

No. 12-17808

In the
United States Court of Appeals
for the Ninth Circuit

GEORGE K. YOUNG, JR.,

Plaintiff–Appellant,

v.

STATE OF HAWAII ET AL.,

Defendants–Appellees.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:12-cv-00336-HG-BMK
District Judge Helen Gillmor

Brief of Neal Goldfarb
as *Amicus Curiae* in Support of Appellees,
Arguing in Favor of Affirmance

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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. He has written extensively about the latter topic, in journal articles, amicus briefs, and blog posts.² He is a Dean’s Visiting Scholar at Georgetown University Law Center (his appointment runs through June 30, 2020), but this brief is filed in his individual capacity.

Amicus files this brief in order to call the Court’s attention to his corpus-linguistic analysis of the key language in the Second Amendment’s operative clause: “the right of the people to keep and bear Arms.” That analysis draws primarily on evidence that was not before the Court when *District of Columbia v. Heller*³ was decided, and it concludes that *Heller* was mistaken about the meaning of that phrase. *Amicus* will argue that despite *Heller*’s precedential status, his analysis is relevant to determining how broadly or narrowly *Heller* should be interpreted.

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

² LAWnLinguistics.com. Links to *amicus*’s briefs and papers are available at bit.ly/GoldfarbBriefs and bit.ly/GoldfarbPapers, respectively.

³ 554 U.S. 570 (2008).

Introduction and Summary of Argument⁴

This brief examines the Second Amendment through the lens of corpus linguistics—a methodology that has over the past decade begun to be used as a tool in legal interpretation. Corpus linguistics entails the use of corpora—large digitized collections of real-world texts—for the purpose of identifying and studying patterns of word usage. Corpus linguistics enables judges and lawyers to perform what is in effect lexicographic research, and in appropriate cases it can provide a clearer and more reliable basis for determining the original public meaning of constitutional provisions than was previously possible.

Amicus has performed an in-depth linguistic analysis of *the right of the people to keep and bear Arms*. That analysis, entitled *A (Mostly Corpus-Based) Linguistic Reexamination of D.C. v. Heller and the Second Amendment* (hereinafter, “*Goldfarb Analysis*”), is available at bit.ly/Goldfarb2dAmAnalysis. It relies mainly on two corpora that became available in May 2018 and that are designed as resources for researching Constitutional original public meaning: COFEA (Corpus of Founding Era

⁴ Both this brief and *amicus*’s analysis follow two typographic conventions generally followed in linguistics:

Italics signal that a word or expression is being used to refer to itself as an expression. *E.g.*, “The word *language* has eight letters.”

‘Single quotation marks’ are used to enclose statements of the meaning of a word or expression. *E.g.*, “*Closed* means ‘not open.’”

American English) and COEME (Corpus of Early Modern English). These corpora provide evidence about founding-era English that is more extensive and reliable than what the Supreme Court relied on in *Heller*.

As discussed in detail in *amicus*'s complete analysis, the evidence points toward the conclusion that *Heller*'s textual analysis was fundamentally flawed. *Amicus*'s analysis concludes that the Second Amendment is best read as protecting the right to serve in the militia, not an individual right to carry weapons in order to be prepared in the event of confrontation.

The major steps along the way to that conclusion are as follows:

- Contrary to the conclusion in *Heller*, *carry* was not generally synonymous with *bear*.
- Although *arms* was often used literally, as meaning 'weapons,' it was used roughly as often in a variety of figurative senses having to do with warfare and the military.
- The use of *bear arms* in the corpus data was overwhelmingly dominated by the use of the phrase in a military-related sense. In all likelihood, therefore, *bear arms* was ordinarily understood to convey such a meaning.
- *The right of the people to...bear Arms* was most likely understood to mean 'the right to serve in the militia.' That interpretation is not ruled out by the fact that *bear arms* appears as part of the phrase *keep and bear arms*.

Moreover, there is reason to think that *the people* as used in the Second Amendment was understood in a collective rather than individual sense and that the class of those who constitute “the people” for purposes of the Second Amendment was understood as being coextensive with the class of people eligible to serve in the militia.

As implied by the final bullet point, *amicus*’s analysis does not rule out the possibility that *Heller* was correct on some of those issues. But it does show that *Heller* was mistaken in thinking that the Second Amendment *unambiguously* means what the Court thought it does. Under the framework followed by *Heller*, therefore, it is appropriate to resolve the ambiguity by consulting the well-regulated-militia clause. And the effect of doing so is that as to each of the relevant textual issues, *Heller*’s nonmilitary interpretation is untenable.

Heller is obviously binding on this Court. But the question whether *Heller* accurately reflects the Second Amendment’s original public meaning is nevertheless relevant here, because it may inform the decision whether *Heller* should be interpreted broadly or narrowly.

Argument

I. An introduction to corpus linguistics as an interpretive tool.

When Lexis and Westlaw were first introduced, what we now think of as simply “legal research” was referred to as Computer Assisted Legal Research. Corpus ling-

uistics makes it possible to do Computer Assisted *Lexicographic* Research. The use of corpus linguistics in legal interpretation is lexicographic in nature because (1) it is based on the basic assumption underlying lexicography (that what words mean is determined by how they are used), (2) it takes advantage of lexicographic methodology, and (3) it is informed by insights about word meaning that have arisen from the use of corpora in lexicography.⁵

The power of corpus analysis arises not merely from using a digitized collection of texts but also from two aspects of corpus design. First, the individual words in a corpus are often tagged to indicate their part of speech (as is the case with COFEA and COEME), which enables linguistically-motivated searches that would otherwise be impossible. For example, the meaning of an adjective can be investigated by looking at the nouns the nouns that it modifies (namely, those occurring immediately to its right), which give insight into how the adjective is understood.⁶

Second, a corpus interface is designed to facilitate linguistic analysis. The kind of search described above (called a “collocate search”) yields a list of the relevant nouns, listed in order of frequency. And if one wants to look at how the relevant word or expression is used, the corpus can provide a KWIC (Key Word In Context)

⁵ See generally Neal Goldfarb, *A Lawyer’s Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. Rev. 1359 (2018).

⁶ Brief for Project on Government Oversight et al. as Amici Curiae at 13-20, *FCC v. AT&T, Inc.*, 562 U.S. 397 (2011) (No. 09-1279).

concordance—a table similar to a spreadsheet, in which the key word appears in a column of its own, along with a portion of the text that immediately precedes it and follows it.

This format makes it possible to review many individual uses quickly, because the context shown in each concordance line is usually enough to support a decision about how each use should be categorized with respect to the question at issue. In this way, one can identify patterns of repeated use that would be difficult if not impossible to recognize by reading the underlying texts one at a time.

The usefulness of corpus linguistics in interpreting legal texts has been recognized by a growing number of appellate judges and by important scholars of originalism and textualism.⁷ One of those scholars said in a 2004 article regarding

⁷ **Judicial opinions:** *E.g.*, *Caesars Entertainment Corp. v. Int’l Union of Operating Engineers Local 68 Pension Fund*, No. 18-2465, 2019 WL 3484247, at *2 (3d Cir. Aug. 1, 2019); *Wilson v Safelite Group, Inc.*, No. 18-3408, 2019 WL 3000995, at *8-11 (6th Cir. July 10, 2019) (Thapar, J., concurring in part and concurring in the result); *Murray v. BEJ Minerals, LLC*, No. OP-0304, 2020 MT 131 at *15-16 (Mont. May 20, 2020) (McKinnon, J., concurring); *State v. Lantis*, 447 P.3d 875, 880-81 (Idaho 2019); *People v. Harris*, 885 N.W.2d 832, 838-39 (Mich. 2016); *id.* at 850-51 n.14 (Markman, J., concurring in part and dissenting in part); *Bright v. Sorenson*, No. 20180528, 2020 WL 1970585 at *10-11 (Utah April 23, 2020); *State v. Rasabout*, 356 P.3d 1258, 1275-90 (Utah 2015) (Lee, A.C.J., concurring in part and concurring in the judgment).

Articles: *E.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *Geo. L.J.* 1, 33 (2018); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 *Yale L. J.* 788 (2018); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 *U. Penn. L.*

the Second Amendment that what is called for by original-public-meaning originalism (the framework in which *Heller* was subsequently decided) is an “examination of linguistic usage among those who wrote and ratified the text as well as the general public to whom the Constitution was addressed.”⁸ He went on to say that if a word or expression had more than one meaning, “it becomes necessary to establish which meaning was dominant,” that the inquiry “is an empirical one that requires actual evidence of usage to substantiate,” that “if possible, one should undertake a quantitative assessment to distinguish normal from abnormal usage.”⁹ Corpus linguistics satisfies all of those requirements. Indeed, Barnett’s prescription was almost certainly informed by his experience a year earlier doing what amounted to a corpus analysis using research assistants rather than a computer.¹⁰

Until recently there existed no publicly available corpus covering the English of the founding era—the period most relevant to investigating constitutional original meaning. But in May 2018, the BYU Law School released beta versions of two cor-

Rev. 261 (2019); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. Rev. 1621, 1643-49 (2018); Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 Yale L.J. 774, 809-10 (2020).

⁸ Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237, 239 (2004).

⁹ *Id.*, at 240 (cleaned up).

¹⁰ Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857-58 (2003).

pora designed specifically as resources for original-meaning research: COFEA (the Corpus of Founding Era American English) and COEME (the Corpus of Early Modern English). Those corpora are the primary source of the new evidence justifying a re-examination of *Heller* and the Second Amendment.

II. The corpus data is far more extensive than the linguistic evidence in *Heller*.

A. Although the Supreme Court in *Heller* cited instances of 18th-century usage, that evidence was limited in scope, and upon examination little of the evidence actually supports the Court's interpretation.

The Court relied heavily on dictionary definitions.¹¹ While those definitions were accurate as far they went, they merely recorded different ways that the words had been used, without saying which senses were the most common or reflecting changes in their use over time. The definitions were therefore incapable of providing the kind of reliable view of 18th-century usage required by original-public-meaning originalism.

In addition to relying on dictionaries, the Court considered a small sample of 18th-century usage: 12 instances of *bear arms*, which it read as denoting the non-military carrying of weapons.¹² However, one of those uses was ambiguous (the sixth

¹¹ 554 U.S., at 581-85.

¹² 554 U.S., at 585 n.8, 587 n.10, 588.

quote in footnote 10), and in the others the sense in which the phrase was used was made clear by contextual factors that don't appear in the Second Amendment.

The Court also relied on an article it described as “identifying numerous non-military uses of ‘bear arms’ from the founding period.”¹³ That article provided 11 quotations from pre-ratification documents, but only two of them unambiguously fit the Court’s description.¹⁴ Of the rest, five strike *amicus* as being ambiguous,¹⁵ and six didn’t use the phrase *bear arms*. Although these last six uses referred to the bearing of weapons, the weapons were referred to using words such as *long-bow*, *sword*, *gun*, *poynard*, and *whingar*.¹⁶ But such phrases had no idiomatic military use and are therefore irrelevant.

B. The data underlying *amicus*’s analysis is much more voluminous than what the Court relied on in *Heller*. It includes 531 relevant uses of *bear arms* (or of grammatical variants such as *bearing arms*, *bore arms*, and *arms they bore*), as well as

¹³ *Id.*, at 587 (citing Clayton E. Cramer & Joseph Olson, *What Did “Bear Arms” Mean in the Second Amendment?*, 6 Geo. J. L. & Pub. Pol’y 511 (2008)).

¹⁴ Cramer & Olson, *supra* note 13, 6 Geo. J. L. & Pub. Pol’y at 513, 514 (text at notes 12, 17).

¹⁵ *Id.*, at 514-15, 517 (text at notes 19, 20, 22, 23, 34). The quote at note 34 is listed as ambiguous because it arguably conveys both meanings at once. *Cf. Goldfarb Analysis*, at 60-73.

¹⁶ *Id.*, at 512-13, 517-518 (text at notes 10, 13, 15, 16, 33, 35).

extensive data relating to *bear, arms, carry, the right of the people*, and more.¹⁷ The data for *bear arms* comprised roughly 16 times as many uses as were relied on in *Heller*.

All the data is available at bit.ly/Corpus2AmData, in the form of spreadsheets that show *amicus*'s judgments as to the meaning conveyed by each concordance line. *Amicus*'s evaluation of each line is therefore subject to being reviewed and challenged. But in the nine months since *amicus*'s analysis was completed (after having been published online in a series of blog posts¹⁸), it was not until May 2020 that anything even partially disagreeing with the analysis was published.¹⁹ And even then, the area of disagreement was much smaller than the areas of agreement. For further discussion, see pages 16-17, below.

¹⁷ The data was obtained from COFEA, which covers the period 1760-1799, and from the materials in COEME from the same period. (The date reflected in each corpus is the date of the edition of the book from which the text was taken, which wasn't necessarily the date of first publication.)

¹⁸ See Neal Goldfarb, *Corpora and the Second Amendment*, LAWnLinguistics, bit.ly/Corpus2dAmGuide (last visited June 1, 2020) (providing links to all posts).

¹⁹ Josh Jones, *The "Weaponization" of Corpus Linguistics: Testing Heller's Linguistic Claims*, 34 *BYU J. Pub. Law.* 135, 161-65 (2020) (*"The 'Weaponization' of Corpus Linguistics"*).

III. The corpus data and related historical evidence point to the conclusion that *Heller* was wrongly decided.

The corpus data shows that in almost every respect, *Heller* was mistaken about the facts of 18th-century usage, and therefore about how *the right of the people to keep and bear Arms* was likely to have been understood. To be sure, there are a few points as to which *Heller*'s interpretation cannot be definitively ruled out. But that merely means that “the right of the people to keep and bear Arms” is ambiguous. Under *Heller* the ambiguity should be resolved by consulting the well-regulated-militia clause. And doing so renders *Heller*'s analysis and conclusion untenable.

A. *The evidence weighs against Heller's interpretation.*

1. *bear* (*Goldfarb Analysis*, at 18-23). According to *Heller*, the 18th-century meaning of *bear* was ‘carry.’²⁰ But the corpus data shows that while *bear* was sometimes used that way, that was not how it was ordinarily used. Its most frequent uses—the meanings it was most often used to convey—differed significantly from *carry*'s. For example, while *carry* was often used to denote the physical carrying of tangible objects (*carry provisions, carry goods, carry baggage, carry supplies...*), *bear* was not.

²⁰ 554 U.S., at 584.

The pattern seen in the data is consistent with the historical development of the English language. In a book published six years after *Heller*, the chief etymologist for the Oxford English Dictionary reported on a study in which he had sought, among other things, to determine when it was that *carry* took over from *bear* as the verb generally used to express the meaning ‘carry.’ He concluded that this transition had occurred by the 17th century—a century before the founding era—and perhaps even earlier.²¹

The foregoing evidence casts serious doubt on *Heller*’s conclusion that the “natural meaning” of *bear arms* was essentially a variation on ‘carry weapons.’²² It also demonstrates the hazards of relying on dictionary definitions, which provide no information about how the defined word was *ordinarily* used.

2. *arms* (*Goldfarb Analysis*, at 23-27). The Supreme Court in *Heller* relied on Samuel Johnson’s dictionary for the proposition that the founding-era meaning of *arms* was “Weapons of offence, or armour of defence.”²³ But that was only one of four potentially relevant senses listed by Johnson, the others being “a state of hos-

²¹ Philip Durkin, *Borrowed Words: A History of Loanwords in English* 407-08 (2014).

²² 554 U.S., at 584.

²³ *Id.* at 581 (quoting *Arms*, 1 Samuel Johnson, *Dictionary of the English Language* [no page number] (4th ed. 1773) (cleaned up) (hereinafter, *Johnson’s Dictionary*)).

tility,” “war in general,” and “action; the act of taking arms.”²⁴ Although the Court didn’t mention any of those senses, the corpus data shows that *arms* was used in a figurative sense relating to war and the military roughly as often as it was used in the literal sense cited by the Court. Many of the figurative uses took the form of idiomatic phrases such as these:

appeal to arms, arise in arms, call to arms, enter into arms, exercise of arms, feats of arms, glory of arms, in arms (against), inequality of arms, men at arms, profession of arms, resort to arms, rise (up) in arms, rouse [somebody] to arms, rush to arms, science of arms, take arms (against), terror of arms, trained to arms, urge [somebody] to arms, victorious arms

This information leads one to view *bear arms* in a new light, especially given that *bear* was not ordinarily used to mean ‘carry.’ What it suggests is that even before looking at the corpus data for *bear arms*, there is reason to think that the phrase was ordinarily used in a figurative rather than literal sense; after all, *bear* didn’t generally mean ‘carry’ and *arms* was often used figuratively. Moreover, the idiomatic military-related use of *bear arms* wasn’t at all out of the ordinary. On the contrary, it was merely one of many idiomatic phrases (a total of 60 in the data) in which *arms* was used figuratively to convey a variety of military-related senses.

3. *bear arms* (*Goldfarb Analysis*, at 34-52). Consistent with what one would expect from the findings summarized above, the predominant use of *bear arms* in

²⁴ *Arms*, 1 *Johnson’s Dictionary*, *supra* note 23.

the corpus data was as an idiomatic phrase conveying one of several military-related uses.

a. *Amicus* searched for all instances of the noun *arms* occurring within four words of any form of the verb *bear* (*bear*, *bears*, *bearing*, etc.). After filtering out duplicate entries and lines that did not convey senses that were clearly irrelevant, there remained 531 concordance lines. Of those, *amicus* categorized 503 (almost 95% of the total) as conveying the idiomatic military sense. *Amicus* categorized only 11 lines (2%) as unambiguously using *bear arms* to mean ‘carry weapons,’ and only seven of those as arguably using the phrase to convey what *Heller* said was its “natural meaning”: essentially, ‘carry weapons in order to be prepared for confrontation.’ Under *amicus*’s categorization, therefore, only 1.3% of the concordance lines can reasonably be thought of as supporting the *Heller* interpretation.

In addition to categorizing the concordance lines according to which sense of *bear arms* they conveyed, *Amicus* grouped them based on commonalities that the concordance format makes it possible to discern. The group of uses that is perhaps the most important to the interpretation of the Second Amendment (accounting for 121 concordance lines) consists of a network of expressions relating to there being a duty to bear arms. Some of these focused on that duty directly: e.g., *duty to bear arms*, *compel to bear arms*, and *shall bear arms*. Others related to the duty by impli-

cation: e.g., *exempted from bearing arms*, *scrupulous of bearing arms*, and *refuse to bear arms*.

Amicus categorized all those uses as conveying a military sense. More specifically, he believes that these instances of *bear arms* conveyed the meaning ‘serve in the militia.’ That belief is based on the fact that there existed a duty to serve in the militia, but no independent duty to carry weapons that was referred to as a duty to “bear arms.”

Somewhat related to the uses described above are 151 concordance lines having to do with fitness or capability to bear arms, such as *able to bear arms*, *capable of bearing arms*, and *fit to bear arms*. *Amicus* believes that in these uses, too, *bear arms* was used and would have been understood to mean ‘serve in the militia.’

There were 132 concordance lines in which *bear arms* appeared as part of the phrase *bear arms against* [*someone or something*] or in constructions such as *bear arms in defense of* [*someone or something*]. The former category of uses was recognized in *Heller* as being unambiguously military.²⁵ And because bearing arms in defense of someone or something entails bearing arms *against* someone or something else, it follows that *bear arms* was used the same way in *bear arms in*

²⁵ 554 U.S., at 586.

defense [of someone or something] as it was used in *bear arms against [someone or something]*.

Finally, *amicus* categorized 83 concordance lines as “miscellaneous military.”

b. In the time since COFEA and COEME became available, three other corpus studies of *bear arms* have been conducted, and all of them reach conclusions similar if not identical to *amicus*'s. Two of them found that in the data they reviewed, the overwhelmingly dominant use of *bear arms* was to express a military-related meaning.²⁶ The third concluded that such a meaning was conveyed by 65.6% of the relevant uses that were reviewed.²⁷ However, the author categorized only 21% of the uses as literal—less than one-third of the number of military uses—because he categorized 13.4% of the uses as being ambiguous between the two senses.²⁸ And of the 14 concordance lines quoted in the article as examples of the literal sense, *amicus* agrees with only two of those categorizations.²⁹ *Amicus* believes that the remaining 12 quoted lines convey a figurative military-related meanings. It follows *a fortiori*

²⁶ 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.

²⁷ *The “Weaponization” of Corpus Linguistics*, *supra* n. 19, 34 *BYU J. Pub. Law.*, at 161.

²⁸ *Id.*, at 161-65.

²⁹ 34 *BYU J. Pub. Law.*, at 164.

that they can reasonably be understood way, and therefore that they aren't unambiguously literal.

4. *the right (of the people) to bear arms* (*Goldfarb Analysis*, at 54-60). *Amicus* began his discussion of the phrase *the right of the people to keep and bear Arms* by considering how *the right to bear arms* was likely to have been understood, independent of the fact that the right to bear arms is described as a “right of the people” and that *bear arms* appears as part of the phrase *keep and bear arms*. He then dealt with each of the latter issues in turn. *Amicus*'s conclusions regarding *the right to bear arms* are discussed here, both as to that phrase by itself and as to *the right of the people to bear arms*. Issues relating to *keep and bear arms* are discussed in subsection five.

a. *Amicus* concludes from the corpus data that *the right to bear arms* was probably understood in a military sense, and specifically that it was probably understood to mean ‘the right to serve in the militia.’ The latter conclusion is based on the fact that during the founding era, bearing arms was regarded as both a right and a duty. When that fact is considered together with the conclusion that the duty to bear arms was probably understood as a duty to serve in the militia, it follows that the right to bear arms was probably regarded as a *right* to serve in the militia.

Amicus disagrees with *Heller*'s conclusion that interpreting the right to bear arms as a right to serve in the military would be “an absurdity that no commentator

has ever endorsed.”³⁰ The analysis shows that such an interpretation had in fact been endorsed by commentators, and more importantly, that it is not absurd. Regarding the latter point, we have already noted that bearing arms was regarded as both a right and a duty.³¹ And beyond that, *amicus*’s analysis points out several founding-era instances of *bear arms* being used in precisely the way that was ridiculed in *Heller*.³²

b. *Amicus* also takes issue with *Heller*’s conclusion that *the people* means the same thing in the Second Amendment as in the Fourth Amendment.³³ His analysis provides several reasons for that conclusion, among which is that he found nine founding-era documents more or less equating *the people* and *the militia* (e.g., “A well regulated militia, composed of the body of the people”).³⁴

5. *keep and bear arms* (*Goldfarb Analysis*, at 60-73). *Amicus*’s analysis rebuts *Heller*’s argument that *bear arms* can’t reasonably be interpreted as having been used in an idiomatic military-related sense. Under such an interpretation, the Court argued, “the word ‘Arms’ would have two different meanings at once: ‘weapons’ (as the object of ‘keep’) and (as the object of ‘bear’) one-half of an idiom.”³⁵

³⁰ 554 U.S., at 587.

³¹ *Goldfarb Analysis*, at 53-54.

³² *Id.*, at 54-55.

³³ 554 U.S., at 579-81.

³⁴ *Goldfarb Analysis*, at 57-59.

³⁵ *Heller*, 554 U.S., at 587.

But that argument can't justify the Court's conclusion, because it applies also to the interpretation in *Heller*, under which *bear arms* is similarly idiomatic, although to a lesser extent. Under a purely literal interpretation, *bear arms* would mean simply 'carry weapons.' But *Heller* interpreted it to mean 'carry weapons *in order to be prepared for confrontation*' Where does 'in order to be prepared for confrontation' come from? Not from the separate meanings of *bear* and *arms*. Rather, it could only be a meaning associated, by convention, with the phrase as a whole—the defining characteristic of idiomaticity.³⁶

And in any event, *amicus* argues that interpreting *bear arms* idiomatically is not ruled out either legally or linguistically. He shows that incoherence isn't always the result when a single use of a word is forced by the context to convey two meanings simultaneously. He also points to three cases in which such an interpretation was adopted by the court. The first is *Heller*, for the reason discussed in the previous paragraph, and the others are *United States v. Hayes*³⁷ and *United States v. Davis*.³⁸ Finally, *amicus* argues that there is reason to think that the Second Amend-

³⁶ See, e.g., David Crystal, *A Dictionary of Linguistics and Phonetics* 236 (6th ed. 2008).

³⁷ 515 U.S. 415 (2009).

³⁸ 139 S. Ct. 2319, 2328 (2019); *id.*, at 2346-47 (Kavanaugh, J., dissenting).

ment's use of *bear arms* would have been understood as an idiom conveying the military-related meaning previously discussed.

B. Because amicus's interpretation is a reasonable one, it is appropriate to consult the well-regulated-militia clause to resolve the ambiguity, at which point Heller becomes unsustainable.

Although *amicus's* analysis leaves open the possibility that *Heller* was right about certain of the linguistic issues, *amicus's* interpretation is a reasonable one. The Second Amendment therefore doesn't *unambiguously* mean what the Court thought it does. And under *Heller's* framework, the ambiguity may be resolved by consulting the well-regulated-militia clause.³⁹

Given that *the right to...bear arms* can reasonably be understood as denoting a right to serve in the militia, that interpretation is virtually compelled once the well-regulated-militia clause is taken into account. And that is the case even though the Court in *Heller* viewed that clause as being consistent with its interpretation of the operative clause. The Court was operating under several mistaken beliefs about 18th-century usage and therefore as to how the operative clause was likely to have been understood. It is therefore not surprising that in declaring the operative clause to be consistent with the prefatory clause, the Court focused on nontextual factors rather

³⁹ 554 U.S., at 577-78.

than, as would have been more appropriate, factors intrinsic to the text. So the issue raised here is not one the Court has previously considered.

IV. *Heller*'s precedential status does not prevent its serious flaws from being taken into account in deciding this case.

The outcome in this case is not dictated by *Heller*. As noted by the panel opinion, the Court finds itself “navigating waters uncharted by *Heller* and *McDonald*,” and its “lodestars” are therefore “text and history.”⁴⁰ In considering the Second Amendment’s text, the Court need not blind itself to evidence that provides a more accurate view of how the text is likely have been understood by founding-era Americans, and that so far has not been significantly disputed. And that evidence casts doubt on the view of history advanced by gun-rights advocates and accepted by *Heller*, since it is a view based on a misunderstanding of the text.⁴¹ Although the Supreme Court has the power to authoritatively bind lower courts on legal issues, it lacks similar authority over questions of history.

Conclusion

The decision below should be affirmed.

⁴⁰ 896 F.3d 1044, 1051 (9th Cir. 2018) (quoting *Heller*, 554 U.S. 595) (cleaned up).

⁴¹ For a view of history that is much more consistent with the new textual evidence, see, e.g., Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (2006).

Respectfully submitted,

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FOR THE NINTH CIRCUIT**

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