No. 14-10078

In the Supreme Court of the United States

JAIME CAETANO,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF OF ARMING WOMEN AGAINST RAPE & ENDANGERMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Second and Fourteenth Amendments protect a right to keep and bear weapons that are less deadly (but also less common) than handguns.

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Arming Women Against Rape & Endangerment (AWARE) is a non-profit, tax-exempt charitable organization founded in 1990 to provide information and training to enable people, particularly women, to avoid, deter, repel, or resist crimes ranging from minor harassment to violent assault.

AWARE's board members and instructors are certified to teach a wide range of self-defense techniques ranging from chemical defensive sprays to firearms. Its staff members have given presentations at the American Society of Criminology and at annual training meetings of American Society of Law Enforcement Trainers, Women in Federal Law Enforcement, and the International Women Police Association. One of its board members has published more than a hundred articles in various magazines and journals regarding the defensive use of firearms and other aspects of personal protection.

This case is of significant interest to AWARE because AWARE believes that law-abiding Americans should have the right to choose whether to defend themselves with lethal weapons or nonlethal weapons.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to this filing.

SUMMARY OF ARGUMENT

Hawaii, Massachusetts, New York, New Jersey, and Rhode Island, and cities such as Baltimore, New Orleans, Philadelphia, and Washington D.C., all ban the possession of stun guns. Yet hundreds of thousands of Americans who want to be able to defend themselves against crime possess stun guns for understandable and law-abiding reasons. Some people may have religious or ethical objections to using lethal weapons. Others may feel emotionally unable to pull the trigger of a firearm. Others may worry that children or a suicidal roommate may misuse the weapon. Still others worry that they may kill someone who they erroneously believe is an attacker.

The ruling below concludes that all these citizens lack the Second Amendment right to possess stun guns, because stun guns fit within the "dangerous and unusual weapons" exclusion recognized by *D.C. v. Heller*, 554 U.S. 570, 627 (2008). Yet the Michigan Court of Appeals in *People v. Yanna*, 297 Mich. App. 137 (2012), held that a ban on stun guns violated the Second Amendment (both as applied to the home and as applied to possession in public).

Moreover, the Connecticut Supreme Court has held that a ban on possessing dirk knives and police batons violated the Second Amendment, *State v. DeCiccio*, 315 Conn. 79 (2014), and the Connecticut court's reasoning directly conflicts with the Massachusetts court's. The Connecticut court held that such weapons should not be viewed as "dangerous and unusual" for Second Amendment purposes, because "dangerous" should be understood to mean *more* dangerous than constitutionally protected

handguns: "a category of arm that is less dangerous [than a handgun] clearly may not be prohibited." *Id.* at 122. The Massachusetts court, on the other hand, held that stun guns satisfy the "dangerous" prong of the "dangerous and unusual" exclusion, because stun guns are designed to "'incapacitate temporarily, injure, or kill'" people, Pet. App. A, at 5 (citation omitted)—something that of course is true of all weapons.

The Connecticut court also held that police batons should not be seen as "unusual," because they are routinely used by the police, and because they are "typically possessed by law-abiding citizens for lawful purposes." *DeCiccio*, 315 Conn. at 129, 133; *see also Yanna*, 297 Mich. App. at 145. The Massachusetts court held the opposite, because stun guns are much less common than handguns, did not exist in 1791, and are not weapons of warfare used by the military. This Court should grant certiorari to resolve this conflict among the lower courts.

ARGUMENT

I. The Ability to Possess Nonlethal Weapons Is an Important Aspect of the Right to Keep and Bear Arms

Five states and more than a dozen cities and towns ban the possession of stun guns. *See* Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defense Life*, 62 Stan. L. Rev. 199, 244-46 (2009). New stun gun bans have been proposed in several states. *Id.* at 246.

At the same time, "[h]undreds of thousands of tasers and stun guns have been sold to private citi-

zens, with many more in use by law enforcement officers." *People v. Yanna*, 297 Mich. App. at 144. Many thousands of these weapons are likely possessed in jurisdictions in which they are illegal, even if they were originally bought in the many states where they are legal.

The ability to possess a stun gun instead of a handgun is an important aspect of the right to keep and bear arms. Some people have religious or ethnical compunctions about killing.[2] Other religious and philosophical traditions, such as Judaism and Catholicism, believe that defenders ought to use the least violence necessary.[3] Some adherents to these beliefs may therefore conclude that fairly effective

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[2] For example, noted Mennonite theologian John Howard Yoder, noted Pentecostalist theologian David K. Bernard, and the Dalai Lama have expressed the view that while one ought not use deadly force even in self-defense, self-defense using non-deadly force is permissible. *See* John Howard Yoder, *Nevertheless: The Varieties of Religious Pacifism* 31 (1971); John Howard Yoder, *What Would You Do?* 28-31 (1983); David K. Bernard, *Practical Holiness: A Second Look* 284 (1985); Hal Bernton, *Students Urged to Shape World: Dalai Lama Preaches Peace in Portland*, Seattle Times, May 15, 2001, at B1. Some members of other religious groups, such as Quakers, share this view. *See* John Webster Gastill, *Queries on the Peace Testimony*, Friends J., Aug. 1992, at 14, 15.

[3] *See Catechism of the Catholic Church*, http://www.vatican.va/archive/ENG0015/_P7Z.HTM, at ¶ 2264; *Babylonian Talmud*, Sanhedrin 74a (I. Epstein ed., Jacob Schacter & H. Freedman trans., Soncino Press 1994); *The Code of Maimonides,* Book Eleven, The Book of Torts 197-98 (Hyman Klein trans., Yale Univ. Press 1954).

non-deadly defensive tools are preferable to deadly tools.

Still other people may feel emotionally unable to pull the trigger on a deadly weapon, even when doing so would be ethically proper.[4] Others may worry about erroneously killing someone who turns out not to be an attacker.

Still others might be reluctant to kill a particular potential attacker, for instance when a woman does not want to kill an abusive ex-husband because she does not want to have to explain to her children that she killed their father, even in self-defense. Some might fear owning a gun because it might be misused by their children or by a suicidal roommate.

Some people who do own guns may prefer to own both a firearm and a stun gun, so that they can opt for a nonlethal response whenever possible, resorting to lethal force only when absolutely necessary. And people who live in states where it is hard to get licenses to carry concealed firearms may choose to get stun guns instead. Volokh, *supra*, at 214-16.

Yet, under the ruling below, all these residents are denied their right to possess nonlethal stun guns for protection. This is a serious burden on Americans'

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[4] Thus, for instance, Liqun Cao et al., *Willingness to Shoot: Public Attitudes Toward Defensive Gun Use*, 27 Am. J. Crim. Just. 85, 96 (2002), reports that 35% of a representative sample of Cincinnati residents age 21 and above said they would *not* be willing to shoot a gun at an armed and threatening burglar who had broken into their home.

Second Amendment rights, and one that merits this Court's consideration.

II. Lower Courts Disagree on the Meaning of "Dangerous and Unusual Weapons" in *Heller*

This Court has stated that the Second Amendment does not protect "dangerous and unusual weapons," such as machine guns. *D.C. v. Heller*, 554 U.S. 570, 627 (2008). But lower courts disagree on how this applies to nonlethal and less lethal weapons, both as to the word "dangerous" and as to the word "unusual." This case perfectly illustrates this disagreement.

A. "Dangerous"

The Michigan Court of Appeals recently ruled that, because "tasers and stun guns * * * are substantially less dangerous than handguns," they do not "constitute dangerous weapons for purposes of Second Amendment inquires." *Yanna*, 297 Mich. App. at 145. Likewise, a recent Connecticut Supreme Court decision favorably cited *Yanna* in deciding that police batons and dirk knives are protected under the Second Amendment. *DeCiccio*, 315 Conn. at 123, 133. Using the same reasoning as in *Yanna*, the Connecticut Supreme Court found that, because batons and knives are far less dangerous than guns, they are not considered to be the sort of "dangerous" weapons that are excluded from Second Amendment protection. *DeCiccio*, 315 Conn. at 123, 133.

And this interpretation of "dangerous" in "dangerous and unusual weapons," as meaning "unusually dangerous," makes sense. All weapons are dangerous

in some measure, especially if one includes danger of pain and injury and not just death. When this Court articulated the "dangerous and unusual weapons" exclusion, it likely intended that "dangerous" have some independent meaning, rather than just being a restatement of an attribute that all weapons possess.

But the decision below uses a different approach. Stun guns, the Massachusetts high court concluded, qualify as "dangerous" for purposes of the "dangerous and unusual" exclusion simply because they were designed to "'incapacitate temporarily, injure, or kill.'" Pet. App. A, at 5 (citation omitted). Thus, the court essentially transformed the "dangerous *and* unusual weapon" exception into an "unusual weapon" exception. Dirk knives (which can often be deadly) and police batons (which can sometimes be deadly) would be even more clearly excluded from Second Amendment protection under the Massachusetts test—a result inconsistent with the Connecticut decision.

B. "Unusual"

Lower courts also disagree as to the meaning of "unusual" in the "dangerous and usual weapons" exclusion. The Michigan Court of Appeals concluded that stun guns were *not* unusual because they are legal in many states, are commonly used by law enforcement officers, and have been in use for decades. *Yanna*, 297 Mich. App. at 145. Similarly, the Connecticut Supreme Court concluded that police batons are not "unusual," because they are "typically possessed by law-abiding citizens for lawful purposes" (rather than being "unique to the criminal element"), and because of their "widespread acceptance * * *

within the law enforcement community." *DeCiccio*, 315 Conn. at 129, 133.

In contrast, the decision below found that stun guns *are* unusual because stun guns were "not 'in common use at the time' of enactment of the Second Amendment"; stun guns are not weapons of warfare that are "readily adaptable to use in the military"; and "the 'number of Tasers and stun guns is dwarfed by the number of firearms.'" Pet. App. A, at 5-6.

But the view that Second Amendment protection extends only to weapons in common use in 1791 was rejected by this Court in *Heller*, 554 U.S. at 582. Indeed, this Court characterized that view as "bordering on the frivolous." *Id.*; *see also* Pet. 6-9. Likewise, this Court has made clear that the "arms" protected by the Second Amendment include "weapons that were not specifically designed for military use and were not employed in a military capacity." 554 U.S. at 581.

And the view that weapons that are much less common than firearms are so "unusual" that they are outside the scope of the Second Amendment is inconsistent with *DeCiccio* and *Yanna*. Neither of those cases compared the number of dirk knives, police batons, and stun guns in private hands to the number of handguns in private hands. Rather, *DeCiccio* and *Yanna* focused on whether those weapons were owned commonly enough by the police and by law-abiding private citizens, not on the relative number of such weapons compared to handguns.

This Court should grant certiorari to resolve how the "dangerous and unusual weapons" exclusion applies to nonlethal and less lethal weapons.

CONCLUSION

For the reasons given above, this Court should grant certiorari.

Respectfully submitted,

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