IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID C. RODEARMEL,	)	
	)	
Plaintiff,	)	No. 1:09-cv-00171-RBW-JR
	)	
v.	)	Honorable Karen LeCraft Henderson
	)	Honorable James Robertson
HILLARY RODHAM CLINTON, et al.	)	Honorable Reggie B. Walton
	)	
Defendants.	)	
	)	

RESPONSE TO MEMORANDUM OF PROFESSORS OF LINGUISTICS AS *AMICI CURIAE* IN SUPPORT OF THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Plaintiff, by counsel, respectfully submits this response to the Professors of Linguistics' *amicus curiae* brief in support of Defendant's Motion to Dismiss.

MEMORANDUM OF LAW

I. The *Amici* Attempt to Use Linguistics to Create Ambiguity Where None Exists.

Starting with *United States v. Granderson*, 511 U.S. 39 (1994), courts have looked to linguistics on occasion to assist them in determining the specific meaning of unclear legal texts. Most recently in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), both Justice Scalia, writing for the majority, and Justice Stevens, writing in dissent, cited an *amicus curiae* brief filed by linguistics experts. *Heller* hinged on the interpretation of the Second Amendment. In that case, the experts did not attempt to create an ambiguity about the meaning of the Second Amendment; instead, they opined that, based on their linguistic analysis of the clause, the appellate court had interpreted the Second Amendment incorrectly. Moreover, they asserted that, based on their linguistic expertise, the Second Amendment could have had only one meaning at

the time of its drafting. Ultimately, the experts linguistic interpretation of the Second Amendment did not sway the majority away from its legal interpretation of the provision.[1]

Unlike in *Heller*, the Professors of Linguistics ("the *amici*") submit their brief to this Court to "show that . . . the meaning of the Ineligibility Clause is not plain." They urge the Court to "find the Ineligibility Clause to be ambiguous." *Amici Brief* at 1 & 5. In support of this proposition, the *amici* explain, "Linguistics can augment the judge's toolkit by providing methods and insights [that] can be helpful to the Court in deciding what interpretations the text of the Ineligibility Clause *can reasonably bear*." *Id.* at 3 (emphasis added). The *amici* do not provide the Court with a specific interpretation of the Ineligibility Clause or evidence of how the language of the clause would have been used or understood in eighteenth-century America; rather, to reach their conclusion that the Ineligibility Clause is ambiguous, they examine it from a highly technical, if not purely academic standpoint that seems to bear little resemblance to how an average modern reader, much less an eighteen-century reader, would have used or understood the language of the clause. The *amici* view their role incorrectly. Plaintiff agrees that linguistics is one of many tools that a court can use to determine the meaning of unclear text. However, linguistics should not be used to create an ambiguity; it should be used as a means to understand a provision only after a court determines that an ambiguity exists.

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[1] "Considering the purpose of the Amendment as expressly articulated by the absolute clause, the reference in the absolute clause to a 'well regulated Militia,' and the use in the second clause of the idiom 'bear Arms,' it is evident that the Framers drafted an Amendment in two symmetrical halves that, together, protect the right of the people to serve in a well regulated militia and keep arms for such service." *Brief for Professors of Linguistics* at 5, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

Unlike in *Heller*, the *amici* are not providing the court with any tools to assist it in reaching a conclusion about an unclear text or evidence of how the Framers understood the Ineligibility Clause. Instead, the *amici* urge the Court to find the clause ambiguous because, in their opinion, it is possible for the clause to have different linguistic meanings.[2] In concluding that the Ineligibility Clause could be read as an example of the "resultative perfect" in addition to the "experiential perfect" posited by Plaintiff, the *amici* appear to disavow the notion that courts are "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[3] *Heller*, 128 S. Ct. at 2788 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931). Not only to the *amici* not provide an analysis of how the words and phrases of the Ineligibility Clause, using their normal and ordinary meaning, would be understood by voters, but the highly technical, academic analysis the *amici* do provide is itself apparently subject to substantial academic debate. *See* Anita Mittwoch, *The English Resultative Perfect and Its Relationship to the Experiential Perfect and the Simple Past Tense*, 31 Ling. & Phil. 323, 324 n.1 & 328 (2008) (noting that "the category Resultative is not clearly demarcated in the literature" and her "informal characterization of the Resultative perfect differs considerably from" those of

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[2] Of course, one could say that asserting and testing alternative hypotheses is the purposes of academic exercises such as the one undertaken by the *amici* in their brief. While such exercises might be common in academic debates among linguists, its usefulness in legal analysis is not at all apparent.

[3] The *amici* also argue that "increased" could be interpreted as an adjective, but do not devote much attention to this argument. The argument appears to be largely circular. Regardless, even the *amici* admit that the more natural reading of "shall have been increased" is as a perfect tense verb. *Amici Brief* at 14.

other authors);[4] *see also Amici Brief* at 5 n.6 (noting debates among linguists about characterizing the perfect "under the rubric of aspect rather than tense" and whether the English language even has a "grammatical category that can be described as future tense."). Indeed, Mittwoch, who authored academic publication excerpted by the *amici* in their brief, notes, "The distinction between Experential and Resultative uses of the perfect is notoriously slippery." Mittwoch, *supra*, at 348. A "notoriously slippery" distinction made by modern academic linguists does not make an otherwise clear constitutional provision ambiguous for purposes of a legal analysis.

Plaintiff continues to maintain, as demonstrated in his opening and reply briefs, that the Ineligibility Clause contains no ambiguity that would justify looking beyond the plain language of the provision. Nonetheless, if the Court were to find the Ineligibility Clause to be ambiguous, it could look to linguistic analysis for guidance in determining the intent of the clause, in addition to relying on more commonly used tools such as canons of interpretation and the intent of the drafters. Unfortunately, the *amici* do not "augment the [Court's] toolkit" because they do not purport to provide guidance in determining the intent of the Ineligibility Clause. Rather, they provide nothing more than an opinion, using twentieth-century (generally speaking) linguistic analysis, that there could be "several reasonable interpretations" of the eighteenth-century clause, including the very plain and ordinary interpretation offered by Plaintiff. *Amici Brief* at 5.

II. The *Amici* Do Not Purport to Interpret the Ineligibility Clause At the Time of Its Drafting.

If the Court finds the use of linguistics to be helpful to its interpretation of the Ineligibility Clause, it is noteworthy that the *amici* fail to provide guidance on how the clause

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[4] A complete copy of the Mittwoch journal article is attached hereto as Exhibit 1.

would have been understood at the time of its drafting. By contrast, in *Heller* the experts provided the Court with analysis of 115 texts consisting of "a compilation of books, pamphlets, and other sources disseminated in the period between the Declaration of Independence and the adoption of the Second Amendment." *Heller*, 128 S. Ct. at 2829 (Stevens, J., dissenting). They also tried to provide historical evidence of how the Second Amendment would have been understood at the time of its drafting.

In their brief, the *amici* present several historical examples of the use of the phrase "have been increased." *Amici Brief* at 12-13 & Appendix B. The earliest of these example appears to date from 1805. Most are from the Nineteenth Century; others are modern. Unlike the more precise formulation presented by the experts in *Heller*, the *amici* assert with respect to these examples that "the relevant language is used in a way (and in a context) that in our view is understood and probably intended resultatively." *Id.* at 11-12. However, the *amici* do not assert that all historical uses of the phrase "have been increased" must be understood as being used in a "resultative" sense only. As the Court in *Heller* noted, "Of course, as we have said, the fact that the phrase was commonly used in a particular context does not show that it is limited to that context . . . . " *Heller*, 128 S. Ct. at 2795. In other words, just because the *amici* have selected certain historical examples of the use of the phrase "have been increased" and concluded that those examples "probably" were intended in a resultative sense does not mean it is accurate to conclude that all uses of the same phrase, including the use in the Ineligibility Clause, were intended to be resultative. Conspicuously absent from the *amici's* analysis is any evidence demonstrating that a usage they characterize as "resultative" would have been used or understood in that same way by the drafters of the U.S. Constitution in 1789. Even if the *amici* were able to

show that the phrase "shall have been increased" was used and understood in a "resultative" sense at the time of the drafting of the U.S. Constitution (which it has not done), the Court should not conclude that the use of this same phrase in the Ineligibility Clause must be read "resultatively" or that it is otherwise ambiguous.

III. The *Amici's* Conclusion That the Phrase "Shall Have Been Increased" is an Example of the "Resultative Perfect" Ignores Textual Cues in the Ineligibility Clause.

Although Plaintiff contends that linguistics should not be used to create an ambiguity in an otherwise unambiguous provision, Plaintiff also contends that the *amici's* conclusion that the phrase "shall have been increased" as used in the Ineligibility Clause is inconsistent with the *amici's* own framework. The *amici* assert that the phrase "shall have been increased" could be understood as an example of the "universal perfect," the "experiential perfect," or the "resultative perfect." They define the "universal perfect" as indicating "that some specified state existed throughout the period identified" and "continue[d] through the reference time." *Amici Brief* at 6 & 8. The *amici* define the "resultative perfect" as "indicating that a discrete event occurred at some point prior to the reference time . . . that results in a change of some sort . . . [and] is understood to continue though the reference time." *Id.* at 8. The *amici* define the "experiential perfect" as an event that has occurred "at a point in time earlier than the reference point." *Id.* at 6. Moreover, the *amici's* brief is largely silent about how to differentiate between the two latter uses of the perfect and pays little attention to the universal. Again, the academic publication excerpted by the *amici* in their brief provides some insight:

> But how does one recognize the Resultative, or, in other words, what distinguishes it from the Experential? The answer to this question depends partly on sentence-internal cues, including prosodic ones, and partly on contextual ones.

> In the absence of such clues, many sentences can be read either way, sometimes with considerable difference in truth value:
>
> (4) Ann. I have lost my passport.
> Beth. Oh dear. What are you going to do?
> Ann. Oh no. I meant in the past.
>
> Beth's reaction indicates that she interpreted Ann's original utterance as Resultative; Anne's correction show that she had intended it as Experential, so that there is no current result state.

Mitwoch, *supra*, at 325.

In arguing that the phrase as used in the Ineligibility Clause is an example of the "resultative perfect," the *amici* ignore the clause's internal cues and instead present the court with what they characterize as a classic example of a resultative perfect phrase, "I have caught a cold." *Id.* Plaintiff agrees that both the phrase "shall have been increased" and the example "I have caught a cold" are in the perfect tense. Plaintiff also agrees that, standing alone, the phrases are indefinite as to time and thus may be interpreted as continuing through the reference time if no other linguist clues are provided.

The Ineligibility Clause does not stand alone, however. It has a specific time component, namely the time for which a member of Congress was elected to serve as a legislator. As a result, any proper analysis of the Ineligibility Clause must take this time component into consideration. If one adds a specific time component to the *amici's* example, "I have caught a cold," the conclusion that the phase indicates or implies a result or state that continues to the present is not at all evident or even accurate. If a speaker states, "I have caught a cold during the summer," the listener is not likely infer that the speaker still has a cold. Instead, the listener most likely would understand the speaker to mean that he or she once had a "summer cold," which

would be an example of the experiential perfect. The inclusion of the time component changes the meaning. The Ineligibility Clause is more complex than the simple sentence "I have caught a cold" or even "The emoluments of the office have been increased." The *amici's* failure to consider this time component leads them to the erroenous conclusion that the Ineligibility Clause, taken as a whole, is an example of the "resultative perfect."

Another internal cue the *amici* fail to consider is that the Ineligibility Clause does not concern simply whether a discrete event occurred and whether that occurrence continued through the reference time. Rather, the obvious focus of the clause is on a disqualification. It is the reason why the clause was included in the U.S. Constitution. If the event occurred during the relevant time period, then there is a disqualification. If it did not occur, then there is no disqualification. As with the time component, the clause is much more complex than the simple statement "I have caught a cold." Rather, a proper analogy must include some reference to an ineligibility or disqualification arising from having caught a cold, such as the sentence, "If you have caught a cold, you are not eligible to volunteer at the hospital." When a time component is added, the obvious meaning of the provision become even more clear: "If you have caught a cold within the past six weeks, you are not eligible to volunteer at the hospital." Like the Ineligibility Clause, and unlike the *amici's* much more simplistic analogy, the internal cues of this example include an emphasis on a disqualifying event within specific time frame. The internal cues of this more complex sentence provide clear insight as to the proper interpretation of the sentence. Whether the event or occurrence (an increase) continued through the time of reference (the appointment) is irrelevant. What matters is the ineligibility and the time component. Indeed, there is nothing in the clause indicating that whether the increase continued

through the time of appointment is relevent. Based on the definitions provided by the *amici*, the clause could be interpreted as an example of the "experential perfect," because an increase occurred during the relevant time period, or the "universal perfect," because only the absence of an increase would allow for eligibility, but not the "resultative perfect."

IV. Conclusion.

The *amici* try to create an ambiguity where one does not exist. Linguistics should not be used to explore whether a phrase may be ambiguous. It should be used by courts to determine a specific meaning when the text is not plain. In this case, the phrase "shall have been increased" is plain and unambiguous.

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Respectfully submitted,

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