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, ET AL.,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* NRA CIVIL RIGHTS DEFENSE FUND IN SUPPORT OF PETITIONERS

PATRICK N. STRAWBRIDGE
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South, PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

TAYLOR A.R. MEEHAN*
Counsel of Record
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
taylor@consovoymccarthy.com

* *Licensed in Illinois & D.C.; supervised by principals of the firm licensed in Virginia while Virginia bar application is pending.*

Counsel for Amicus Curiae

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STATEMENT OF INTEREST

The NRA Civil Rights Defense Fund (the "Fund") is a separate and independent trust, governed by a board of trustees and recognized by the Internal Revenue Service as a 501(c)(3) tax-exempt entity.[1] The Fund was established in 1978 to assist in the preservation and defense of the human, civil, and constitutional rights of the individual to keep and bear arms in a free society. Today, the Fund provides legal and financial assistance to individuals and organizations defending their right to keep and bear arms. The Fund sponsors legal research and education on a wide variety of issues, including the meaning of the Second Amendment, and has participated as *amicus* in numerous other cases implicating the right to keep and bear arms. The Fund has a compelling interest in the Court's resolution of this case because the arguments made by the Respondents, if affirmed by this Court, would harm millions of citizens in jurisdictions with "proper cause" or equivalent public carry restrictions. That is contrary to the mission of the Fund, created to protect the fundamental right of all law-abiding Americans to possess and carry a firearm for lawful purposes, including self-defense.

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Thirteen years ago, this Court confirmed that the Second Amendment protects an ancient and individual right of self-defense. *See District of Columbia v. Heller*, 554 U.S. 570, 599 (2008). Just like every other Bill of Rights guarantee, the Second Amendment secures a fundamental right, not "a second-class right, subject to an entirely different body of rules." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). And yet, some courts and scholars have used the intervening thirteen years to chip away at *Heller*. Some lower courts have subjected that personal right of self-defense to the very judge-made "assessments of its usefulness," sliding scales, and "interest-balancing" that *Heller* rejected. *Heller*, 554 U.S. at 634. There is no better example than cases such as this one—where States, with the *imprimatur* of lower federal courts, insist that individual citizens prove they are worthy enough to exercise their fundamental rights with "proper cause" or similar requirements. *See, e.g.*, *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc); *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012).

Certain scholars, for their part, contend that *Heller* got it all wrong. Armed with 21st-century "corpus linguistics" databases, these scholars allege that the Second Amendment protects only a collective right connected to military service. Surely that would be news to 17th-century Protestants in Glorious

Revolution England,[2] the 18th-century Framers in Founding-era America,[3] and the 19th-century Freedmen's Bureau in the post–Civil War south.[4] These databases, while a sometimes useful tool, ought not be deployed as a blunt-force instrument for constitutional interpretation—especially so for the Bill of Rights and its protection of our individual rights pre-existing the Constitution.

In short, the corpus linguistics methodology, at least with respect to the Second Amendment, over-emphasizes the elite and the newsworthy, with no way to fully account for the history and tradition of the longstanding and fundamental right of self-defense. It is no substitute for the traditional tools of constitutional analysis used in *Heller*. Snippets of constitutional text cannot be interpreted in a vacuum, no matter how sophisticated or seemingly scientific.

Understanding any one of the Bill of Rights guarantees requires equal attention to the full text, history, and tradition. That was the methodology of this Court in *Heller*, consistent with this Court's many other constitutional decisions. *Heller* already acknowledged that "bear arms" has military applications; it didn't take corpus linguistics to discover that. But *Heller* did not stop at that one potential application of two words of the Second Amendment. The amendment's

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[2] *See Heller*, 554 U.S. at 592-93; Diarmuid F. O'Scannlain, *Glorious Revolution to American Revolution: the English Origin of the Right To Keep and Bear Arms*, 95 Notre Dame L. Rev. 397, 403-06 (2019).

[3] *See Heller*, 554 U.S. at 598-600.

[4] *See id.* at 614-16; *McDonald*, 561 U.S. at 771-77; *id.* at 846-50 (Thomas, J., concurring in judgment).

text also describes "the right of the people," which, confirmed by history and tradition, includes the individual right to defend oneself. *Heller*, 554 U.S. at 579-81, 598-619. That this everyday conception of the fundamental self-defense right was not often the subject of presidential papers or pamphlets since catalogued in linguistics databases is no more remarkable than the fact that daily prayers by Americans today are not frequently the topic of such publications. Both are indisputable features of American life. But to fully understand them requires something more than an examination of whether "bear arms" or "free exercise" are discussed alongside such terms as "self-defense" or "rosary" in print.

Heller, and its discussion of the history and tradition of the right to keep and bear arms, all but answers the question presented here. "[T]he right to carry arms for self-defense inherently includes the right to carry in public. This conclusion not only flows from the definition of 'bear Arms' but also from the natural use of the language in the text." *Rogers v. Grewal*, 140 S. Ct. 1865, 1868 (2020) (Thomas, J., dissenting from denial of certiorari). It doesn't take a database to understand that "[t]he most natural reading" of the Second Amendment's protection to not only "keep" but also to "bear" arms "encompasses public carry." *Peruta v. California*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari). "To speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012).

ARGUMENT

In recent years, a few scholars targeting the Second Amendment have declared the "correctness" of *Heller* to be "in grave doubt."[5] Their claim is rooted in "corpus linguistics," which is a methodology using large databases to study language use.[6] Corpus linguistics "is based on an assumption" that "how words are used" in these databases "determines what they mean."[7] Applying an extreme version of that assumption to the Second Amendment, these scholars conclude that *Heller* was wrong because "keep arms" and "bear arms" overwhelmingly appear in military contexts in Founding-era linguistics databases. They argue that this newly discovered "textual evidence" is "powerful evidence that *Heller* was mistaken about

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[5] Br. for Neal Goldfarb as *Amicus Curiae* ("Goldfarb Certiorari-Stage Amicus Br.") 3; *see also* Br. of Neal Goldfarb as *Amicus Curiae* ("Goldfarb *New York* Amicus Br.") at 3, *New York State Rifle & Pistol Ass'n v. City of New York* (18-280); Br. of Corpus Linguistics Scholars as *Amici Curiae* ("Linguistics Scholars *New York* Amicus Br.") at 7-8, *New York State Rifle & Pistol Ass'n v. City of New York* (18-280); Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 Hastings Const. L. Q. 509, 517-18 (2019).

[6] *See generally* James C. Phillips, et al., *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 Yale L. J. F. 21 (2016).

[7] Goldfarb *New York* Amicus Br. at 11; *but see* Kevin Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726, 796 (2020) ("just because 'car' appears more often as a vehicle in the corpus than does 'bicycle' or 'cement-mixer' does not mean that the latter two *clearly* fall outside of the ordinary meaning"); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. Rev. 1621, 1647 (2017) ("corpus data alone cannot disambiguate text").

the Second Amendment's original meaning."[8] And they conclude that the Second Amendment can refer only to a collective right for military service (not an individual right held by "the people" more broadly).[9]

This brief challenges those findings and the use of corpus linguistics more broadly for the Bill of Rights guarantees. The Bill of Rights is unlike a federal statute or even the structural provisions of our Constitution. It is an acknowledgment of a pre-existing set of fundamental rights that "the people" did not surrender to their new government. *See* Part II, *infra.* Understanding their full scope requires "carry[ing] ourselves back to the time when the Constitution was adopted," aided by the tools of history and tradition, in addition to the constitutional text. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting) (quoting T. Jefferson, Letter to William Johnson (June 12, 1823), in 15 Writings of Thomas Jefferson 439, 449 (A. Lipscomb ed. 1904)). These fundamental rights cannot be reduced to a few words of text run through a database.

Corpus linguistics could well be a useful *starting* point for that historical analysis (though it has particular drawbacks for the Second Amendment, *infra*). But it is hardly the *only* starting point. And no corpus linguistics findings should ever be considered the dispositive *end* point in interpreting "the right of the people" that was and remains theirs.

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[8] Goldfarb Certiorari-Stage Amicus Br. 2.

[9] *See, e.g.*, Baron, 46 Hastings Const. L. Q. at 510, 517-18; Goldfarb Certiorari-Stage Amicus Br. 3; Goldfarb *New York* Amicus Br. at 25-26; Linguistics Scholars *New York* Amicus Br. at 3-4.

I. Corpus Linguistics Cannot Fully Reveal the Second Amendment's Scope.

As even some of its notable proponents have acknowledged, corpus linguistics is not "a panacea for originalist methodology."[10] Its shortcomings are particularly acute for the Second Amendment. Corpus linguistics alone, untempered by history and tradition, is as likely to reveal *irregular* meanings of the right to keep and bear arms.

A. Corpus linguistics is as much art as it is science.

Corpus linguistics involves searching large collections of texts digitized in a database (or "corpus") to study language usage.[11] The linguistics scholar reviews the way in which the word or phrase is used in the corpus as evidence of its commonly understood meaning.[12]

As scientific as it might sound, discerning usage from database hits is full of judgment calls. Any corpus linguistics analysis is as much art as it is science. At every step, there is some amount of subjectivity, even bias, that can enter into the analysis.[13]

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[10] Phillips, 126 Yale L. J. F. at 29.

[11] *See* Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 B.Y.U. L. Rev. 1417, 1421 (2017).

[12] *See id.* at 1441-42; *see* Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 B.Y.U. L. Rev. 1311, 1337 (2018); *but see also id.* at 1351, 1354 (cautioning "against inferring that a prototypical use of an expression is necessarily the most frequently occurring usage" in a corpus).

[13] *See* Phillips, 126 Yale L. J. F. at 29; *see also* Tobia, 134 Harv. L. Rev. at 778-89 (discussing potential for ideological bias in applying dictionaries and corpus linguistics findings); *see generally*,

For starters, what goes into the linguistics database? What's excluded? Each so-called "corpus" contains many texts, but none purports to be exhaustive.[14] What is left out necessarily affects the analysis. For example, the following instance of "bear arms" relied upon in *Heller* appears to be missing from two databases commonly used by Second Amendment corpus linguistics scholars.[15] James Wilson described the Pennsylvania constitution's Second Amendment analog, guaranteeing citizens' "right to bear arms in the defence of themselves," which "shall not be questioned," and their corresponding duty to "keep arms for the preservation of the kingdom, and of their own persons."[16] *Heller* relied upon that reference (and others) as evidence that the Second Amendment described a right for "militiamen *and everyone else*."[17]

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e.g., Matthew Jennejohn, et al., *Hidden Bias in Empirical Textualism*, 109 Georgetown L. J. 767 (2021) (discussing potential for gender bias in corpora).

[14] For indexes of the corpora used by Second Amendment corpus linguistics scholars, Brigham Young University's Corpus of Founding Era American English and Corpus of Early Modern English, *see* https://bit.ly/3xoX4l7 (COFEA) and https://bit.ly/2V6k7Tl (COEME).

[15] Brigham Young University's Corpus of Founding Era American English (COFEA) and Corpus of Early Modern English (COEME) databases are publicly available at https://lawcorpus.byu.edu/.

[16] *Heller*, 554 U.S. at 583 n.7 (quoting 3 B. Wilson, The Works of the Honourable James Wilson 84 (1804)).

[17] *Id.* at 583 (emphasis added).

The databases cannot possibly catalogue every possible usage of "keep arms" or "bear arms."[18] And they should not be held out as if they do, reporting findings with seemingly scientific precision.[19]

Next, how is the database searched? Even minor changes at this step can lead to meaningfully different results within the same corpus.[20] For example, Professor Neal Goldfarb has limited his search to the years 1760 to 1799.[21] Such a limited search will exclude earlier historical references including the English Bill of Rights, a "predecessor to our Second Amendment," and later Reconstruction-era references that undeniably describe the right to bear arms as an individual right for all.[22] That selected timeframe, moreover, was a time when colonial America was steeped in war. *See*

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[18] *See* Mark W. Smith & Dan M. Peterson, *Big Data Comes for Textualism: The Use and Abuse of Corpus Linguistics in Second Amendment Litigation* 22-24 (July 14, 2021) (unpublished manuscript), https://bit.ly/2UQDpfz (listing other examples of missing references).

[19] *See, e.g.*, Goldfarb *New York* Amicus Br. at 21 ("only 1.3% of the concordance lines can reasonably be thought of as supporting the *Heller* interpretation"); Note, *Corpus Linguistics and Gun Control: Why* Heller *Is Wrong*, 2019 B.Y.U. L. Rev. 1401, 1414-15 (2020); Baron, 46 Hastings Const. L. Q. at 510-11.

[20] *See, e.g.*, Solan & Gales, 2017 B.Y.U. L. Rev. at 1348-49.

[21] *See* Goldfarb *New York* Amicus Br. at 15.

[22] *Heller*, 554 U.S. at 593, 614-16; *McDonald*, 561 U.S. at 771-77 (discussing Freedmen's Bureau Act and Civil Rights Act of 1866); *id.* at 846-50 (Thomas, J., concurring in judgment) (describing importance of "federal solution" to enforce all citizens' right to bear arms, regardless of race, against the States); O'Scannlain, 95 Notre Dame L. Rev. at 405-08 (discussing English predecessor).

pp. 16-17, *infra*. A proliferation of pamphlets, papers, and other publications using "arms" in a military sense during that time period is entirely unsurprising.

And then, how are search results analyzed? This too is a subjective process.[23] It does not eliminate the need for "judgment any more than LexisNexis has eliminated the need for lawyers to analyze caselaw."[24]

Applied here, scholars have counted how many usages of "keep arms" or "bear arms" are military or "collective" usages.[25] But search results are not all that tidy. For example, scholars have concluded that references use "bear arms" in a "collective sense" when "bear arms" appears with plural subjects (*e.g.*, "'Slaves were not permitted to *bear arms*'").[26] Such references, so goes the argument, prove that "ordinary citizens" understood "bear arms" to "refe[r] to an activity undertaken by groups of people, not only by individuals."[27] In fact, ordinary citizens could come to

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[23] *See* Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 Colum. Sci. & Tech. L. Rev. 156, 202-03 (2011) ("The corpus methodology, however, cannot fully escape confirmation bias. The judicial interpreter must still read through the concordance lines and her biases may shape how she perceives the words in the data presented to her."); Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 Seton Hall L. Rev. 401, 419, 442-44 (2019).

[24] Phillips, 126 Yale L. J. F. at 30.

[25] *See, e.g.*, Goldfarb *New York* Amicus Br. at 16-23; Linguistics Scholars *New York* Amicus Br. at 18-24.

[26] Allison L. LaCroix, *Historical Semantics*, The Panorama (Aug. 3, 2018); *see* Linguistics Scholars *New York* Amicus Br. at 21-24.

[27] *Id.*

a much different conclusion: a reference can simultaneously discuss a group of people and a right individually held by each member of the group (*e.g.*, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"). Similarly, how ought scholars categorize Founding-era state constitutions, which acknowledge the right of the people "to bear arms in defence of themselves and the State"?[28] And should the common 18th-century conception of the right to bear arms to defend against tyrannical takeover be labeled a personal or collective right?[29] The answer is both.

Some amount of judgment is inherent in any legal analysis. Corpus linguistics analysis is no exception, as empirical-sounding as it might be.

B. Corpus linguistics risks amplifying the elite and the newsworthy.

Corpus linguistics rests on an assumption that the most frequent *use* of a term indicates its commonly understood *meaning*. That assumption might hold for a new statute or some of the new structural provisions

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[28] *See, e.g.*, Pa. Const. art 1, § 21 (1790); Vt. Const. ch. 1, art. 16 (1777); Ky. Const. of 1792, art. XII, cl. 23; Ohio Const. of 1802, art. VIII, § 20; *see also* Ala. Const. art. I, § 27 (1819); Conn. Const. art. I, § 27 (1818); Ind. Const. of 1816, art. I, § 20; Me. Const. of 1819, art. 1, § 16; Mich. Const. of 1835, art. 1, § 13; Miss. Const. of 1817, art. I, § 23; Mo. Const. of 1820, art. XIII, § 3; Or. Const. art. 1, § 27; Repub. of Tex. Const. of 1836, Declaration of Rights, cl. 14.

[29] *See* O'Scannlain, 95 Notre Dame L. Rev. at 408 (quoting Federalist No. 46); Robert Leider, *Federalism and the Military Power of the United States*, 73 Vand. L. Rev. 989, 1031 (2020); *see also id.* at 1008-09 (discussing founding-era use of the "militia" as referring to "entire able-bodied population").

prescribed by our Constitution. A database of contemporaneous usage reveals something about the meaning of words used to describe Congress's Article I powers or the Executive's Article II powers when they were written.[30] But a database of usages by politicians and other elites might not fully reveal commonly understood meaning when it comes to the Bill of Rights. What was commonly understood about those pre-existing rights cannot be distilled into keyword searches alone. Doing just that, certain corpus linguistics proponents have concluded that *Heller* is wrong. For the following reasons, these corpus linguistics findings are no substitute for *Heller*'s multifaceted discussion of text, history, and tradition.

1. Elites versus "the people"

By their nature, the linguistics databases reveal how elite thinkers, often politicians, used terms. The majority of included texts are those written by the political elite and others on the highest rungs of society, including presidents, congressmen, Supreme Court justices, popular authors, and others.[31] Largely absent are many other ordinary early Americans who did not (or could not) write about their Second Amendment

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[30] *See, e.g.*, Jennifer L. Mascott, *Who Are "Officers of the United States*, 70 Stan. L. Rev. 443 (2018); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003); *but see* Hessick, 2017 B.Y.U. L. Rev. at 1509 (doubting frequency assumption); Tobia, 134 Harv. L. Rev. at 795-96 (same); Solan & Gales, 2017 B.Y.U. L. Rev. at 1351-54 (cautioning infrequent or absent usage is not necessarily evidence of unaccepted meaning).

[31] *See*, *e.g.*, Corpus of Founding Era American English (COFEA) (Oct. 11, 2019), Brigham Young University, https://bit.ly/2UIFBpe.

rights. Those missing perspectives are as relevant to understanding how the Second Amendment was originally understood as the views of those who wrote it.[32]

The index of BYU's COFEA database provides a useful example of this phenomenon. COFEA comprises six collections, consisting largely of legal documents, congressional records, records of national and state conventions and legislative sessions, and federal and state laws.[33] It includes the papers of Washington, Adams, Jefferson, Madison, Franklin, and Hamilton.[34] Only the sixth collection, the Evans Early American Imprints, ventures beyond these largely legal and political sources. The Evans imprints include sermons, eulogies, novels, hymns, almanacs, advertisements, poems, speeches, and the like.[35] But as of 2019, the Evans collection represented less than 3 percent of the documents in the corpus.[36] In short, the corpus overwhelmingly comprises sources by and for the political elite.

How the political elite spoke or wrote about a fundamental right will show only part of the story. "The

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[32] *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 38 (Princeton 1997) (rejecting notion that Framers' intent "is authoritative and must be the law").

[33] *See* Corpus of Founding Era American English (COFEA) (Oct. 11, 2019), Brigham Young University, https://bit.ly/2UIFBpe; COFEA Index, https://bit.ly/3xoX4l7.

[34] *See id.*

[35] *See id.*; *see also* Evans Early American Imprints (Evans) TCP, University of Michigan, https://bit.ly/3xEUVSh.

[36] Corpus of Founding Era American English (COFEA) (Oct. 11, 2019), Brigham Young University, https://bit.ly/2UIFBpe (tallying 2,645 Evans documents of 119,801 total).

Constitution was written to be understood by the voters," with its "words and phrases" taking on "normal and ordinary" meaning, excluding "secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Heller*, 554 U.S. at 576-77 (quotation marks omitted). The sorts of publications in these databases might not always be the best (let alone complete) evidence of that "normal and ordinary" meaning. They cannot fully reveal "the right of the people" as understood by the people more broadly.

2. The frequency fallacy: the newsworthy versus the mundane

Certain corpus linguistics proponents have equated original public meaning with the most frequent usage of "keep arms" or "bear arms" in linguistics databases. *Heller* already rejected such word-counting as an oversimplified interpretive method. 554 U.S. at 588-89. And other proponents of corpus linguistics have similarly warned that "the most frequent meaning" in a corpus linguistics analysis "is not necessarily the ordinary meaning in context."[37]

Every possible usage of "bear arms," even the least frequent in corpus linguistics databases, merits

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[37] Solum, 2017 B.Y.U. L. Rev. at 1647; *see also* Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 B.Y.U. L. Rev. 1503, 1509 (2017) ("the frequency with which a word appears in print is separate from how an ordinary citizen would understand that word"); Tobia, 134 Harv. L. Rev. at 795-96 (questioning assumption that the most "common" or "prototypical" use of a term indicates its only ordinary meaning).

attention.[38] There is no benchmark for when a usage is frequent (or infrequent) enough to be indicative (or not indicative) of meaning.[39] Ignoring those less frequent usages is arbitrary and simplifies language to only its more prototypical uses. Should "battery" now be understood to describe only power sources while rejecting other commonly understood (albeit less frequently used) meanings—intentional torts, artillery batteries, a battery of tests, battery hens, or legendary baseball batteries?

The emphasis on frequency is especially fraught for the Bill of Rights. That is because corpus linguistics findings are based on usages that appear in print, versus usages of the same terms in unrecorded conversations.[40] A corpus comprising presidential papers, congressional records, pamphlets, newspapers, sermons, letters, and the like will indicate how phrases from the Bill of Rights were used in print in connection with newsworthy events, political events, or current events more broadly. Such usages will differ from

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[38] *See* Tobia, 134 Harv. L. Rev. at 796 ("Insofar as legal corpus linguistics data may not adequately reflect nonprototypical uses, one cannot conclude that the rarity of use implies that such a use is not part of the term's ordinary meaning.").

[39] *See* Gries & Slocum, 2017 B.Y.U. L. Rev. at 1421 ("Corpus analysis can provide valuable insights about language usage but cannot itself resolve normative issues," *e.g.*, "what makes some permissible meaning the ordinary meaning"); Solan & Gales, 2017 B.Y.U. L. Rev. at 1351-54.

[40] *See* Hessick, 2017 B.Y.U. L. Rev. at 1509 ("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."); *see also* Smith & Peterson, *Big Data*, *supra*, 25-26.

usages in unrecorded discussions about the more mundane. For example, printed news and political commentary about firearms today will presumably focus on gun violence, gun control, and perhaps ammunition shortages; while day-to-day discussions in American households could cover a much broader range of topics including keeping firearms for self-defense, hunting trips, plans for target shooting, and other day-to-day uses for firearms. Corpus linguistics databases cannot fully account for those day-to-day discussions. And it would be a mistake to equate the absence of a certain usage in a corpus linguistics database with the absence of commonly understood meaning.[41]

With respect to the Second Amendment in particular, it is no surprise that the phrase "bear arms" in late-18th century sources overwhelmingly appears in the military context.[42] Americans fought two wars during that time period, first the French and Indian War and then the Revolutionary War little more than a decade later. Is it any surprise that letters to and from General Washington, Commander-in-Chief of the Continental Army, discuss bearing arms in the military sense? Hardly. It is "especially unremarkable" that the language of weaponry is disproportionately associated with military service during that wartime

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[41] Solan & Gales, 2017 B.Y.U. L. Rev. at 1351-54; Tobia, 134 Harv. L. Rev. at 795-96.

[42] *See* Goldfarb *New York* Amicus Br. at 21; Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, Harv. L. Rev. Blog (Aug. 7, 2018), https://bit.ly/3jT4VmQ (finding "overwhelming majority of instances of 'bear arms' was in the military context" when sampling 50 instances in COFEA).

period, just as it was "especially unremarkable" that the legal sources marshaled in *Heller* most often used "bear arms" in a military context. 554 U.S. at 587 (noting the congressional record "would have had little occasion to use it *except* in discussions about the standing army and the militia").

If anything, corpus linguistics is especially prone to reveal irregular meanings of the Second Amendment. The newsworthy events of the time were wartime events. Those most likely to speak publicly on the right to bear arms were wartime politicians and other public officials, with much occasion to opine on the collective duty to defend America. That there was little occasion to opine (in print) on the more mundane does not erase Americans' well-understood individual right to defend themselves.

3. The exclusivity fallacy: one of many uses versus the only use

The assumption that the most frequent use of a term in linguistics databases is equivalent to the originally understood public meaning of the term is tenuous. Some have taken that assumption a step further here—assuming that the most frequent uses of "keep arms" or "bear arms" indicate their *only* originally understood meaning.[43] That is incorrect.

That a "phrase was commonly used in a particular context does not show that it is limited to that context." *Heller*, 554 U.S. at 588. As Justice Scalia put it in *Heller*, concluding that the Second Amendment has *only* militia-related connotations based on linguists'

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[43] *See, e.g.*, Baron, 46 Hastings Const. L. Q. at 510-11; Goldfarb *New York* Amicus Br. at 17-25.

word-tallying "is rather like saying that, since there are many statutes that authorize aggrieved employees to 'file complaints' with federal agencies, the phrase 'file complaints' has an employment-related connotation." *Id.* at 583. That these terms are frequently used—even overwhelmingly frequently used—in one context does not negate that "everyone else" might also bear arms or file complaints too. *Id.* As one commentator has observed, "many instances in the corpus demonstrate a military *context*, but not all of them demonstrate a military (or military-only) *meaning* of the phrase."[44]

* * *

Corpus linguistics, while a useful tool, cannot by itself reveal the full scope of pre-existing fundamental rights. For all of the foregoing reasons, even if corpus linguistics scholars' numerical findings about instances of "keep arms" or "bear arms" in linguistics databases were entirely correct, the meaning of the Second Amendment cannot be reduced to word-counting. And it is especially inappropriate to tally words in databases to *constrict* a pre-existing right. When deployed in this manner, corpus linguistics is strict constructionism by another name. But "[a] text should not be construed strictly" or "leniently," for that matter; "it should be construed reasonably, to contain all that it fairly means." Scalia, A Matter of

[44] William Baude, Heller *Survives the Corpus*, Duke Center for Firearms Law Blog (July 9, 2021), https://bit.ly/3xu98BG.

Interpretation 23.[45] As in any constitutional analysis, that requires equal attention to tradition and history.[46]

II. Corpus Linguistics Is No Substitute for Traditional Tools of Constitutional Analysis, Especially in a Case Involving Fundamental Rights.

The Constitution, by its nature, describes "only its great outlines" and designates "its important objects" while leaving "the minor ingredients which compose those objects [to] be deduced from the nature of the objects themselves." *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819). The text alone (let alone snippets of that text) will not always reveal those "minor ingredients." History and tradition must fill the gap—especially so for the Bill of Rights.

Unlike federal statutes or some of the structural provisions of the Constitution, the Bill of Rights does not confer or create anything.[47] It is an acknowledgment of pre-existing rights. For that reason, some Federalists initially saw no need for the amendments. As Hamilton put it, "the people surrender nothing; and as they retain every thing, they have no need of

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[45] *See also* Tobia, 134 Harv. L. Rev. at 783-84 (observing that "in the few cases that explicitly cite corpus linguistics, the results tend to narrow the contested sense of meaning").

[46] *See, e.g.*, Mascott, 70 Stan. L. Rev. at 507-44 (examining historical practice of executive appointments in addition to corpus evidence).

[47] *See McDonald*, 561 U.S. at 818-19 (Thomas, J., concurring in judgment) ("the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights").

particular reservations."[48] Enumerating these unsurrendered rights was "not only unnecessary in the proposed Constitution, but would even be dangerous."[49] "For why declare that things shall not be done which there is no power to do," lest the new federal government give those "men disposed to usurp[] a plausible pretense for claiming that power."[50] How prescient.

Interpreting "the right of the people" described in the Second Amendment must account for that history and the unique station of the Bill of Rights in our constitutional structure. The amendments themselves do not purport to exhaust the scope of the rights they acknowledge. They are but "aphorisms."[51] These rights (and the corresponding restraint on government power) can only begin to be fully understood with an examination of history and tradition. That is—what was the state of play before these rights were reduced to a few lines of text in 1789? That is exactly why *Heller* instructs courts to consider "the historical background of the Second Amendment" because "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." 554 U.S. at 592.

Corpus linguistics cannot capture the centuries of history and tradition necessary to reveal the full scope of the Bill of Rights guarantees. For example, our Fourth Amendment rights cannot be fully understood

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[48] The Federalist No. 84 (Alexander Hamilton).

[49] *Id.*

[50] *Id.*

[51] *Id.*

without knowing that "[t]he Founding generation crafted the Fourth Amendment as a response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quotation marks omitted); *see also, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("The right to confront one's accusers is a concept that dates back to Roman times."). Likewise, the rights described in the Second Amendment cannot be understood without understanding past abuses—be it the confiscation of weapons by Charles II and James II from English Protestants or by George III in the Revolutionary-era colonies.[52]

Nor can the Second Amendment be fully understood without accounting for the tradition of arms bearing in early America. Thomas Jefferson, for example, advised his nephew that his gun ought to "be the constant companion of your walks."[53] And he later gifted a pair of Turkish pistols—pistols Jefferson used "daily" by holstering to his saddle or carriage—to the stepson of James Madison.[54] John Adams famously argued on behalf of the British soldiers charged with murder for the Boston Massacre that "every private

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[52] *See Heller*, 554 U.S. at 592-93, 594-95; *see also* O'Scannlain, 95 Notre Dame L. Rev. at 402-03.

[53] T. Jefferson, Letter to Peter Carr (Aug. 19, 1785), National Archives Founders Online, https://bit.ly/2U0guhy.

[54] T. Jefferson, Letter to John Payne Todd (Aug. 15, 1816), National Archives Founders Online, https://bit.ly/36uM4Xk.

person is authorized to arm himself."[55] He continued, "I do not deny the inhabitants had a right to arm themselves at that time, for their defense."[56] And when former Vice President Aaron Burr was tried for treason, his counsel argued that the presence of firearms would not be evidence of treacherous conspiracy: "Arms are not necessarily military weapons . . . . Rifles and shot guns are no more evidence of military weapons than pistols or dirks used for personal defence, or common fowling pieces kept for the amusement of taking game. It is lawful for every man in this country to keep such weapons."[57]

In other contexts, this Court has not hesitated to rely on historical evidence to interpret the generally worded text of the Bill of Rights. In *Crawford*, for example, the Court grappled with the original meaning of the Sixth Amendment's Confrontation Clause. The text—the accused's right "to be confronted with the witnesses against him"—could "not alone resolve th[e] case." *Crawford*, 541 U.S. at 42. Confronting "witnesses against" could mean "those who actually testify at trial," "those whose statements are offered at trial," "or something in between." *Id.* at 42-43. Only an examination of the historical rights of the accused could resolve that ambiguity. The Court charted the English common-law evolution of the confrontation right, including the notorious trial of Sir Walter Raleigh for

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[55] Argument for the Defense by J. Adams (December 3-4, 1770), National Archives Founders Online, https://bit.ly/2U5iy8b (citing 1 Hawkins, Pleas of the Crown 71, § 14).

[56] *Id.*

[57] David Robinson, Reports of the Trials of Colonel Aaron Burr 582 (Hopkins & Earle 1808), https://bit.ly/3r7fyo0.

treason. *Id.* at 43-45. Raleigh's alleged accomplice implicated him, but not as a witness. *Id.* at 44. The judges refused Raleigh's demand to "'[c]all my accuser before my face.'" *Id.* He was convicted and sentenced to death. *Id.* It was seen as a great failure of justice, and legal reforms followed. *Id.* at 44-45. By 1791 the tradition was firmly cemented to require accusers as live witnesses, available for cross-examination. *Id.* at 45-50. It was that history, not text alone, that informed the metes and bounds of the Confrontation Clause right in *Crawford*.

Such historical evidence also includes contemporaneous Founding-era practices. In *McIntyre*, for example, Justice Scalia explained that history and tradition left "no doubt" that "laws against libel and obscenity do not violate 'the freedom of speech' to which the First Amendment refers" given that "they existed and were universally approved in 1791." *McIntyre*, 514 U.S. at 372 (Scalia, J., dissenting); *see also McKee v. Cosby*, 139 S. Ct. 675, 678-79 (2019) (Thomas, J., concurring in the denial of certiorari) ("Laws authorizing the criminal prosecution of libel were both widespread and well established at the time of the founding"). Likewise, "[r]acks and thumbscrews, well-known instruments for inflicting pain, were not in use because they were regarded as cruel punishments," *McIntyre*, 514 U.S. at 372 (Scalia, J., dissenting)—a historical marker that necessarily informs how the Eighth Amendment's contemporaneous prohibition on "cruel and unusual punishments" was understood. *See also Baze v. Rees*, 553 U.S. 35, 94-99 (2008) (Thomas, J., concurring in judgment).

Here too, as *Heller* already instructed, understanding the Second Amendment requires consideration of the historical evidence of the people's right to keep and bear arms. And the Second Amendment certainly should not be circumscribed without reconciling that history and tradition.

III. "Proper Cause" Requirements Are at Odds With the Second Amendment's Text, History, and Tradition.

For all of the reasons discussed in Petitioners' brief, New York's proper cause requirement infringes the commonly understood "right of the people to keep and bear arms." The right plainly extends beyond the home. Pet. Br. 38-40. And not just for those with "proper cause." Pet. Br. 40-48.

No amount of corpus linguistics findings can overcome the historical evidence that it was well-understood at the Founding (and through Reconstruction) that Americans retained an individual right to defend themselves. As an initial matter, consider the place of the Second Amendment in the Constitution. Corpus linguistics scholars now posit that the Second Amendment is a collective right. But it sure would "be strange to find in the midst of a catalog of the rights of *individuals* a provision securing *to the states* the right to maintain a designated 'Militia.'" Scalia, A Matter of Interpretation 137 n.13.

And then consider the history. That history confirms that while the rights protected by the Second Amendment are "not unlimited," they do not stop at the doorsteps of American homes. *Heller*, 554 U.S. at 595; *see, e.g.*, *State v. Reid*, 1 Ala. 612, 616-17 (1840) ("A statute which, under the pretence of regulating,

amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."). It makes little sense to speak of the fundamental right to keep *and bear* arms if only the lucky few with "proper cause" are entitled to do so outside the home. *See Drake*, 724 F.3d at 444 (Hardiman, J., dissenting) ("To speak of 'bearing' arms solely within one's home not only would conflate 'bearing' with 'keeping,' in derogation of the [*Heller*] Court's holding that the verbs codified distinct rights, but also would be awkward usage given the meaning assigned the terms by the Supreme Court.").

Described in *Heller*, the impetus for the Second Amendment included disarmament in England and then in the colonies. 554 U.S. at 592-95. Over time, limitations on carrying firearms outside the home were narrowly construed—such that whatever those limitations "banned on the shores of England or colonial America, the right to bear arms by the time of the Founding was thought to protect carrying for self-defense generally."[58] Indeed, certain colonial

[58] *Wrenn v. District of Columbia*, 864 F.3d 650, 660 (D.C. Cir. 2017) ("Founding-era Northampton laws banned only the carrying of 'dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.'" (quoting James Wilson, The Works of the Honourable James Wilson 79 (1804))); *see also*, *e.g.*, *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422-23 (1843) ("[C]arrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime.").

jurisdictions *required* citizens to be armed.[59] As of the Founding, "Americans understood the 'right of self-preservation' as permitting a citizen to 'repe[l] by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *Heller*, 554 U.S. at 595 (quoting 1 Blackstone's Commentaries 145-46, n.42 (1803)).

Early decisions by the state supreme courts also illustrate that carrying firearms in public in "*some form*" was included in the bundle of Second Amendment rights. *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1172 (2014) (O'Scannlain, J.), *rev'd* 824 F.3d 919 (2016) (en banc); *Moore*, 702 F.3d at 936 ("[O]ne doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home."). Those decisions illustrate that there can be some limitations on public carry rights—for example, by forbidding unusual weapons or weapons brandished to terrify or alarm,[60] or permitting only open carry but not concealed carry.[61] But to prohibit *every* form of public carry is in effect an "absolute

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[59] *See Young*, 992 F.3d at 795-96 (collecting examples from Connecticut, Georgia, Massachusetts, Maryland, Rhode Island, South Carolina, Virginia).

[60] *See Huntly*, 25 N.C. at 422-23; *see also Simpson v. State*, 13 Tenn. (5 Yer.) 356, 360 (1833).

[61] *See, e.g.*, *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Chandler*, 5 La. Ann. 489, 490 (1850); *but see Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91-92 (1822). Historically, open carry was the preferred method of public carry, versus today's more common practice of concealed carry. *See Peruta*, 742 F.3d at 1172 (acknowledging states historically "passed laws banning concealed carry . . . *so long as* open carry was still permitted").

prohibition." *Andrews v. State*, 50 Tenn. 165, 187 (1871); *see Reid*, 1 Ala. at 616-17; *Nunn*, 1 Ga. at 251; *see also Bliss*, 12 Ky. at 91-92.

Likewise, St. George Tucker's edition of Blackstone's commentaries "conceived of the Blackstonian arms right as necessary for self-defense," *Heller*, 554 U.S. at 606, with no suggestion that it was a right to be exercised only inside the home. Rather, he described the self-defense right as "'the true palladium of liberty'" and "'the first law of nature.'" *Id.* (quoting Tucker). He specifically pointed to English game laws ("prohibiting 'keeping a gun or other engine for the destruction of game'") as an abuse of the right. *Id.* The example speaks for itself—Americans don't hunt in houses.

In light of this and all of the other evidence marshaled by Petitioners, "proper cause" or "good cause" requirements stand out as historical anomalies. In New York, similar to some other jurisdictions, "[a] generalized desire to carry a concealed weapon to protect one's person and property" is insufficient to establish "proper cause" for a concealed-carry license. *Kachalsky*, 701 F.3d at 86 (quotation marks omitted); *see also id.* (open carry prohibited). To be eligible for a license, the applicant must show they are "atypical." Pet. 5. Despite *Heller*'s assurance that "the inherent right of self-defense has been central to the Second Amendment right," 554 U.S. at 628, these jurisdictions prohibit nearly all ordinary citizens from exercising their fundamental self-defense right where confrontation is as or more likely to occur. Imagine a Fourth Amendment analogue, where a hypothetical state law subjects everyone except homeowners with

even-numbered addresses to annual warrantless searches of their houses. Or a Fifth Amendment analogue, where no person is called to be a witness against himself, except in cases where DNA evidence implicates the accused. Or a First Amendment analogue, where a state proclaims to permit the free exercise of religion, except on Saturdays and Sundays. No one would seriously debate the constitutionality of such hypotheticals. So too here—prohibiting all but the atypical from exercising their fundamental rights is to effectively prohibit the exercise of the fundamental right outside the home altogether.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

PATRICK N. STRAWBRIDGE
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South, PMB #706
Boston, MA 02109
(617) 227-0548

TAYLOR A.R. MEEHAN*
Counsel of Record
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
taylor@consovoymccarthy.com

* *Licensed in Illinois and D.C.; supervised by principals of the firm licensed in Virginia while Virginia bar application is pending.*

Counsel for Amicus Curiae
NRA Civil Rights Defense Fund

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