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 AS SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE LIBERAL GUN CLUB AND COMMONWEALTH SECOND AMENDMENT IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Liberal Gun Club provides a voice for gun-owning liberals and moderates in the national conversation on gun rights, gun legislation, firearms safety and the shooting sports. The Club serves as a national forum for all people, irrespective of their personal political beliefs, to discuss firearms ownership, firearms use and the enjoyment of firearms-related activities—free from the destructive elements of political extremism that sometimes dominate this subject on the national scale. The Club actively develops and fosters a variety of programs for the purpose of firearms training and firearms safety education, for both gun owners and non-gun owners alike.

While the Club's membership is primarily left-of-center individuals who also enjoy owning and using firearms, its members come from every political ideology—including but not limited to Democrat, Independent, Libertarian, Democratic Socialist, Republican and Green. The national Club has three focuses: education, outreach and speaking out on Second Amendment-related issues when the Club's unique perspective can bring value to the conversation. For example, Club members in Virginia recently met with liberal elected officials to discuss their concerns about a package of laws that would have broadly

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[1] No counsel for any party authored this brief in whole or in part, nor did any counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. All parties' counsel of record received timely notice of the intended filing of this brief, and all consented to its filing.

restricted semiautomatic firearms and magazines. The Club was the only voice that both came from a liberal perspective and also embraced the right of the people to keep and bear arms. Likewise, club members in Oregon have met with left-of-center elected officials to discuss their concerns about a proposed firearms-storage law. Again, the Club served as the only voice that both came from a perspective that was both liberal and that embraced the right of the people to keep and bear arms.

One of the Club's core missions is to educate the public about the importance of root cause mitigation—that is, addressing the root causes of crime and social problems, rather than the symptoms of those problems. While there is debate about whether and to what extent various gun restrictions will impact the number of crimes that ultimately take place in society, what is sadly clear is that any such impacts are universally very small when compared with the gains that would attend achieving a more just society—one that ensures that all of its citizens have access to the basic necessities of healthcare, housing and meaningful opportunities.

Commonwealth Second Amendment, Inc. ("Comm2A") is a Massachusetts nonprofit corporation dedicated to preserving and expanding the Second Amendment rights of individuals residing in Massachusetts and New England. Comm2A works locally and with national organizations to promote a better understanding of the rights that the Second Amendment guarantees. Comm2A has previously submitted amicus curiae briefs to this Court and to

state supreme courts, and it has also sponsored litigation to vindicate the rights of law-abiding Massachusetts gun owners. Comm2A receives and responds to many queries from the public regarding firearms laws and licensing in Massachusetts, and particularly, regarding the imposition of restrictions on Massachusetts firearms licenses—an issue that is highly analogous to that presented in the case at bar.

New York's "proper cause" standard, and the discretion it allows for, substantially impacts both organizations. Both organizations have members who live in New York, and as such, members of both organizations hold pistol licenses that carry "Target & Hunting" (and similar) restrictions, which preclude them from bearing arms for the core Second Amendment purpose of self-defense. Moreover, Comm2A is uniquely interested in issues surrounding Massachusetts law, and as will be seen, some lower courts have relied on misinterpretations of historical Massachusetts laws to uphold broad preclusions on the ability to bear arms.

SUMMARY OF ARGUMENT

In *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021), the majority of an en banc panel of the Court of Appeals for the Ninth Circuit concluded that laws in place at the time of the founding were tantamount to broad preclusions on carrying firearms in public such that the Second Amendment's guarantee of "the right of the people to keep and bear arms" did not protect the bearing of arms in public. The Hawaii law at issue in *Young*, like the New York law at issue in the case at bar, broadly precluded the ability to bear arms in

public. *See* Haw. Rev. Stat. §134-9(c) (prohibiting "carry concealed or unconcealed" in the absence of a license); N.Y. Penal L. §265.01-B (prohibiting "possess[ion of] any firearm"). This amici curiae brief shows that the *Young* court's conclusion is unsupported and untenable. Contrary to the panel's conclusion, the historical laws it discussed did not stand as general prohibitions on the peaceful carry of arms. Rather, these laws specifically did not apply to law-abiding citizens who did not create a threat to others. Moreover, and setting this aside, the restrictions that the United Kingdom placed on carrying firearms and other weapons during the Twentieth Century bely any claim that laws from the Fourteenth Century already stood as broad preclusions on the bearing of arms.

ARGUMENT

In *Young*, the panel majority concluded that an 1836 Massachusetts law was tantamount to "a good-cause restriction" on carrying guns that "permitted public carry, but limited it to persons who could demonstrate their need to carry for the protection of themselves, their families, or their property." *See Young*, 992 F.3d at 799 (*citing* REVISED STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS ch. 134, § 16 (1836)). The panel went on to reason that "[a] number of states followed Massachusetts and adopted some version of" this Massachusetts law, thereby also adopting broad preclusions on carry. *See id.* at 799-800; *see also id.* at 819. The Ninth Circuit reasoned—without any citation—that the Massachusetts law "did not require proof that the person carrying was a threat to the complainant; it was

sufficient for the complainant to show that there was a threat to the peace. . . ." *Id.* According to the panel, "surety laws" like this one from Massachusetts "show[ed] that carrying arms in public was not treated as a fundamental right" during the country's early days. *See id.*

Similarly, the Ninth Circuit panel described the Statute of Northampton, 2 Edw. 3, c. 3 (1328), and its colonial and stateside equivalents, as "broad prohibitions on the public carriage of firearms," *Young*, 992 F.3d at 796. The panel's reasoning was that early Americans "brought with them the English acquiescence to firearm limitations outlined in the Statute of Northampton," and that "restrictions on firearms in public were prevalent in colonial law." *Id.*

An examination of the historical record shows that these conclusions are untenable. The colonial laws that *Young* considered were not plucked from thin air, as some sort of newly derived "Massachusetts model," but were instead enactments that codified established parameters of English law in place at the time of the founding. Specifically, these laws codified the established parameters of the Statute of Northampton, which—at least as it had developed—prohibited the bearing of arms in terrorem populi as affray, as well as the established parameters of "binding over" individuals to prevent breaches of the peace and to ensure their good behavior. Contrary to the conclusions of the *Young* majority, neither the Statute of Northampton nor the practice of "binding over" stood as general prohibitions on bearing arms by the peaceful.

To the contrary, both acted to restrain only those who were not peaceful.

Begin with the historical power to "bind over" individuals in order to prevent breaches of the peace. At common law, a justice of the peace had authority to "bind all those to keep the peace, who in his presence make any affray; or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people; and all such as he knows to be common barretors." 4 WILLIAM BLACKSTONE, COMMENTARIES *251-52 (citing 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 126 (1716)). The Justices of the Peace Act 1361, 34 Edw. 3 c. 1, expanded this power by directing justices of the peace "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people," *id.*

The Justices of the Peace Act and its statutory power to "bind over" for good behavior—that is, to require that individuals post surety to ensure their good conduct—remains in force today, and is an area of English law that "has been heavily influenced by Blackstone." THE LAW COMMISSION, BINDING OVER (Law Com. No. 222) ¶ 2.4 (Feb. 1994). Blackstone explained that magistrates could require good behavior sureties "for causes of scandal, *contra bonos mores* [against good morals], as well as *contra pacem* [against the peace]." 4 WILLIAM BLACKSTONE, COMMENTARIES *253. Accordingly, magistrates could:

> bind over all night-walkers, eves-droppers; such as keep suspicious company, or are reported to

> be pilferers or robbers; such as sleep in the day, and wake on the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour may reasonably bring them within the general words of the statute, as person not of good fame[.]

Id. While this power was (and is) broad, it is not unlimited, but instead requires "a *probable* ground to suspect of future misbehaviour." *R. v. Sandbach ex parte Williams*, [1935] 2 K.B. 192, 196 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *248). In this connection, one commenter attempted to derive "five partially overlapping categories of conduct considered reprehensible enough to attract the jurisdiction." *See* Peter Power, *An Honour and Almost a Singular One: A Review of the Justices' Preventive Jurisdiction*, 8 MONASH U. L. REV. 69, 89-90 (1981). These ranged from "causes for which a man may also be bound to keep the peace" to "those who are of evil name or evil behavior generally." *See id.* And significantly, once bound over, a person could forfeit their recognizance by, pertinently, "going armed with unusual attendance, to the terror of the people," as well as "by speaking words tending to sedition; or, by committing any of those acts of misbehaviour, which the recognizance was intended to prevent." 4 WILLIAM BLACKSTONE, COMMENTARIES *254.

Operating at the same time was the Statute of Northampton, 2 Edw. 3, c. 3 (1328), which provided:

> that no man great nor small, of what condition soever he be, except the king's servants in his

> presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also [upon a cry made for arms to keep the peace, and the same in such places where such acts happen,] be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure.

Id.; *see also Wrenn v. District of Columbia*, 864 F.3d 650, 659 (D.C. Cir. 2017). Blackstone explained that "[t]he offense of *riding or going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the Statute of Northampton." 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49. A related crime was that of affray, which was "the fighting of two or more persons in some public place, to the terror of his majesty's subjects." *Id.* at *145. Riots, routs and unlawful assemblies, in contrast, required at least three individuals. *See id.* at *146.

Given that both the Justices of the Peace Act and the Statute of Northampton date to the Fourteenth Century, when language was somewhat different, justice of the peace manuals from the time of our country's founding are particularly instructive on their meaning. These shed light on the actual nature of these

laws, and particularly, on the actions they both proscribed and left open. George Webb's manual, published in 1736, was the first manual that attempted to integrate colonial laws with those of those of England. *See* Nathaniel J. Berry, *Justice of the Peace Manuals in Virginia Before 1800*, 26 J. S. LEGAL HIST. 315, 323 (2018). Webb explained that justices of the peace "may apprehend any Person who shall go or ride with unusual and offensive Weapons, in an Affray, or among any great Concourte of the People, or who shall appear, so armed, before the King's Justices sitting in Court, and may bind such Offender to the Peace, or Good-behaviour; and if he refuses to be bound, may commit him." GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 13 (1736). Thus, as it related to weapons, the power to bind over arose when one engaged not in ordinary behavior, but in extraordinary behavior—by riding "with unusual and offensive Weapons," or "among any great Concourte of the People," or "before the King's Justices sitting in Court."

William Hening's manual, published just after the Revolution, similarly advised "that in some cases there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people." WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 17 (1795). Hening explained that this conduct "is said always to have been an offence at the common law, and is strictly prohibited by statute," after which he quoted the Statute of Northampton. *See id.* at 17-18. Yet, Hening cautioned that "no person is within the intention of the

law" if they sought to suppress rioters and disturbers of the peace, and as well:

> Nor unless such wearing be accompanied with such circumstances as are apt to terrify the people; from whence it seems dearly to follow, that the wearing of common weapons, or having the usual number of attendants, merely for ornament or defence, where it is customarv to make use of them, will not subject a person to the penalties of this act.

Id. at 18 (citing 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136 (1716)). However, if someone ran afoul of the Statute of Northampton, then they could not "excuse the wearing . . . by alledging that such a one threatened him." *Id.* (citing 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136 (1716)). Notably, George Burn's manual, published in England around the same time, described the Statute of Northampton using similar, and often verbatim, language. *See* GEORGE BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 18 (18th ed. 1793) ("persons of quality are in no danger of offending against this statute, by wearing common weapons").

English caselaw from the time is also consistent with the understanding that bearing arms, alone, is not an offense in the absence of circumstances that cause terror to others. For example, in 1703 King's Bench reversed the rioting convictions of two men because the indictment had not alleged that the men had acted "in terrorem populi." *See R. v. Soley*, [1703] 88 E.R. 935, 937 (K.B.). The court explained that "[i]f a number of men assemble with arms, in terrorem populi, though no

act is done, it is a riot." *Id.* at 936-37. For, "[t]hough a man may ride with arms, yet he cannot take two [others] with him to defend himself, even though his life is threatened." *Id.* at 937 (citing 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 20-21 (7th ed. 1795)). This understanding—that the peaceful bearing of arms, without more, is not unlawful—continued into the twentieth century. One particular example is *R. v. Smith*, [1914] 2 Ir. Rep. 190, 204 (K.B.), where King's Bench reversed a conviction for carrying a loaded revolver on a public road because there had been no proof that the defendant had acted "*in terrorem populi*". The court explained that "[t]he words 'in affray of the peace' in the statute, being read forward into the 'going armed,' render the former words part of the description of the statutable offence" and accordingly mandate "two essential elements of the offence—(1) That the going armed was without lawful occasion; and (2) that the act was *in terrorem populi*." *Id.* at 204; *see also R. v. Meade*, 19 L. Times Repts. 540, 541 (1903) (statute covered one who made himself "a public nuisance by firing a revolver in a public place, with the result that the public were frightened or terrorized").

In this light, the actual import of the Massachusetts laws that the Ninth Circuit panel relied upon is clear. Shortly after its organization, in 1692, the Province of Massachusetts Bay enacted a chapter of criminal laws. *See* 1692 Mass. Acts ch. 18. That chapter included a section that provided, in full:

> That every justice of the peace in the county where the offence is committed, may cause to be staid and arrested all affrayers, rioters,

> disturbers or breakers of the peace, and such as shall ride, or go armed offensively before any of their majesties' justices or other their officers or ministers doing their office or elsewhere by night or by day, in fear or affray of their majesties' liege people, and such others as shall utter any menaces or threatening speeches ; and upon view of such justice or justices, confession of the party or other legal conviction of any such offence, shall commit the offender to prison until he find sureties for the peace and good behaviour, and seize and take away his armour or weapons, and shall cause them to be apprized and answered to the king as forfeited; and may further punish the breach of the peace in any person that shall smite or strike another, by fine to the king not exceeding twenty shillings, and require bond with sureties for the peace, or bind the offender over to answer it at the next sessions of the peace, as the nature or circumstance of the offence may be ; and may make enquiry of forcible entry and detainer, and cause the same to be removed, and make out hue and crys after runaway servants, thiefs and other criminals.

1692 Mass. Acts ch. 18, § 6. Viewed in the light of actual history, this section served to codify three related legal principles that would have been familiar to colonial jurists—rather than cutting from whole cloth to create new prohibitions. Specifically, the section combined the common law power to bind over in order to prevent breaches of the peace with the statutory power, derived from the Justices of the Peace

Act, to bind over for good behavior. Then, the section identified the essential conduct that the Statute of Northampton prohibited—"rid[ing], or go[ing] armed offensively before any of their majesties' justices or other their officers or ministers doing their office or elsewhere by night or by day, in fear or affray of their majesties' liege people"—as a specific ground for arresting and binding over offenders.

This continued to hold true when, shortly after the Revolution in 1794, the Commonwealth of Massachusetts repealed its 1692 law in favor of a new enactment, which similarly provided:

> that every Justice of the peace, within the County for which he may be commissioned, may cause to be staid and arrested all affrayers, rioters, disturbers or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth, or such others as may utter any menaces or threatening speeches, and upon view of such Justice, confession of the delinquent, or other legal conviction of any such offence, shall require of the offender to find sureties for his keeping the peace, and being of the good behaviour; & in want thereof to commit him to prison, untill he shall comply with such requisition: And may further punish the breach of the peace in any person that shall assault or strike another, by fine to the Commonwealth not exceeding twenty shillings, and require sureties as aforesaid, or bind the offender to appear and answer for his offence, at the next Court of

> General Sessions of the Peace, as the nature or circumstances of the case may require.

1794 Mass. Acts ch. 26. Again, this statute combined the common law power to bind over to prevent breaches of the peace with the statutory power to bind over for good behavior. And, the statute identified the conduct that Northampton proscribed—"rid[ing] or go[ing] armed offensively, to the fear or terror of the good citizens of this Commonwealth"—as a specific ground that would justify arresting and binding over offenders. If anything, the legislature's elimination of references to "their majesties' justices" and other "officers or ministers" makes the section's meaning clearer. The conduct prohibited was being "armed offensively," and doing so "to the fear or terror of the good citizens."

The Ninth Circuit panel in *Young* placed the bulk of its reliance on a provision in a statutory compilation that the legislature published in 1836, which had sought to consolidate and revise the existing laws of Massachusetts. *See* REVISED STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS v-vi (1836); *see also Young*, 992 F.3d at 799-800, 819-20.[2] Chapter 134 of these Revised Statutes addressed "proceedings to prevent the commission of crimes," and included section 16, which provided:

> If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an

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[2] The court in *Young* erroneously cited the 1836 Revised Statutes as "1836 Mass. Acts 750, ch. 134," a reference to a nonexistent act of the legislature. *See Young*, 992 F.3d at 799-800, 820.

> assualt or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

REVISED STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, ch. 134, § 16. Notably, this section identified Chapter 26 of the 1794 Acts, discussed above, as its genesis. *See id.* But notwithstanding the language quoted above, requiring "reasonable cause to fear an injury, or breach of the peace," the *Young* court reasoned that the statute "did *not* require proof that the person carrying was a threat to the complainant; it was sufficient for the complainant to show that there was a threat to the peace." *Young*, 992 F.3d at 820 (emphasis added). Incredibly, the court provided no citation for this conclusion, aside from averring that it was "a standard that harkened to the Statute of Northampton," *see id.*—a proposition that is untenable, based on the "in terrorem populi" requirement that attended a violation of that law.

Counsel and amici are not aware of any legal authorities that construed this provision of the 1836 Revised Statutes. However, it is significant that courts construing an analogous provision in Pennsylvania did indeed conclude that a complaining party needed to show a threat that resulted in fear in order to invoke the statute. The Pennsylvania law, enacted in 1860, provided:

> If any person shall threaten the person of another to wound, kill or destroy him, or do him any harm in person or estate, and the person threatened shall appear before a justice of the peace, and attest, on oath or affirmation, that he believes that by such threatening he is in danger of being hurt in body or estate, such person so threatening as aforesaid shall be bound over, with one sufficient surety, to appear at the next sessions, according to law, and in the meantime to be of his good behavior, and keep the peace towards all citizens of this commonwealth. If any person, not being an officer on duty in the military or naval service of the state or of the United States, shall go armed with a dirk, dagger, sword or pistol, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his family, person or property, he may, on complaint of any person having reasonable cause to fear a breach of the peace therefrom, be required to find surety of the peace as aforesaid.

Pa. Act of Mar. 31, 1860, P.L. 427, § 6, *quoted in Commonwealth v. Cushard*, 132 A.2d 366, 368 (Pa. Super. Ct. 1957). Thus, the 1860 Pennsylvania law required a "complaint of any person having reasonable cause to fear a breach of the peace therefrom," while the 1836 Massachusetts law required a "complaint of any person having reasonable cause to fear an injury, or breach of the peace"—which was essentially the same, but for the inclusion of "injury" along with "breach of the peace."

And significantly, courts construing the Pennsylvania provision were uniform in their conclusion that a complainant needed to face a real threat that placed them in fear. In 1926, for example, a lower court quashed an indictment because the prosecutor, rather than "the persons against whom the threats are alleged to have been made," was the one pursuing the action. *See Commonwealth v. Rice*, 8 Pa. D. & C. 295, 297 (1926). In 1957, a superior court upheld a lower court's order binding a defendant over because the defendant's threat had reflected "a malicious intent to do harm," and it had "put [the complainant] in fear of her safety." *Cushard*, 132 A.2d at 368. Finally, in 1973 the Supreme Court of Pennsylvania upheld the Pennsylvania statute, notwithstanding the argument that it violated the right to a trial by jury. *See Commonwealth v. Miller*, 305 A.2d 346, 348-49 (Pa. 1973). Notably, three justices concurred by analogizing to Blackstone's discussion of sureties, discussed above. *See id.* at 351 (Nix, J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *252-53); *see also Commonwealth v. Kennedy*, 64 Pa. D. & C.2d 771, 773-74 (1973) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *252-53).

Thus, the authorities that construed analogous language in the Pennsylvania statute found that this language did not mark a substantial change from the prior practice of requiring a complaint by someone who had been threatened and feared an injury. And, there is no authority that counsels a different reading of the Massachusetts statute. The irreducible conclusion is that, contrary to the *Young* court's conclusion, the Massachusetts statute did not stand as a general

prohibition on carrying guns, but instead, on doing so in a manner that amounted to a threat that caused others to fear injury.

Beyond all this, the history of firearms regulation in the United Kingdom itself belies the claim that historical laws like the Statute of Northampton and the Justices of the Peace Act stood as general prohibitions on bearing arms, or as requirements that individuals have sufficient "reason" or "cause" for doing so. At the outset, we note that English law protects "constitutional" rights in a different manner than does the law of the United States, for in England, Parliament is free to repeal and take away rights, even though they may be deemed "constitutional." *See generally R. v. Sec'y of State for Transport ex parte Factortame, Ltd. (No. 2)*, [1991] 1 A.C. 603; [1990] 3 C.M.L.R. 375 (H.L.) (appeal taken from Eng.). At present, there is general consensus that the United Kingdom has effectively repealed the arms guarantee contained in Declaration of Rights 1689. *See, e.g.,* Derek Phillips, *Wrongs and Rights: Britain's Firearms Control Legislation at Work*, 15 J. ON FIREARMS & PUB. POL'Y 123, 123, (2003). What is significant, for present purposes, is that it was legislative developments during the Twentieth Century, not the Fourteenth Century, that brought about this repeal.

Parliament's first action that regulated the general act of carrying of guns was its enactment of the Gun License Act, 1870, which required "[e]very person who shall use or carry a gun elsewhere than in a dwelling-house or the curtilage thereof" to obtain a license. *See* Gun License Act, 1870, 33 & 34 Vict. c. 57, ¶ 7. The

Gun License Act did not require an individual seeking a license to meet any particular qualifications, although it did provide that a license would become null and void upon a conviction for certain offenses. *See id.* at ¶ 11. Moreover, the Act's requirements did not apply to licensed hunters and to individuals on their own occupied lands, meaning that it was the act of carrying guns—in public, and for reasons other than hunting—that gave rise to the requirement of a license. *See id.* at ¶ 7(2)-(4). Suffice it to say that no one had the understanding that either the Statute of Northampton[3] or the Justices of the Peace Act already prohibited the act of carrying a gun. To the contrary, on the floor of Parliament the bill's sponsor had expressed his desire to limit the carrying of revolvers, while opponents of the bill had objected that it was "'unconstitutional,' since it would disarm the country to a great extent." *See* JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 117-18 (2002).

[3] The Statute of Northampton remained in force until 1969. *See* Statute Law (Repeals) Act 1969, 1969 c. 52.

The next significant action[4] was Parliament's enactment of Firearms Act, 1920, 3 Edw. VII c. 18, which significantly expanded the scope of firearms regulation by mandating that no one "purchase, have in his possession, use, or carry any firearm or ammunition" unless they held a valid firearms certificate, *see id.* at ¶ 1(1). Notably, before adopting this legislation Parliament had, in 1918, established a committee to "consider[] the question of the control which it is desirable to exercise over the possession, manufacture, sale, import and export of firearms and ammunition in the United Kingdom after the war." SIR ERNLEY BLACKWELL, REPORT OF THE COMMITTEE ON THE CONTROL OF FIREARMS (Nov. 15, 1918) (hereinafter, the "BLACKWELL REPORT"). At its outset, the committee's report had observed that "[t]he Gun License Act of 1870 only makes it necessary for [one] to obtain an Excise License before he can legally use or carry a gun outside the curtilage of his dwelling-house, but a license can be obtained by the simple formality of buying one at a Post Office for the sum of 10s." *Id.* at ¶ 1(1). So again, there was no contention that historical

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[4] Parliament had enacted Pistols Act, 1903, 3 Edw. VII c. 18, but this only regulated the sale of handguns by generally requiring purchasers to have obtained licenses under the Gun License Act, albeit with a number of exceptions, *see id.* at ¶ 3. For example, exceptions were provided for householders who "propose[d] to use such a pistol only in his own house or the curtilage thereof" and to individuals who averred that they were "about to proceed abroad for a period of not less than six months." *See id.* Aside from setting a presumptive minimum age of 18 years for handgun possession (with an exception for licensed individuals), *see id.* at ¶ 4, Pistols Act, 1903 did not regulate the carry or use of handguns.

laws already stood as general prohibitions on using or carrying guns.

Firearms Act, 1920 changed the status quo by directing police officials to issue firearms certificates only if they were "satisfied that the applicant is a person who has a good reason for requiring such a certificate." Firearms Act, 1920, 3 Edw. VII c. 18, at ¶ 1(2). Initially, Home Office issued directions that indicated that self-defense could be a sufficient "good reason." *See* MALCOLM, GUNS AND VIOLENCE, *supra*, at 149 (quoting HOME OFFICE, GUIDANCE FROM HOME OFFICE ON FIREARMS ACT, 1920 p. 3 (Oct. 5, 1920)). But over time, this waned. In 1937, Home Office's directions provided that "applications to possess firearms for house or personal protection should be discouraged on the grounds that firearms cannot be regarded as a suitable means of protection and may be a source of danger." *Id.* at 156 (quoting HOME OFFICE, MEMORANDUM FOR THE GUIDANCE OF THE POLICE, FIREARMS ACT 1937). And by 1964, the instruction was that "[i]t should hardly ever be necessary to anyone to possess a firearm for the protection of his house or person," and "only in very exceptional cases." *Id.* at 171 (quoting HOME OFFICE, MEMORANDUM FOR THE GUIDANCE OF THE POLICE, 1964, p. 7). Finally, in 1969, it would "never be necessary for anyone to possess a firearm for the protection of his house or person." *Id.* (quoting HOME OFFICE, MEMORANDUM FOR THE GUIDANCE OF THE POLICE, September, 1969, p. 22).

While later acts of Parliament would further restrict the keeping and bearing of arms—ultimately, among other things, banning handguns to the general

public—it was Firearms Act, 1920 that instituted a license requirement that was tied to a "good reason" requirement. As Parliament itself recognized in the Blackwell Report, before 1920 nothing but the Gun License Act, 1870 stood to prevent one from "legally us[ing] or carry[ing] a gun outside the curtilage of his dwelling-house," and the Gun License Act required nothing more than the payment of a nominal 10-shilling license fee. BLACKWELL REPORT, *supra*, at ¶ 1(1). Plainly, Parliament understood that laws dating back to and before the Fourteenth Century did not stand as a bar.

Indeed, one other act of Parliament bears this out. The Prevention of Crimes Act, 1953, 1 & 2 Eliz. II c. 14, made it illegal to "ha[ve] . . . in any public place any offensive weapon" unless one had "lawful authority or reasonable excuse, the proof whereof shall lie on him," *id.* at s. 1(1). An "offensive weapon" was "any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him." *Id.* at s. 1(4). While self-defense could potentially be a "reasonable excuse," this was only the case when there was "an imminent particular threat affecting the particular circumstances in which the weapon was carried," rather than a threat that was "constant or enduring." *See Evans v. Hughes*, 56 Cr. App. R. 813, 817 (1972). Moreover, a firearms certificate did not amount to "lawful authority or reasonable excuse." *See R. v. Jones*, 1 Cr. App. R. 262, 266 (1994). Again, the fact that Parliament found it necessary to enact this law in 1953 means that other preexisting laws, such as the Statute of Northampton and the Justices of the Peace Act, did not already stand

as bars on having weapons in public without a "reasonable excuse."

CONCLUSION

The Statute of Northampton, Justices of the Peace Act and the common law power to bind over individuals to prevent breaches of the peace were not general bans on the peaceful carry of arms. Rather, broad preclusions on bearing arms arose in the Twentieth Century, both in England, as well as in the United States. The existence of these historical laws is no justification for rewriting the Second Amendment to effectively exclude the right to bear arms today.

Respectfully submitted,

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