
CONCURRING IN PART AND IN THE JUDGMENT

THAPAR, Circuit Judge, concurring in part and concurring in the judgment. I agree with the majority's textual analysis and concur to the extent the majority rests on that analysis. Because the text of 29 U.S.C. § 1002(2)(A)(ii) is clear, we should go no further. And the text *is* clear, as many tried-and-true tools of interpretation confirm. But so does one more: corpus linguistics. Courts should consider adding this tool to their belts.

I.

This case, like many others, asks us to interpret the text of a statute. Faced with the parties' conflicting understandings, we must figure out the most reasonable interpretation. When doing so, our job is not to replace the text that Congress enacted or explore the alleged purposes behind that statute. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("Congress designed the Act in a specific way, and it is not our proper role to redesign the statute."). In fact, the subjective intent of the elected officials who enacted the statute is irrelevant. Our elected officials have many different reasons why they pass a certain statute or incorporate a specific provision. And we simply cannot know which of those varied reasons should control.

Instead, we operate under the fundamental principle that our elected officials write laws that all of us can understand by simply reading them. *United States v. Davis*, 2019 WL 2570623, at *1 (2019) ("In our constitutional order, a vague law is no law at all."). This principle is baked into our constitutional design. For one, it gives meaning to having a republic. As James Madison argued, it makes little sense to elect people to govern if those people pass laws that are "so incoherent that they cannot be understood." *See* The Federalist No. 62, at 421 (James Madison) (J. Cooke ed., 1961). Such laws would "leave people no sure way to know what consequences will attach to their conduct," *Davis*, 2019 WL 2570623, at *1, and would thus favor the "moneyed few over the industrious and uniformed mass of the people." The Federalist No. 62, *supra*, at 421. For another, the separation-of-powers principle that preserves our

republic dictates that elected officials write the laws—not judges. *Davis*, 2019 WL 2570623, at *1 ("Only the people's elected representatives in Congress have the power to write new federal . . . laws."). If judges can simply rewrite statutes, "we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). Thus, to fulfill these principles, we interpret laws with their "ordinary meaning at the time Congress enacted the statute." *Id.* (internal alterations, quotation marks, and citation omitted). Or, to put it another way, we look at how an ordinary person would normally understand the words that Congress used given the circumstances in which Congress used them. Only then can we give "ordinary people fair warning about what the law demands of them." *Davis*, 2019 WL 2570623, at *1.

But words often have multiple permissible meanings. And parties will dispute which of a word's *permissible* meanings does, in fact, prove to be its *ordinary* one, given the statutory context. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 800, 802 (2018) (describing how words have possible, common, most frequent, exclusive, and prototypical meanings).

To assist in this sometimes-difficult task, judges and lawyers can utilize a variety of tools. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2145 (2016) (book review); *see generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012). For example, judges routinely consult the canons of interpretation, especially those which help us "understand the English language." Kavanaugh, *supra*, at 2145. We also look to other statutes or the pre-existing common law for context or to better understand a term's meaning. *See Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947))); *see also* Scalia & Garner, *supra*, §§ 25, 53–54. And we need look no further than the majority opinion to see the value that dictionaries bring to our interpretive endeavor.

We ought to embrace another tool to ascertain the ordinary meaning of the words in a statute. This tool—corpus linguistics—draws on the common knowledge of the lay person by showing us the ordinary uses of words in our common language. How does it work? Corpus linguistics allows lawyers to use a searchable database to find specific examples of how a word was used at any given time. *State v. Rasabout*, 356 P.3d 1258, 1275–76, 1289 (Utah 2015) (Lee, A.C.J., concurring in part and concurring in the judgment). These databases, available mostly online, contain millions of examples of everyday word usage (taken from spoken words, works of fiction, magazines, newspapers, and academic works). *See, e.g.*, *Corpus of Contemporary American English*, BYU, https://corpus.byu.edu/coca/help/texts.asp (listing types of sources); *Corpus of Historical American English*, BYU, http://www.english-corpora.org/coha/. Lawyers can search these databases for the ordinary meaning of statutory language like "results in." The corresponding search results will yield a broader and more empirically-based understanding of the ordinary meaning of a word or phrase by giving us different situations in which the word or phrase was used across a wide variety of common usages. *See* Lee & Mouritsen, *supra*, at 831 ("Linguistic corpora can perform a variety of tasks that cannot be performed by human linguistic intuition alone."). In short, corpus linguistics is a powerful tool for discerning how the public would have understood a statute's text at the time it was enacted.

Of course, corpus linguistics is one tool—new to lawyers and continuing to develop—but not the whole toolbox. Its foremost value may come in those difficult cases where statutes split and dictionaries diverge. In those cases, corpus linguistics can serve as a cross-check on established methods of interpretation (and vice versa). *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. Rev. 1621, 1669–70 (2017) ("[C]orpus linguistics allows for rigorous intersubjective validation of individual subjective judgments about word meaning."); *see also* Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 Yale L.J. 1561, 1566 (1994) (book review) (arguing that empirical methods may assist judges in hard cases of ordinary meaning). This cross-check can provide both judges and parties with greater certainty about the meaning of words in a statute.

II.

The other concurring opinion argues that we should not add corpus linguistics to the judicial toolkit for several reasons. The first is methodological—corpora are not representative because of their sources. For instance, a corpus search for "flood" may lead to an overinclusion of newspaper articles talking about giant flood waters rather than basements flooding. But the entire practice of law—and certainly the practice of interpretation—involves judgment calls about whether a particular source is relevant. And, at least with corpus linguistics, those calls can be vetted by the public in a more transparent way. *Cf. Muscarello v. United States*, 524 U.S. 125, 142–43 (1998) (Ginsburg, J., dissenting) (criticizing the majority opinion for selective and non-transparent examples of word use). That is more than can be said of the alternative, which, as Justice Lee has thoughtfully noted, is for a judge to use his or her intuition—something far less representative and frankly far less "democratic." *See Rasabout*, 356 P.3d at 1274–75 (Lee, A.C.J., concurring in part and concurring in the judgment). Plus, the danger of judges relying upon their own intuition is that we introduce other risks, like confirmation bias. *Id.* at 1274. Judges may unintentionally give greater weight to those definitions that match up with their preconceived notions of a word's meaning. We cannot get away from confirmation bias altogether, but we can surely check our intuition against additional sources of a word's meaning. The corpus allows us to do this.

Second, the other concurring opinion argues that the use of corpus linguistics will descend into mere rote frequency analysis; judges will simply pick the use of the word that shows up the most. Yet judges who use corpora do not become automatons of algorithms. They will still need to exercise judgment consistent with the use of the other tools of statutory interpretation. Sometimes the most frequent use of a word will line up with its ordinary meaning as used in a statute. Sometimes it will not. The data from the corpus will provide a helpful set of information in making that interpretive decision. But the judge must make the ultimate decision after considering multiple tools.

Third, the other concurring opinion suggests that corpus linguistics is redundant when compared with another tool—dictionaries. Expert lexicographers already do corpus linguistics when compiling dictionaries, so, the argument goes, when judges use corpus linguistics, they

become unnecessary and unhelpful armchair lexicographers. But the use of corpus linguistics improves upon dictionaries by helping pinpoint the ordinary uses of a word at the time a statute was enacted. For example, when a court considers a dictionary definition, it looks at a dictionary from that time period. *See New Prime*, 139 S. Ct. at 539–40 & n.1. But the usage examples in those dictionaries often come from a time before the dictionary was published. *See* Lee & Mouritsen, *supra*, at 808–09; Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1190 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) ("An unabridged dictionary is simply a[] historical record, not necessarily all-inclusive, of the meanings which words in fact *have* borne, in the judgment of the editors, in the writings of reputable authors."); *see also id.* at 1375–76. So the dictionary definition may actually tell us the ordinary meaning at a time *long before* Congress enacted the statute. *See* Lee & Mouritsen, *supra*, at 809; Scalia & Garner, *supra*, Appendix A at 419 (noting that dictionaries lag behind the times). And in many cases (like the ones discussed below), both the majority and dissent will point to dictionaries without any clear resolution. Instead of relying on just a few sample sentences in the dictionary, the corpus develops a broader picture of how words were actually used when Congress passed the statute.

Plus, "[w]e judges are experts on one thing—interpreting the law." *Rasabout*, 356 P.3d at 1285 (Lee, A.C.J., concurring in part and concurring in the judgment) (emphasis omitted). Corpus linguistics is just one variation on a very old theme in this field of expertise. Judges often consider the context of words—both within and beyond the text of the statute in dispute. *See* Scalia & Garner, *supra*, § 31 (detailing the "noscitur a sociis" canon of interpretation); *see also* Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347, 355 (2005). Judges look to contemporaneous judicial decisions. *See, e.g.*, *New Prime*, 139 S. Ct. at 540. They look to seemingly common phrases. *See, e.g.*, *FCC v. AT&T, Inc.*, 562 U.S. 397, 403–04 (2011) (considering how the word "personal" is used in "personal life" and "personal expenses"). And, for constitutional cases, they look to word use in the Anti-Federalist and Federalist Papers. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring). While sometimes this "enterprise may implicate disciplines or fields of study on which we lack expertise, [it] is no reason to raise the white flag" and forgo considering corpus linguistics. *Rasabout*, 356 P.3d at 1285 (Lee, A.C.J., concurring in part and concurring in the judgment).

Instead, judges should do what they have always done—"summon all our faculties as best we can" and take advantage of adversarial briefing. *See id.*

In sum, I agree that corpus linguistics is not the only tool we should use, but it is an important tool that can assist us in figuring out the meaning of a term.

III.

Some examples help prove the point. Consider *Smith v. United States*, 508 U.S. 223 (1993). In that case, the majority and dissent debated whether exchanging a firearm for drugs constitutes "use" of a firearm "during and in relation to a . . . drug trafficking crime." *Id.* at 228 (quoting 18 U.S.C. § 924(c)(1)) (internal quotation marks omitted); *id.* at 241–43 (Scalia, J., dissenting). The *Smith* majority noted that, because "use" was not defined within the statute, the Court needed to determine "its ordinary or natural meaning." *Id.* at 228. Thus, the majority consulted an 1884 case and two dictionaries (Webster's and Black's) before deciding that "use" meant "to employ" or "to derive service from." *Id.* at 229 (citations omitted). And, in trading a firearm for drugs, the majority concluded that the defendant "'used' or 'employed'" that firearm. *Id.* Three justices disagreed. *Id.* at 241–42 (Scalia, J., dissenting). Writing for these dissenters, Justice Scalia first noted that, when we "use an instrumentality," we ordinarily mean that we will "use it for its intended purpose." *Id.* at 242. He colorfully pointed out that when someone asks, "'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane." *Id.* So when someone says, "Do not use a firearm," the natural reading of that phrase is that the listener should not use a firearm *as a weapon*—not that the listener cannot scratch his head with the firearm. *Id.* at 242–43.

Could corpus linguistics have helped in this debate? I think so. In a study of the Corpus of Contemporary American English, the authors found 159 instances where the verb "use" was followed by a noun representing a weapon (like "gun" or "rifle"). Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. Rev. 1417, 1459 (2017). Of these 159 instances, there was not a single time that "use" signified a barter. *Id.* at 1460 (noting further that 88% were clearly not barter and many involved discharging or brandishing, while

12% were probably not barter when coded "in the most conservative way," meaning the "comprehender would have to bend over backwards semantically" to demonstrate that "use" meant "barter"). And, to ensure that this conclusion was not simply based on the most frequent use of the word, the authors of the study ensured that these examples were sufficiently dispersed in the corpus, i.e., that they did not come only from one source or one type of source (like legal writings). *Id.* at 1459–60. It is hard to say this evidence would have been neither compelling nor relevant to the debate between the majority and dissent in *Smith*.

Take another quick example. In *Muscarello*, the Supreme Court debated whether carrying a firearm meant carrying it on one's person or carrying it more generally (as in a car). 524 U.S. at 126–27. The majority concluded that a person who transported a firearm in a locked glove compartment or in the trunk of his car was guilty of "carry[ing] a firearm during and in relation to a drug trafficking crime." *Id.* (quoting 18 U.S.C. § 924(c)(1)) (internal quotation marks omitted). In contrast, Justice Ginsburg, writing for four dissenting justices, said that the term "carr[ying]" contextually meant to carry on one's person. *Id.* at 139–40 (Ginsburg, J., dissenting). The debate between the majority and dissent is instructive, as the justices themselves performed *ad hoc* corpus analyses. The majority looked at how "carry" was used in the King James Bible, Robinson Crusoe, and Moby Dick, in addition to "survey[ing] modern press usage, albeit crudely, by searching computerized newspaper databases." *Id.* at 129 (citations omitted). Justice Ginsburg offered another *ad hoc* corpus search with her own examples. *Id.* at 143–44 (Ginsburg, J., dissenting).

Like with *Smith*, an actual corpus analysis has since been performed. *See* Lee & Mouritsen, *supra*, at 845, 847. The evidence suggests that, generally (but not always), people use "carry" when referring to someone personally carrying an object. *Id.* at 847; *see also* Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. Rev. 1359, 1405–12 (2017) (using a different corpus but reaching a similar conclusion). Again, it is difficult to say the corpus analysis would not have assisted the lawyers and the Court.

IV.

Now for the case at bar. Dan Wilson sued Safelite Group, Inc. ("Safelite") under Ohio law about its Nonqualified Deferred Compensation Plan ("Safelite Plan"). We have grappled with whether ERISA (a 1974 statute) applies to the Safelite Plan. If so, Wilson's state law claims are preempted, and his lawsuit is over. As relevant here, ERISA covers a company's deferred income plan when the plan "results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A)(ii). Unsurprisingly, Wilson argues that his Safelite Plan does not fall under ERISA—principally because the plan allowed for distributions while he was still employed. He reads the statute to mean that ERISA covers only those plans that "*require* a deferral of income by employees for periods *until* the termination of covered employment or beyond." Because the plan allowed payments while employees still worked at Safelite, the plan does not require all income to be deferred until termination. According to Wilson, that means ERISA does not apply.

In making his argument, Wilson claims that "results in" means "requires" and that "extending to" means essentially "until a certain time." "Results in," however, is a phrasal verb (verbs that end in a preposition or participle) that, at the time ERISA was passed in 1974, meant "to cause" or "have (something) as a result." *Longman Dictionary of Phrasal Verbs* 506 (1983); *see also* Scalia & Garner, *supra*, Appendix A at 419 (noting that to understand the meaning of a word in a statute, it is "quite permissible" to consult a dictionary published a decade or so later because dictionaries "lag behind linguistic realities"). "Results in" does not mean "requires." And, as the majority explains, where Congress wanted to make something a requirement in the ERISA statute, it specifically did so by using the word "requires." *See* Majority Op. Part II.A.1. Similarly, when grappling with "extending to," the majority applied the surplusage canon to make sure we gave effect to the term "extending to" and correctly found that "extending to" does not preclude in-service distributions. "Extend to," another phrasal verb, meant "to reach" at the time ERISA was passed. *Longman Dictionary of Phrasal Verbs* 170 (1983). In sum, § 1002(2)(A)(ii) includes plans that "cause" the deferral of income by employees for periods "t[hat] reach" to the termination of covered employment or beyond. *See Longman Dictionary of Phrasal Verbs* 170, 506 (1983).

The corpus confirms this textual analysis. If we limit the searches to the 1960s and 1970s (the time period immediately before and during ERISA's enactment), we only get a few hundred results for each phrase in the Corpus of Historical American English. And there is simply no result—not one—where the phrasal verb "results in" could be read to mean "requires." To bring this to life, here are just a few of the many examples generated by the corpus search:

- "Two enterprises are competitive when an increase in the output of one *results in* a decrease in the output of the other." Emery N. Castle & Manning H. Becker, *Farm Business Management: The Decision-Making Process* (1962).
- "Army gets little gridiron help, because the cooler New York weather *results in* spring football running until late April." *Federal Power Takes Over*, *Sports Illustrated* (June 8, 1964).
- "The Federal Aviation Act frowns on price competition among the interstate airlines, and the CAB quickly pounces on any sign of rate-cutting. This *results in* competition being trivialized into 'booze wars,' 'lounge wars,' and fuselage decoration, with the passengers compelled to pay the bill." Peter H. Schuck, *Why Regulation Fails*, *Harpers* (September 1975).
- "Do not let an inexperienced guest attack [splitting logs] without instruction and supervised practice. Most of my guests tended to drive one wedge into a log as far as it would go and then find that the log had not split and they could not remove the wedge. This *results in* frustrated guests, a battered wedge head and unsplit wood." Patricia Crawford, *Homesteading* (1975).

For "extending to," the corpus search included "extend(s) to" as well. Here too, the analysis supports the majority's conclusion with only one example that arguably can be read to mean "until a certain point in time." Here are just a few, starting with the one that supports Wilson's reading:

- "The hospital is being built by Hospital Corporation of America, which has a contract *extending to* 1980 to recruit employees and medical staff and to manage the hospital." Howard Dernton, *Saudi Arabia*, *Saturday Evening Post* (April 1974).
- "A new public plaza at Chambers Street will link the center of the island with the waterfront of the Hudson River, connecting with Battery Park City to the south and a shoreline park system *extending to* the north and south, the Mayor said." Charles G. Bennett, *Downtown Renewal Plan Adds College for 5,000*, *N.Y. Times* (1968).

- "A favorite design is a heart-shape with two prongs *extending to* either side from the point of the heart." Alex W. Bealer, *The Art of Blacksmithing* (1969).
- "The knights support a worldwide program of medical aid and refugee relief that *extends to* 42 countries." *Knightly Return*, *Time* (June 21, 1968).

Ultimately, in this case, the corpus results serve as a method to check our work. And those results confirm that the majority's textual analysis is correct. In future cases where the ordinary meaning is debatable, like in *Smith* and *Muscarello*, the results could be determinative.

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We seek ordinary meaning because laws are written for everyday people, and it is not our role as judges to rewrite those laws. I join the portions of the majority's opinion that faithfully apply traditional tools of textual analysis and that do not journey beyond the statutory text to discern ordinary meaning. In this case, a corpus linguistics analysis confirms the majority's analysis as well. In future cases, adversarial briefing on corpus linguistics can help courts as they roll up their sleeves and grapple with a term's ordinary meaning.