in the parties' supplemental briefs is false or misleading. But while the Court could ordinarily count on the parties in a case to correct their opponents' errors, the parties here

cannot be counted on to do that. This means that unless Movant's brief is accepted for filing, the Court will have no source of accurate information to correct the parties' false or misleading statements.

Appellants have informed Movant that they oppose this motion. Appellees have stated that they take no position on the motion.

Because oral argument is scheduled for May 12—only 9 days after the filing of this motion—Movant requests that this motion be decided on an expedited basis.

1. **The court should suspend the operation of Circuit Rule 29.1.**

Whereas Fed. R. App. P. 29(a)(7) provides that an amicus may file a reply brief with the Court's permission, Circuit Rule 29.1 states, "No reply brief of an amicus curiae will be permitted." Therefore, the granting of this motion would require that the operation of Circuit Rule 29.1 be suspended. As explained below, the Court has the power to do so, and in the unusual circumstances presented here, that power should be exercised.

a. The Court has power to suspend the operation of Circuit Rule 29.1.

Rule 2 of the Federal Rules of Appellate Procedure provides that for good cause, a court of appeals may "suspend any provision of these rules in a particular case and order proceedings as it directs" (except to the extent that Rule 26(b) prohibits the extension of certain deadlines). While the Circuit Rules do not include a counterpart to Fed. R. App. P. 2, the Circuit Rules themselves are promulgated

under its authority, as well as that of Fed. R. App. P. 47 ("Local Rules by Courts of Appeals").[1] Because Rule 47 is sufficient on its own to authorize each circuit to promulgate its own local rules, it is reasonable to conclude that based on the invocation of Rule 2 as a source of authorization, the power of suspension under Rule 2 extends to the Circuit Rules as well as to the Federal Rules of Appellate Procedure.

b. Suspension of Circuit Rule 27.1 is appropriate here.

The circumstances presented here are a far cry from the kind of situation that was most likely what motivated the promulgation of Circuit Rule 27.1. It is fairly obvious from the Circuit Advisory Committee Note that the rule is an effort to deal preemptively with the all-too-common problem of *amicus* briefs that are repetitive of those filed on behalf of the parties:

> The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. Prospective amici are encouraged to file a joint brief. Movants are reminded that the Court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties.
>
> Amici who wish to join in the arguments or factual statements of a party or other amici are encouraged to file and serve on all parties a short letter so stating in lieu of a brief. If the letter is not required to be filed electronically, the letter shall be provided in an original. [2]

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[1] Ninth Circuit Rules, Preamble.

[2] Circuit Rule 27.1 note.

While redundant *amicus* briefs are a possibility at any stage in the briefing, there is reason to think that it would present a heightened concern at the reply-brief stage, when there would be less chances that an *amicus* brief would provide value above and beyond what would be provided by the parties' briefs.

There are also factors specific to this case that weigh in favor of suspending the operation of Rule 27.1. One of them has to do with the nature of the issues as to which the Court called for supplemental briefing, which create a need for *amicus* participation that is absent in the vast majority of cases. The supplemental-briefing order was entered *sua sponte*, in two senses: the Court called for supplemental briefing on its own initiative, and the idea of consulting corpus data had not previously been raised by the parties on either side of the dispute. Moreover, those issues involve a newly-developed interpretive methodology with which most attorneys are unfamiliar. That puts a premium on input from *amici* possessing the necessary knowledge and experience.

Another factor is that Movant is seeking leave to file a brief that does not support either party, the purpose of which is to correct false and misleading statements made by both parties in their supplemental briefing. And in the unusual circumstances here, there is no reason to expect that the parties on one side will call out the errors made by their opponents.

That is because on the question whether the Court should consider corpus evidence, the parties' respective positions are largely aligned: neither party wants corpus linguistics to play any part in the case. Appellants argue that in the context of legal interpretation, corpus linguistics is unreliable altogether.[3] And while Appellees do not share Appellants' hostility to the substance of *amicus*'s analysis, they are skittish about the use of corpus linguistics as a general matter, and they contend that it shouldn't be considered with this case in its current posture.[4] So as to the question whether the Court should consider corpus data in this case (whether for the purpose of deciding the case under *Heller* or otherwise), neither set of parties has much incentive to dispute anything that has been said by those on the other side.

There are also additional factors making it likely that with respect to the use of corpus linguistics, the parties' reply briefs will be in agreement much more than would be expected in a more typical case. However, those factors go not only to the issue of whether Circuit Rule 27.1 should be suspended, but also to whether, if the rule is suspended, Movant's brief should be accepted for filing. It is therefore discussed below, as part of the argument on the latter issue.

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[3] Appellants' Supp. Br. at 8-20.

[4] Appellees' Supp. Br. 18-20, 23-24.

2. *Amicus* should be granted leave to file a reply brief, because the parties have provided false and misleading information that may diminish the value of the supplemental briefing to the Court if it is not corrected.

Having directed the parties to file supplemental briefs discussing what light corpus linguistics can shed as to several specified issues, the Court has an obvious interest in being provided with accurate information about corpus linguistics. Unfortunately, the parties' supplemental briefs fall short on that score.

Of the two briefs, Appellants' is the more problematic one. More than a third of the brief is devoted to a six-part condemnation of the use of corpus linguistics in legal interpretation, with two of the parts presenting a distorted picture of corpus linguistics as it is used in legal interpretation, and the remaining four being devoted to arguments that in some respects have at least some general validity, but that are overblown to the point of being misleading.[5]

Appellees' brief is more measured than Appellants', but it too is misleading in several respects. Appellees cite and discuss articles by two critics of using corpus linguistics, but they neither cite nor discuss the articles by *amicus* in which he

[5] In addition to the flaws discussed above, Appellants present what purports to be a corpus analysis of *well regulated militia* that Movant describes in his brief as "corpus-linguistic malpractice" (p. 10). As of the filing of this motion, it is unknown whether Appellees have noticed the flaw *amicus* has identified and will point it out in their reply brief.

responded to those authors' criticisms.[6] As to one of the articles, *amicus* treated the criticism as overstated, explaining that it amounted to no more than saying that some issues are not good candidates for corpus analysis.[7] And *amicus*'s response to the other article argues that the author's analysis is fundamentally flawed.[8]

Appellees might not have been aware of *amicus*'s responses to the articles it cited, since both responses were posted on the Social Science Research Network but not published in a law review. But even assuming complete good faith on the part of Appellees', their supplemental brief presented an incomplete picture of the relevant literature and was therefore misleading. And to make matters worse, the content of that misleading impression overlaps with the unfounded criticisms levelled by Appellees.

Furthermore, Appellees discuss and quote from one of *amicus*'s articles in a way that can be read to give the misleading impression that *amicus* agrees in part

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[6] Appellees' Supp. Br. 18 (discussing Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. Rev. 1503 (2018) and Kevin P. Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726 (2020).

[7] Neal Goldfarb, *Corpus Linguistics in Legal Interpretation: When Is It (In)appropriate?* at 2-4 (2019), available at bit.ly/WhenCorpLing (responding to the argument raised by Hessick (and others)).

[8] Neal Goldfarb, *Varieties of Ordinary Meaning: Comments on Kevin P. Tobia, "Testing Ordinary Meaning"* (2020), available at bit.ly/VarietiesOrdinaryMeaning.

with Appellants.[9] And this error is less excusable then the first one, because *amicus*'s position was made unmistakably clear in the sentence immediately following the one Appellees quoted.

3. The Court should grant leave for Movant's reply brief to contain 2,948 *words.*

Under the formula prescribed by Fed. R. App. P. 29(a)(5), which limits *amicus* briefs to half the maximum number of words allowed for a party's brief, Movant's brief would be permitted to contain no more than 1,625 words (half the 3,250 words permitted for reply briefs by the order directing supplemental briefing).

Considering the number of issues to which a response was necessary, 1,625 words is insufficient to permit an adequate discussion of all of them. Even with a brief containing 2,948 words, *amicus* has been forced to leave out certain arguments that he would otherwise have made, and to present greatly abbreviated versions of the arguments he did include, which made it necessary to omit any discussion of various complexities. Cutting the brief back even more would substantially reduce its usefulness to the Court.

May 3, 2021.

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[9] Appellees' Supp. Br. 24 (quoting from Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. Rev. 1359, 1379.

Respectfully submitted,

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Certificate of Compliance

I HEREBY CERTIFY as follows:

1. I am the attorney for the Movant.

2. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(a) because it contains 1,785 words, excluding the parts exempted by Fed. R. App. P. 32(f).

3. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

/s/ Neal Goldfarb
Counsel for Movant

Dated: May 3, 2021

Certificate of Service

I HEREBY CERTIFY as follows:

1. On May 3, 2021, the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

2. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Neal Goldfarb

Dated: May 3, 2021 *Counsel for Amicus Curiae*

No. 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 United States District Court
for the Southern District of California, Civil Case No. 3:19-cv-01226-L-AHG
(District Judge M. James Lorenz)

Reply Brief of Neal Goldfarb as Amicus Curiae in Support of Neither Party, Responding to the Parties' Supplemental Briefs and Taking No Position as to Affirmance or Reversal

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Interest of Amicus[1]

Amicus Neal Goldfarb previously filed an *amicus* brief in this case (with leave of Court) addressing the issues on which supplemental briefing had been ordered, in order to inform the Court of the corpus-based work he has done regarding the Second Amendment's original meaning. The purpose of this reply brief is to correct certain false and misleading information about corpus linguistics that is provided in the parties' supplemental briefs, and to point out a major flaw in Appellants' corpus analysis of *well regulated militia.*

Argument

I. Appellants' criticisms of corpus linguistics are either unfounded or overstated.

A. Appellants present a distorted view of how corpus linguistics is used in legal interpretation.

Appellants contend that "the 'frequency hypothesis' is unsound" and that "legal corpus linguistics ignores the history and context of legal texts."[2] Both arguments paint an inaccurate picture of how corpus linguistics is used in legal interpretation.

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[1] No party's counsel authored any part of this brief. Nobody other than amicus and his counsel contributed any money to fund the brief's preparation or submission.

[2] Appellants' Supp. Br. 8, 17.

1. The frequency hypothesis.

a. Appellants argue that it makes no sense to say that the meaning of a word in a particular context should be determined on the basis of most frequent use of a word overall, without regard to context.[3] They are right in making that point, but they are wrong in arguing that as used in legal interpretation, corpus linguistics follows such a nonsensical approach.

As actually used in legal interpretation corpus linguistics (and more particularly, sense differentiation via frequency analysis) has always taken account of the context in which the relevant word or phrase appears in the statute, constitution, or other provision at issue.[4] Thus, what matters is not the most common use of the word

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[3] *Id.* at 8-11.

[4] *See, e.g.*, *In re Adoption of Baby E.Z.*, 266 P.3d 702, 726-27, 728, 729 (Utah 2011) (Lee, J., concurring in part and concurring in the judgment); Stephen C. Mouritsen, *The Dictionary Is Not A Fortress: Definitional Fallacies and A Corpus-Based Approach to Plain Meaning*, 2010 BYUL Rev. 1915, 1957-58; Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. Rev. 1359, 1362, 1366-68, 1378-87 (2018) ("*A Lawyer's Introduction*"); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L. J. 788, 795, 821-24, 826 (2018); Neal Goldfarb, *Corpus Linguistics in Legal Interpretation: When Is It (In)appropriate?* (2019), ("*When Is Corpus Linguistics (In)appropriate?*") available at bit.ly/WhenCorpLing; Neal Goldfarb, *The Use of Corpus Linguistics in Legal Interpretation*, 7 Ann. Rev. Ling. 473, 476, 477-78 (2020) ("*Corpus Linguistics in Legal Interpretation*"), available at bit.ly/ GoldfarbAnnRevLing.

or phrase overall, but the most common use when the word or phrase appears in a context similar to its context in the legal provision.[5]

b. Contrary to what Appellants imply, it is not true that no justification has been offered for the frequency hypothesis.[6] Amicus has presented such a justification in two papers.[7] As those papers explain, one of the ways in which courts have fleshed out the idea of ordinary meaning has been to equate the ordinary meaning of a word or phrase with the way in which the word or phrase is "ordinarily used." That formulation is frequency-based by definition, because what happens "ordinarily" is what happens most of the time. And on the assumption that people typically speak and write in such a way that they are understood, the fact that the word-in-context or phrase-in-context is ordinarily *used* to convey a particular meaning is evidence as to how it is ordinarily *understood*.[8]

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[5] *E.g.*, *A Lawyer's Introduction*, 2017 BYU L. Rev. at 1379; *Judging Ordinary Meaning*, 127 Yale L. J. at 795, 823; *Corpus Linguistics in Legal Interpretation*, 7 Ann. Rev. Ling. at 476, 477-78 (2020) (bit.ly/Goldfarb AnnRevLing).

[6] Appellants' Supp. Br. 11.

[7] *Varieties of Ordinary Meaning* at 2-8 (bit.ly/VarietiesOrdinary Meaning); *Corpus Linguistics in Legal Interpretation*, 7 Ann. Rev. Ling. at 476, 477-78 (bit.ly/Goldfarb AnnRevLing).

[8] *See Varieties of Ordinary Meaning*, at 5-8, 8 (bit.ly/VarietiesOrdinary Meaning); *Corpus Linguistics in Legal Interpretation*, 7 Ann. Rev. Ling. at 476-77 (bit.ly/Goldfarb AnnRevLing).

c. The foregoing justification for the frequency hypothesis disposes of Appellants' arguments relying on the assertions that "some plainly accepted uses of a word may not appear in a corpus *at all* "[9] and that "legal corpus linguistics often neglects non-prototypical uses of a term."[10] A use-in-context of a word or phrase that is acceptable, but nevertheless infrequent, or that is non-prototypical and infrequent, does not reflect the way the word-in-context or phrase-in-context is ordinarily used.

But this would not prevent such a use from being considered part of the word's ordinary meaning. The conception of ordinary meaning as "how the word-in-context is ordinarily used" is not the only conception of ordinary meaning that courts have articulated. Under a different conception, the fact that an infrequent use is deemed acceptable might suffice for it to be regarded as within the ordinary meaning.[11]

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[9] Appellants' Supp. Br. 12 (emphasis in the original).

[10] *Id.* (cleaned up).

[11] *See, e.g.*, *Smith v. United States*, 508 U.S. 223, 230 (1993) ("it is both reasonable and normal to say that petitioner 'used' his [firearm] his drug trafficking offense by trading it for cocaine").

Note, too, that it is doubtful that questions such as whether a blue pitta is a bird or an airplane is a vehicle present issues of word meaning all. Just as one wouldn't say that *spouse* or *parent* has two meanings—one for men and another for women—it makes little sense to say that *bird* has a different meaning for each avian species, or that *vehicle* has separate meanings for cars, trucks, airplanes, and whatever else it might be applied to.

2. Social and historical context.

Appellants fault corpus linguistics for (on their view) "ignor[ing] the history and context of legal texts."[12] But that argument is like criticizing bicycles because they can't mow lawns. Corpus linguistics, like most tools, has a function it was designed to perform, and like most tools it's not good at performing other functions. But that's no reason to throw the tool away.

And that isn't the only absurdity in Appellants' argument. For example, dictionaries resemble corpus linguistics in their inability to perform the kind of historical and political analysis that Appellants refer to. By Appellants' logic, therefore, dictionaries shouldn't be used in legal interpretation. And turnabout is fair play: historical and political analysis by itself cannot resolve issues of word meaning. So by Appellants' logic, it too gets thrown into the trash.

The *sensible* question to ask about how corpus linguistics analysis relates to historical inquiry is not whether corpus analysis by itself illuminates "the ideological and historical context of the Second Amendment right,"[13] but whether using corpus linguistics is somehow incompatible with considering such context.

The answer is no. When dealing with 230-year old texts, the disciplines of linguistics and history complement one another. For example, work by historians can

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[12] Appellants' Supp. Br. 17.

[13] *Id.*

inform one's understanding of individual uses-in-context, and corpus linguistics can reduce the risk that someone doing historical analysis (whether a historian or a Supreme Court justice) will mistakenly assume that a particular word or phrase was used then in the same way that it is used now.

This complementary relationship can be seen in action in *amicus*'s work on the Second Amendment, in which his interpretation of the corpus data drew on historical scholarship and primary historical sources.[14] In contrast, the Court in *Heller* was mistaken abut how *bear arms* was ordinarily used during the Founding Era, and as a result its entire historical analysis is called into doubt.

A different approach to combining corpus linguistics with history is proposed by the important originalist scholar Lawrence Solum.[15] This approach, which Solum calls "triangulation," brings corpus linguistics together with two additional methodologies: (1) immersing oneself in "the linguistic and conceptual world of the authors and readers of the constitutional provision being studied," and (2) studying the "Constitutional Record," which includes "precursor provisions," drafting history, the ratification debates, early historical practice, and early judicial decisions.

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[14] Neal Goldfarb, *A (Mostly Corpus-Based) Linguistic Reexamination of* D.C. v. Heller *and the Second Amendment* 53-56 (2019) ("*A (Mostly Corpus-Based) Reexamination"*), available at bit.ly/ Goldfarb2dAmAnalysis.

[15] Lawrence Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. Rev. 1621.

B. Although Appellants' remaining points are to some extent valid in a general sense, their significance is overstated, and they don't establish that corpus linguistics is unreliable.

1. "Biases in favor of newsworthy or historically salient subjects."

Appellants' argument on this point is explicitly speculative: the corpus data "*may* merely represent biases in favor of newsworthy or historically salient subjects"; "a majority usage…*may* be measuring essentially irrelevant social facts."[16] But while such cases might exist, that suggests only that there are issues as to which using corpus linguistics is not appropriate—a point that amicus recognized and addressed two years ago.[17]

The way to deal with this possibility is to be sensitive to it when deciding whether to use corpus analysis, when deciding what data to collect, and when interpreting the results, not to rule out the use of corpus linguistics across the board.

For example, the risk that the results reflect social contingency rather than linguistic fact can be assessed by investigating whether and to what extent the corpus includes passages in which the relevant meaning is conveyed by expressions that are different from the one at issue and that do not raise the social-contingency risk.

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[16] Appellants' Supp. Br. 13.

[17] Goldfarb, *When Is It (In)appropriate?* at 3-4, 26-53 (bit.ly/WhenCorp Ling).

Thus, in a corpus analysis of *bear arms*, one can review the data for *carry arms*, as to which the results are unlikely to be skewed by the kinds of factors that Appellants refer to. Amicus has in fact reviewed that data, and it shows that in contrast to the scarcity of uses of *bear arms* to convey the meaning 'carry weapons,' people could and did do so by using *carry* arms.[18] As a result, Appellants' discussion of the social and historical circumstances of the Founding Era is a red herring.

2. "Privileging elite usage over common usage."

While *amicus* does not dispute the premise that the corpus data is dominated by what Appellants call "elite" usage, there are several reasons why that factor does not justify rejecting corpus analysis.

First, the perfect is the enemy of the good. While corpus linguistics, like all human creations, is imperfect, it is an improvement over established interpretive tools such as dictionaries.

Second, while there was undoubtedly variation in linguistic usage based on social differences such as urban versus rural, educated versus uneducated, what is important is not merely that such variation existed, but whether that variation makes a difference in interpreting the Constitution. For example, was there in fact variation

[18] *A (Mostly Corpus-Based) Reexamination* at 35-39 (bit.ly/Goldfarb2dAmAnalysis).

in how phrases such as *bear arms* were used and understood? Appellants don't try to answer that question, and *amicus* is unaware of any scholarship addressing the issue. So we are back where we started: the perfect is the enemy of the good.

Finally, legal interpretation has to *amicus*'s knowledge never paid any attention to the issue of "elite" versus "non-elite" usage. For example, the Supreme Court in *Heller* relied on Samuel Johnson's dictionary without worrying about whether it reflected the usage of the lower socioeconomic classes.[19] To the extent that the issue of elite versus non-elite usage is of concern, it is an issue that concerns legal interpretation generally, not just the use of corpus linguistics.

3. "A false illusion of scientific objectivity."

Amicus agrees that corpus analysis should not be seen in a way that gives it a "false façade of scientific objectivity."[20] What is objective about corpus analysis is the data; in other respects—*e.g.*, the interpretation of the data—the exercise of human judgment is necessary. It is unfortunate that some corpus-linguistics advocates of have made statements that have generated misimpressions of the kind that Appellants have fallen victim to.

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[19] 554 U.S. at 581, 582, 597.

[20] Appellants' Supp. Br. 19.

In any event, the way to prevent corpus analyses from being given undue deference is to promote an accurate understanding of what it involves, not to reject it altogether.

C. Appellants do not contend that any of their criticisms apply to amicus's work on the Second Amendment.

The discussion above has shown that to the extent that Appellants' have made valid points, the conclusion to be drawn isn't that corpus linguistics is inherently unreliable as an interpretive tool, but rather that its use is not appropriate for all issues and that anyone using it has to be careful and know what they are doing. Thus, Appellants' argument are properly directed not toward the use of corpus linguistics in general but to its use in particular cases, as to specific issues.

But Appellants don't contend that any of the concerns they have raised are applicable to *amicus*'s work on the Second Amendment. Indeed, they don't even mention it, or any of the other corpus analyses of the Second Amendment.

II. In their corpus analysis of *well regulated militia*, Appellants commit corpus-linguistic malpractice (and also one of the sins of which they accuse corpus linguistics generally).

Although the Court's supplemental-briefing order directed the parties to brief the original meaning of *well regulated militia*, Appellants' corpus analysis deals only with the single word *militia*, rather than the phrase specified by the Court. Their

reason for doing so is unclear, but whatever the explanation, Appellants' analysis is a good example of how *not* to perform a corpus analysis.

Given the focus on context that characterizes the use of frequency analysis in legal interpretation, analyzing only one word out of a three-word phrase does not represent acceptable corpus-linguistic practice. As explained by Utah Supreme Court Justice Thomas Lee and his coauthor James Phillips, "The communicative content of a phrase isn't always the sum of its parts. This is the linguistic problem of 'compositionality': the meaning of a complex expression is sometimes a compositional function of the meanings of its semantic constituents, and sometimes not."[21]

Moreover, Appellants' treatment of *well regulated militia* is inconsistent with their criticism of the frequency hypothesis, By focusing on a single isolated word, Appellants have committed precisely the same sin that they wrongly impute to legal-interpretive corpus linguistics generally.

III. Appellees' discussion of corpus linguistics is flawed in several respects.

Amicus will address here what he regards as the three most serious flaws in Appellees' discussion.

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[21] Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. Penn. L. Rev. 261, 283-84 (2019) (cleaned up).

First, Appelles quote Carissa Hessick's statement that "how 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."[22] Hessick's basis for that statement was the "newsworthiness" objection that is discussed above in connection with Appellants's argument.[23] Amicus has already explained that the objection shows only that some issues are not good candidates for using corpus linguistics.

Moreover, there is in fact a connection between relative frequency and likely understanding, as *amicus* has shown as part of his justification for the frequency hypothesis.[24]

Second, Appellees quote Kevin Tobia to the effect that the use of corpus linguistics might not "reliably track ordinary people's judgments about meaning."[25] But as *amicus* has shown elsewhere, the experiments on which Tobia based his con-

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[22] Appellees' Supp. Br. at 18 (quoting Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. Rev. 1503, 1509 (2017) ("*Hessick*").

[23] *See Hessick*, *supra* note 22, at 1509.

[24] *Varieties of Ordinary Meaning* at 2-8 (bit.ly/VarietiesOrdinaryMeaning); *Corpus Linguistics in Legal Interpretation*, 7 Ann. Rev. Ling. at 476, 477-78 (bit.ly/GoldfarbAnnRevLing).

[25] Kevin Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726, 727 (2020) (quoted in Appellees' Supp. Br. at 18).

clusions were incapable of providing any relevant information about corpus linguistics.[26]

Third, Appellees refer to, and quote, one of *amicus*'s articles in a way that presents a misleading impression.[27] They say, "any corpus linguistics analysis would have to be careful not to conflate 'ordinary meaning' with 'most common meaning'" (citing amicus's article *A Lawyer's Introduction to Meaning in the Framework of Corpus Interpretation*, 2017 BYU L. Rev. at 13179), and then offer this quote from the same paragraph: "The 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."[28] Taken together, these two statements can be read as suggesting that *amicus* opposes the use of frequency analysis.

But Appellees leave out the sentence that follows the language quoted above, which makes clear that what *amicus* opposes is the use of frequency analysis without limiting the search results to uses of the word at issue in the relevant type of context:

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[26] *Varieties of Ordinary Meaning* at 1-5, 8-13 (bit.ly/VarietiesOrdinary Meaning).

[27] Appellees' Supp. Br. 24. (discussing and quoting *A Lawyer's Introduction*, 2017 BYU at 1379) (cleaned up).

[28] *A Lawyer's Introduction*, 2017 BYU L. Rev. at 1379 (quoted in Appellees' Supp. Br. 24).

"The relative frequency of different senses will typically be relevant only if the inquiry focuses on the specific usage that is at issue."[29]

Conclusion

The discussion in this brief presents an overview of the issues that are discussed; there are details and complexities that it has not been possible to address. But amicus hopes that he made clear that although the use of corpus linguistics in legal interpretation has drawn criticism, the criticism is either groundless or overblown.

May 3, 2021.

Respectfully submitted,

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[29] *Id.* (cleaned up).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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

I am the attorney or self-represented party.

This brief contains 2,948 **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).

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[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
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Signature /s/ Neal Goldfarb **Date** May 3, 2021

Certificate of Service

I HEREBY CERTIFY as follows:

1. On May 3, 2021, the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

2. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Neal Goldfarb

Dated: May 3, 2021 *Counsel for Amicus Curiae*