No. 20-843

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH, Petitioners,

v.

KEITH M. CORLETT, in His Official Capacity as Superintendent of New York State Police, RICHARD J. MCNALLY, JR., in His official Capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS JOHN ELSON ESQUIRE IN SUPPORT OF RESPONDENTS

JOHN ELSON
Counsel of Record

Box 1621
Castle Rock, WA 98611
johnelson92620@gmail.com
360 519 0033

CURRY & TAYLOR ♦ 202-393-4141

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Interest of Amicus[1]

Amicus John Elson is a former California civil trial attorney, now residing in Washington as he transitions to fishing bum.

Though licensed for salmon, steelhead, sturgeon and trout, amicus is not yet admitted to the bar of the Evergreen State, so he practices guitar instead.

Between runs of fish and the pentatonic scale, *inter alia*, he occasionally reads some law.

Introduction and Summary of Argument

In *District of Columbia v. Heller* (2008) 554 U.S. 570 both parties, and the majority and minority, all assumed the Second Amendment created a right to keep and bear arms, disagreeing on whether the right was tied to militia service, as *DC* and the dissenters argued (554 U.S. at 577, 595; 636 [Stevens, dis.]; 681 [Breyer, dis.]), or the right existed independently, as *Heller* argued, and the majority held (*ibid*, 577; 595).

Despite the crushing tonnage, both pre- and post-*Heller*, from courts and a legion of commentators weighing in on the "meaning" of the Second, its *words* remain barely examined, and in the context, or light, of the framers' use of language in Amendments I, III, IV and VII, not at all. As a result, all have gotten it

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

wrong, and badly.

The Second's words pertaining to guns literally do nothing more than to restrict congress from "infring[ing]. . . . the right to keep and bear arms". As a whole or piecemeal II sheds no light on whether an individual right was also intended to be created. In their search for clues courts and commentators have cast their nets so far afield - clauses, schmauses, pfui- that the resulting efforts at legal reasoning - with *Heller* being the nadir - are more mixed up than amicus' metaphors.

The question of whether the framers intended to create an individual right to keep and bear arms was answered by the language in Amendments I, III, IV and VII, and the answer was and is "no", despite recent errant pronouncements to the contrary.

Statement

Simple English in Lieu of Interpretive Tools, and Amicus' Analysis

Amicus has neither expertise in linguistics, nor any experience as a constitutional law litigator, but he does subscribe to the notion that

> "The English language is a form of communication! ... Words aren't only bombs and bullets—no, they're little gifts, containing meanings!"

Zubulake v. UBS Warburg LLC ((2004) 229 F.R.D. 422, at 424, quoting from Philip Roth's *Portnoy's Complaint*.

The framers chose quite specific words, then how and where to place them, when writing the Amendments.

The words in the Second do not suggest any intention to create an individual right, so looking to the framers' use of language in other Amendments for help in construing the Second would appear to be as good an interpretative aid as any.

Analysis of the framers' use of language entails identifying, then appreciating the significance of,

** which words were chosen for other Amendments but not for the Second, and those in the Second not in other Amendments;

** where words or ideas were placed in other Amendments, contrasted with where placed in the Second;

** what pattern in sentence construction is reflected in other Amendments which is also common to the Second, and what that pattern suggests;

** the relative importance of a right *vis a vis* others, based upon the framers' language used to describe a transgression against, or contravention of, that right compared to how described concerning other rights; and

In addition, amicus also relies upon *Federalist Paper* No. 29, "On the Militia".

Argument

According to *U.S. v. Cruikshank* (1875) 92 U.S. 542, at 553, " 'The second amendment . . . means no more than that it ["the right to keep and bear arms"] shall not be infringed by Congress,' " quoted by *Heller* (554 at 619-620). This observation applies to the amendment when and as written, and therefor several decades before the 14th Amendment took effect and, of course, before *Heller* was extended to the states by *McDonald v. City of Chicago* (2010) 561 U.S. 742.

The answer to the question of whether the framers intended to "codify" the common law right to bear arms does not appear from II's language.

For reasons unknown, it appears that amicus is the proverbial minority of one to argue the framers' use of language in I, III, IV and VII illuminates the issue, and answers that question.

Nonetheless, when construed through the prism of how language was used in other Amendments to state and achieve certain goals - e.g., ,"the right of trial by jury shall be preserved" (VII) - two things come into focus about II:

(1) read in the light of I, III, IV and VII, the framers did not intend to create an individual right to keep and bear arms, and

(2) the framers went out of their way when composing the Second to avoid even the appearance of having created any such individual right.

I

The framers' use of language in the Bill of Rights belies any intention to create an individual right to keep and bear arms

A The Framers knew how to state both "thou shall not" and codification in both absolute and conditionally absolute terms, did so in I and III, then again in IV and VII, but chose none of the above for II.

1. *The straightforward restraints and restrictions of I & III.*

In both I and III, the framers opened with absolute commands, "Congress shall make no law. . . " and "No soldier shall, in time of peace, be quartered . . . .", even if the latter had a qualification - "in time of peace".

Had the framers wanted to "codify" the common law right to keep and bear arms, they could have easily borrowed from I, "Congress shall make no law infringing the right of the people . . . ", or they could have adapted from III, "No law shall infringe the right of the people. . . ".

They didn't, instead beginning II with "A well-regulated militia being necessary to the security of a free state. . . .." In both I and III, the framers were bluntly declarative at the outset; II is anything and everything but, instead providing the "because" of the entire Amendment (Heller, 554 at 577).

The framers made choices when they wrote the

Amendments, are we not bound to recognize and respect them?

Can we ignore the framers' choice to begin II with language quite different from the straightforward declaratives of I and III, while purporting to construe II as if it were similarly direct?

2. *The intent to "codify" on the face of both IV & VII.*

In IV and VII the language made clear the framers intended to "codify."

"The right of the people to be secure . . . . shall not be violated. . .," and "In suits at common law . . . the right of trial by jury shall be preserved" both evince an intention to create a federally protected right.

Each begins the sentence, even if VII is qualified by the amount in controversy, with the declaration of the right or the thing to be protected; not so II.

It begins with language *Heller* dismissed as merely "prefatory", with the purportedly codified right in clause two, at the back of the bus.

This placement of the right in II underscores probably the most compelling of the evidence against the notion of II codifying anything: the framers' pattern of sentence construction, and placement of the right or goal to be protected, in II, IV and VII.

B. The common pattern of sentence structure, but different placement of content within IV and VII compared to II, reflect the framers' decision to codify in IV and VII, and their choice not to in II.

As the chart below portrays far more clearly and easily than a paragraph or two could explain, II, IV and VII share sentence structure, with the goal or thing to be protected up front, and the means to the end, such as rules to be applied or tools to use, to achieve the end, at the end of each amendment:

Stated goal or thing to be protected		**Means to the end, or rules/tools to achieve goal or protection**
II. A well-regulated **militia** being necessary to the security of a **free state**,		the right of the people to keep and bear arms shall not be infringed.
IV. The **right of the people to be secure** in their persons, houses, papers, and effects **against unreasonable searches and seizures** shall not be violated, and		no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

VII. In suits at common law, where the value in controversy shall exceed twenty dollars, **the right of trial by jury** shall be preserved, and		no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Page width limitations preclude a third column, the "how and why" the means / rules / tools serve to achieve the stated goal or thing to be protected, so a word or two on each is appropriate.

IV's goal is served because requiring particularized warrants helps to ensure the "right of the people to be secure. . .against unreasonable searches and seizures." The text literally provides the rules for the judiciary to employ when assessing either to issue a warrant, or whether the search or seizure was reasonable.

VII's goal of preserving jury trial is served by restricting the judges, whether trial or appellate, from monkeying with jury findings or verdicts for any reason or upon any ground that was not part of the common law governing England in 1791, *Dimick v. Schiedt* (1935) 293 U.S. 474.

Contrary to *Heller's* dismissal of clause one as "prefatory" the framers, or at least one them, thought it was the meat and potatoes; see *Federalist Paper* No 29, "On the Militia," discussing at length the "well regulated militia" that is mentioned in clause one, not clause two.

Here, the need to have a militia is served by restricting congress from "infringing" the common law right to arms; the ultimate interest being served is "the security of a free state."

The framers decided that the goal of having a "well regulated militia" would be met by ensuring locals had their own muskets, powder and shot so that they were provisioned, however modestly, as their circumstances permitted. In II the rule restricting congressional interference with the common law right to arms was not imposed by clause one, where the framers placed the goals in IV and VII, but by clause two, where the framers placed the means / rules / tools to achieve the ends - the ends being the right specified, goal or thing to be protected in clause one.

C. The framers went to considerable lengths when drafting the Second to avoid even the appearance of having created an individual right to keep and bear arms.

Upon review of the lists of commands and restrictions in Amendments I - VIII, what is striking is how many different ways the framers either codified common law rights, as they did in IV and VII, or imposed restrictions, "Congress shall make no law. . ." I,, "No person shall be held. . . " V, and "Excessive bail shall not. . ." VIII.

As noted above, the Framers could've begun II with the declaratives of I and III, but they didn't.

The framers could have merely dropped the first clause of II, and intent to codify would be difficult to

deny if clause II was all there was, but they didn't.

The framers could have said the right to arms "shall not be violated" as they did in IV, or the right to arms "shall be preserved" as they did in VII, but they didn't.

They knew how to say "no way" directly and without equivocation, and did so elsewhere:

> No person shall be held to answer . . . .; nor shall any person be subject. . . . ; nor shall be compelled, nor be deprived . . . . nor shall private property be taken. . .

Amendment V.

> Excessive bail shall not. . ., nor excessive fines . . ., nor cruel and unusual punishments . . . .

Amendment VIII.

When the framers wanted to confer rights affirmatively, they knew how to say so:

> In all criminal prosecutions, the accused shall enjoy . . . .and to be informed. . . . to be confronted. . . ; to have compulsory process. . . and to have the assistance of counsel . . .

Amendment VI

Despite all the various ways in which the framers conferred rights and imposed restrictions in other amendments, when they wrote II, they went out

of their way to avoid any of them.

D. Other pertinent indicia of the choice not to "codify" a right to arms.

1. *Combining placement and substance reflects that the framers didn't intend to "codify".*

From the text alone any reasonable reader would conclude the subject matter of clause one is the more important clause, referring to the "security of a free state" right up front, while the individual right purportedly being codified follows in clause two.

Which is worthy of mention in an amendment to the constitution of a new nation in 1791, and presumably of greater significance to its citizens, "the security of a free state" and the importance to it of a "well regulated militia," or a promise that a pre-existing, and well recognized common law right to arms would not be "infringed"?

Even without reference to the substance, structure, or organization of other amendments, on its own, II's text reflects that clause one was the framers' focus, not clause two.

2. *The framers chose as modest a word as possible to describe a contravention of, or transgression against, the common law right.*

II's purported codification is mentioned in luke-warm terms, "shall not be *infringed*", compared to "shall not be *violated*" (IV), or even the more emphatic

"*shall be preserved*" (VII).

If the framers intended to codify, why do so with "not to be infringed" - language distinctly less visceral - "shall not be violated" - or indicative of purpose - "shall be preserved" - than the words chosen for IV and VII?

II
Publius and his two cents worth

Long before becoming broadway bound, in *Federalist Paper* #29, "On the Militia", Alexander Hamilton as Publius wrote at length on the notion of the "well regulated militia"; a clause one subject.

Nowhere in the entirety of the Federalist Papers is there so much as

a reference to or the implication of,

a word, phrase, sentence, paragraph, concerning,

either a whimper or a whisper about,

even so much as a cajole much less a command touching upon,

"the right of the people to keep and bear arms", a clause two subject.

What does that say as to what a fairly influential framer thought was the business end of the deuce?

Conclusion

The Second as written has nothing to do with codifying a common law right to arms; its focus is making sure the local militia necessary for "the security of a free state" is sufficiently provisioned to defend against enemies, foreign or domestic.

Heller got it wrong.

The Court should repudiate *Heller* and progeny as not merely wrongly but badly decided, and affirm,

Respectfully submitted,

John Elson
Amicus Curiae/Counsel of Record
Box 1621
Castle Rock, WA 98611
johnelson92620@gmail.com
360 519 0033