No. 20-56174

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MATTHEW JONES, *et al.*,
Plaintiffs-Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California, *et al.*,
Defendants-Appellees,

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

PLAINTIFFS-APPELLANTS' RESPONSIVE SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Other Authorities

INTRODUCTION

The Court inquired about "the original public meaning of [three] Second Amendment phrases," and whether "the tool of corpus linguistics help[s] inform the determination" of those phrases' original meaning. Order at 1. Our Supplemental Brief explained that *Heller* conclusively resolves the meaning of the phrases "A well regulated Militia" and "the right of the people," and that the meaning of "shall not be infringed" may clearly be discerned from traditional originalist sources. California largely agrees with these propositions. The State *also* agrees that the tool of corpus linguistics does little to illumine the original meaning of the phrases in question—based on many of the same concerns about the methodology that we articulated in our brief. And California presents no corpus-linguistics evidence that contradicts the analysis in our Supplemental Brief showing that, should the Court nonetheless decide to consult corpus linguistics, the data derived from that method *only confirm* the meaning established by *Heller* and traditional originalist methods.

Instead, California's Supplemental Brief is largely comprised of a recitation of its arguments, set forth in prior briefing, that 18-to-20-year-olds have no Second Amendment rights and that the challenged limits survive intermediate scrutiny. Those arguments are just as flawed as they were the first time around, *see* Reply Br. 3-11, 21-26, and nothing California says addresses the answers to those arguments in our Reply brief.

ARGUMENT

I. The challenged restrictions are unconstitutional under the Second Amendment's original public meaning.

A. "A well regulated Militia."

As shown in our Supplemental Brief, *District of Columbia v. Heller* conclusively interpreted the Second Amendment's reference to "[a] well regulated Militia" as originally meaning the body of "all able-bodied men." 554 U.S. 570, 596 (2008). California acknowledges this. Appellees' Suppl. Br. 8. Because it is undisputed that 18-to-20-year-olds were part of this Militia, at the Founding, it necessarily follows that these adults are protected by the Second Amendment's sweep.

California resists this conclusion, based on a convoluted "distinction between rights and duties." *Id.* at 11. While 18-to-20-year-olds may have been subject to "militia-related duties" at the Founding—including the duty "to 'keep' arms in connection with militia service"—that does not, the State says, mean the Second Amendment "conferred upon those individuals a right to possess or purchase firearms for use in their individual capacities." *Id.* at 9. That is nonsense. Whatever the interpretive weight of "firearms-related duties when determining the scope of the Second Amendment right" in other contexts, we know from *Heller* that militia duties *necessarily entailed* Second Amendment "*rights* to perform those duties," *id.* at 9-

10, because the very "purpose for which the right was codified" was "to prevent elimination of the militia," 554 U.S. at 599.

The amicus brief filed by Mr. Goldfarb—an attorney who has an interest in the Second Amendment and who professes "expertise in linguistics," Goldfarb Amicus 1—strikes a more confrontational pose to *Heller*'s interpretation. *Heller*'s conclusion that the phrase "well regulated Militia" refers to the body of all able-bodied men rather than specific "organized" militias does not "add up to a coherent whole," according to Goldfarb, because the Court failed to explain "where th[e] discipline and training" that makes the militia "well regulated" "would come from." *Id.* at 4. Mr. Goldfarb's independent research, he claims, provides the answer: "the concept of 'regulating' the militia was understood to entail regulation by the government," thus "reflecting an understanding of a well regulated militia as a state-regulated militia," *id.* at 5-6 (emphases omitted), and refuting *Heller*'s interpretation of the phrase as referring to "all able-bodied men," 554 U.S. at 596.

There are at least three fatal problems with this argument. First, even if Mr. Goldfarb had actually shown that *Heller*'s interpretation of the Second Amendment is incorrect, this Court has no authority to depart from it—a reality he concedes. Goldfarb Amicus 14. Second, even if *Heller* were incorrect *and* the Court were free to disregard it, it is undisputed that 18-to-20-year-olds were members of *both* the "unorganized" *and* every State's "organized" militia in 1791, so it simply *does not*

matter which of these bodies the phrase "well regulated Militia" refers to, for purposes of this case—which Goldfarb *also* effectively concedes. *Id.*

Third, the argument fails to show that *Heller*'s interpretation is incorrect to begin with. *Heller* does not claim that the militia's "command structure [w]ould have emerged spontaneously," and nothing it says is inconsistent with the conclusion that the "discipline and training" that made the militia "well regulated" was "imposed *by the government*." *Id.* at 5. All *Heller* says is that (1) the phrase "well regulated Militia" refers to the body of "all able-bodied men," not just individual "state- and congressionally-regulated military forces," 554 U.S. at 596, and (2) the Second Amendment right serves the purpose of "prevent[ing] the elimination of the militia" by barring the Government from "taking away the people's arms" and thereby "eliminat[ing] a militia consisting of all the able-bodied men," as "had occurred in England," *id.* at 598-99. None of these propositions is inconsistent with the assumption that the "discipline and training" that makes the Militia "well regulated" came from the government. *Id.* at 597.

Indeed, we *know* that the Founding generation had no linguistic difficulty referring to a "well regulated Militia" that was composed of the whole "body of the people" because both the Virginia ratifying convention and James Madison's original draft of the Second Amendment *did exactly that*. *See* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE

FEDERAL CONSTITUTION 659 (1836) ("[A] well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state."); 1 ANNALS OF CONG. 778 (1789) (Joseph Gales ed., 1834) ("A well regulated militia, composed of the body of the people, being the best security of a free state ...."). Goldfarb never grapples with these sources, and his attempt to pick a fight with *Heller* goes nowhere.

B. "The right of the people."

California admits that *Heller* resolves the original meaning of this phrase, too, by holding that it protects an "individual right" that "belongs to all Americans," "not an unspecified subset." Appellees' Suppl. Br. 11-12. But the State nonetheless claims, directly in the teeth of these determinations, that "there is considerable historical evidence demonstrating that the phrase 'right of the people' was not originally understood to refer to individuals under 21." *Id.* at 13. Its only support for that claim amounts to a regurgitation of the flawed historical arguments we have already debunked.

For example, California once again trots out the assertion that at the founding, "the age of majority was 21." *Id.* As we have twice explained, however, it is simply not the case that 18-to-20-year-olds "were considered infants" for all purposes in 1791, *id.*—and *one* context where we *know* they were treated as adults was *membership in the militia*. California also relies, again, on the 1883 edition of

Thomas Cooley's treatise—penned over *nine decades* after the Second Amendment was ratified—which it quotes for the proposition that "the State may prohibit the sale of arms to minors." *Id.* But that statement (supported only by a citation to a single Tennessee case from 1878) was an aside during Cooley's discussion of *regulatory takings*—in the same footnote, for example, as a case that apparently upheld a ban on the "possession of game birds after a certain time." THOMAS M. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 740 n.4 (5th ed. 1883). Cooley nowhere discusses whether a prohibition on arms sales would be consistent with the right to keep and bear arms. *See id.*

California also renews its argument that age-based restrictions on firearm purchases are "longstanding" and "have been in effect since the nineteenth century." Appellees' Suppl. Br. 14. But it provides no answer to our briefing explaining, at length, that: (1) restrictions that appeared for the first time in the late nineteenth century can shed no light on the original meaning of the Second Amendment, *see* Reply Br. 9-10; and (2) anyway, the smattering of outlier historical restrictions cited by the State do not show any historical understanding that 18-to-20-year-olds could be barred from acquiring common firearms, *see* Opening Br. 34.

C. "Shall not be infringed."

Finally, our Supplemental Brief showed that the original meaning of the phrase "shall not be infringed" imposes a mandatory duty on the Government not to

restrain, impede, or curtail the right to keep and bear arms in any degree. California presents no evidence to the contrary. *See* Appellees' Suppl. Br. 15; *see also* Goldfarb Amicus 12-13 (acknowledging the original meaning of "infringe" is to "breach," "violate," "transgress," or "contravene"). The State insists that this language was "not originally understood to confer an absolute right to keep and bear arms." Appellees' Suppl. Br. 15. But while *Heller* establishes that the Second Amendment was originally understood to be subject to certain traditional limitations, 554 U.S. at 626-27, as just discussed (and explained in detail in our earlier briefing), none of the limits accepted at the Founding encompass restrictions preventing 18-to-20-year-olds from acquiring common firearms. And in any event the dispute is irrelevant, since the restrictions challenged here fail even California's favored intermediate-scrutiny approach. *See* Opening Br. 39-52.

II. Corpus linguistics' flaws make it an unreliable guide to the Second Amendment's original meaning.

A. Conventional originalist sources—and the binding decision in *Heller*—thus establish that the original public meaning of the Second Amendment is flatly inconsistent with the challenged restrictions. As our Supplemental Brief explained, available corpus linguistics data are consistent with this conclusion; but the inherent flaws in applying the corpus linguistics methodology to legal analysis make it a poor guide to the Constitution's original meaning. Importantly, California essentially agrees with our concerns about using corpus linguistics in this context—and also

agrees that "no [corpus linguistics] analysis is necessary to resolve this appeal." Appellees' Suppl. Br. 16.

California's supplemental brief highlights many of the concerns that we raised about the use of corpus linguistics in constitutional interpretation. Our brief, for example, detailed why the central tool of legal corpus linguistics—the "frequency hypothesis" that a word or phrase's most-frequent meaning, across the corpus of texts, is necessarily the *correct* meaning in the Constitution—suffers from fatal conceptual flaws. California basically agrees: "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 or the Constitution," the State says, and "corpus linguistics analysis [must] be careful not to conflate 'ordinary meaning' with 'most common meaning.' " Appellees' Suppl. Br. 18, 24 (cleaned up).

Our brief further explained that the available corpora privilege the use of language by elites—the sorts of eighteenth-century Americans who drafted laws, published sermons, and preserved their correspondence for prosperity—over that of the "ordinary citizens in the founding generation." *Heller*, 554 U.S. at 577. California agrees: "corpus linguistics sources … may not reliably track ordinary people's judgments about meaning," it explains, and "careful attention must be paid to which sources (and voices) are not included in a given database, which could skew

the data away from the 'ordinary' usage of the words being studied." Appellees' Suppl. Br. 18, 19 (quotation marks omitted).

Further still, our Supplemental Brief explained that legal corpus linguistics depends on *deliberately stripping away* the rich contextual information that ordinary interpretation has always been understood to depend upon, in favor of a quantitative analysis of hundreds of decontextualized snippets of text. California effectively agrees: interpretation of the individual words and phrases of the Second Amendment, it notes, "require[s] a careful examination of those phrases in the contexts in which they appear." *Id*. at 24.[1]

Finally, our supplemental brief warned that despite legal corpus linguistics' façade as a quantitative, objective, and scientific methodology, at bottom it depends on irreducibly subjective judgments about the meaning of language. California, once again, agrees: "because [corpus linguistics] searches often return irrelevant results,

[1] California cites Justice Alito's recent concurring opinion in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), as indicating that corpus linguistics "can be an attractive analytical tool." Appellees' Suppl. Br. 17. But in reality, Justice Alito's opinion suggests just the opposite. While Justice Alito stated that a corpus-linguistics analysis of the "series-qualifier" canon of construction "would be interesting," the whole point of his opinion is that such an analysis "is not what matters," since the purpose of legal interpretation is "to identify the way in which a reasonable reader, fully competent in the language, would have understood the text at the time it was issued" based on "our common understanding" of language, not "mechanically applying a set of arcane rules." *Duguid*, 1174-75 (Alito, J., concurring) (cleaned up). Just so.

the user must make a decision about which search results to evaluate and which results to exclude from evaluation." *Id*. at 20 (quotation marks omitted).

California also argues that because of these "challenges and considerations"—as well as the "complex[ity]" of the corpus linguistics method—"any corpus linguistics analysis likely should be performed (if at all) by experts or lawyers trained in the tool, in the context of discovery in the trial court." *Id.* at 19, 24-25. Plaintiffs do not believe any further development in the trial court is necessary. *Id.* at 25. Both parties agree that the legal corpus linguistics methodology is subject to serious weaknesses, and both parties agree that the method, in any event, should not—and, for the most part, under binding precedent cannot—alter the Court's conclusions concerning the original meaning of the Second Amendment. *Id.* Should the Court conclude that a corpus linguistics analysis is appropriate, the existing briefing on the issue is sufficient to show that such an analysis merely confirms the interpretation established by traditional historical sources (and *Heller*).

B. Mr. Goldfarb's amicus brief disagrees with California about the utility of legal corpus linguistics. He purports to have "examined the corpus data" for each of the Second Amendment phrases identified by the Court, and he argues that these data "pose[] a serious challenge for *Heller*'s interpretation of the Second Amendment" and "lay the groundwork for the Supreme Court to revisit *Heller*." Goldfarb Amicus 2, 14-15. Because Goldfarb concedes that "*Heller* nevertheless

constitutes a binding precedent"—and that his corpus research is not relevant "at all" to the issues actually raised in this case, Goldfarb Amicus 14—an extended discussion of his arguments is unnecessary. We close by briefly discussing several of Mr. Goldfarb's claims, however, because they exemplify the critical flaws of legal corpus linguistics.

Goldfarb asserts that "[t]he corpus data shows that *Heller* was mistaken about how bear arms was … likely to have been ordinarily understood," because uses of the phrase to mean physically carrying a firearm "were virtually nonexistent in the corpus data." *Id.* at 3. But "virtually nonexistent" turns out not to mean *actually* nonexistent: Goldfarb's underlying data show that he coded at least 33 concordance lines as either clearly or arguably consistent with *Heller*'s interpretation, roughly 6 percent of the total uses he identified.[2] Moreover, we *know* that the phrase could be used to convey (at least partially) the sense of carrying firearms for self-defense—in extremely similar contexts—because that is how the Pennsylvania ratifying convention and at least nine State constitutions adopted shortly before or in the few decades after 1791 used it. *See The Address and Reasons of Dissent of the Minority of the Convention, of the State of Pennsylvania, to Their Constituents* (Dec. 18, 1787), *available at:* https://bit.ly/2R7OEhy ("That the people have a right to bear

[2] Neal Goldfarb, *COFEA & COEME: "bear arms" & "carry arms"* (rev. July 31, 2019), http://bit.ly/Goldfarb2AmBearArmsCarryArms.

arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game"); *Heller*, 554 U.S. at 601-03, 658. Just because the phrase was more often used in an idiomatic, military sense in the body of texts collected in COFEA, there is no justification for treating this as the necessarily correct meaning in the Second Amendment.

Similar difficulties also infect Mr. Goldfarb's analysis of "keep arms." He asserts that this phrase was used predominantly "in a military context, a collective context, or both," but he admits that it was used "in a nonmilitary context" in fully a quarter of the instances he reviewed. Goldfarb Amicus 10.

Finally, the problem is even more pronounced in Mr. Goldfarb's discussion of "right of the people." Goldfarb claims this phrase "was most often used to denote rights that were collective," but according to his math, about one-third of the uses he examined either clearly or arguably referred to individual rights. *Id.* at 7. And he also admits that the phrase conveyed this individual-rights sense *elsewhere in the Constitution*. *Id.* at 11-12. It remains entirely mysterious why we should conclude that "right of the people" in the Second Amendment "was most likely to have been understood in a collective sense," *id.* at 8—contrary to the way the phrase was clearly used throughout the Constitution—simply because it was used that way in roughly three-fifths of the other, extraneous texts collected in the COFEA database.

Mr. Goldfarb's analysis also aptly illustrates the way in which legal corpus linguistics ignores the broader context of legal provisions. He claims that "the right of the people" must refer to a collective right in the Second Amendment because of the many instances he found where the phrase was used to refer to collective activities such as voting. *Id.* at 7. But the fact that COFEA apparently includes more texts discussing collective rights than individual rights hardly means that ordinary founding-era citizens would have understood "right of the people" to protect a purely collective right when reading the Second Amendment (yet not, as Goldfarb admits, when reading the First or Fourth Amendments, *id.* at 11-12).

Goldfarb makes a weak effort to weave some of the surrounding context into his analysis of "right of the people," arguing that the "likely understanding" of the phrases "well regulated militia," "bear arms," and "keep arms" would have "primed" Founding-era readers "to understand *the right of the people* in a collective sense." *Id.* at 8-11. This is a far cry from the richly textured approach to context that constitutional interpretation has always been understood to involve. Having concluded that these three other decontextualized phrases have a "collective" meaning—based on the majority use of those phrases in other texts that for the most part have nothing to do with the Second Amendment—Goldfarb then attempts to leverage his (flawed) analyses of each of those three snippets of text into *also* supporting a collective reading of "the right of the people." Entirely missing from

this mechanical endeavor is the sort of probing analysis that *Heller* undertook of the Second Amendment's purposes, its history, and its understanding in contemporary historical sources (sources actually having something to do with the Second Amendment).

CONCLUSION

The Court should reverse the decision below.

Dated: May 3, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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Dated: May 3, 2021

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