No. 14-10078

In the
Supreme Court of the United States

JAIME CAETANO,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent

On Petition For A Writ Of Certiorari To The Massachusetts Supreme Judicial Court

BRIEF IN OPPOSITION

MAURA HEALEY
Massachusetts Attorney General

THOMAS E. BOCIAN*
JULIA KOBICK
Assistant Attorneys General
OFFICE OF THE MASSACHUSETTS ATTORNEY GENERAL
One Ashburton Place
Boston, MA 02108
thomas.bocian@state.ma.us
(617) 727-2200, ext. 2617
* *Counsel of Record*

October 13, 2015

QUESTIONS PRESENTED

1. Whether electric stun guns qualify as "arms" protected by the Second Amendment.

2. Whether the petitioner's conviction under Mass. Gen. Laws ch. 140, § 131J, which prohibits civilians from possessing stun guns, violates the Second Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Statutes

Page

Constitutional Provisions

Court Rules

Other Authorities

Page

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (Pet. App. A) is reported at 470 Mass. 774, 26 N.E.3d 688 (2015). The order and opinion of the Framingham District Court (Pet. App. C) are unreported.

JURISDICTION

The judgment of the Supreme Judicial Court was entered on March 2, 2015. The petition for a writ of certiorari was filed on June 1, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. Massachusetts prohibits the possession and sale of portable devices or weapons "from which an electrical current, impulse, wave or beam may be directed," when the "current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill." Mass. Gen. Laws ch. 140, § 131J. The law exempts law enforcement personnel who possess such weapons in the course of their official duties, provided they have completed an approved training course. *Id.* It also exempts suppliers of such weapons, if possession is "necessary to the supply or sale of the device or weapon" to law enforcement agencies. *Id.* Portable electrical weapons sold pursuant to Section 131J must "include a mechanism for tracking the number of times the device or weapon has been fired." *Id.*

2. On September 29, 2011, police officers in Ashland, Massachusetts were dispatched to a grocery store in response to a call about a possible shoplifting. The store's manager identified the petitioner, Jaime Caetano, and a male companion as

possible perpetrators. The petitioner, who was seated in a car in the parking lot, gave the officers consent to search her purse. Inside the purse they found an operational stun gun.[1] The petitioner told the officers that she kept it for protection against a former boyfriend. As a result of her possession of the stun gun, the police charged her with a violation of Section 131J.[2] *Commonwealth v. Caetano*, 470 Mass. 774, 775, 26 N.E.3d 688, 689 (2015).

3. Before trial, the petitioner moved to dismiss the charge, contending that Massachusetts's ban on stun gun possession abridged her right to keep and bear arms, as guaranteed by the Second Amendment, *see District of Columbia v. Heller*, 554 U.S. 570 (2008), and as made applicable to the states by the Fourteenth, *see McDonald v. City of Chicago*, 561 U.S. 742 (2010).[3] *Caetano*, 26 N.E.3d at 690. The motion was denied. *Id.*; Pet. App. C.

During a jury-waived trial, the petitioner testified that she kept the stun gun for protection against an abusive former boyfriend. *Caetano*, 26 N.E.3d at 690. She also testified that she had been homeless and had lived in a hotel at the time she

---

[1] The petitioner's stun gun "was a black electronic device with two metal prongs and a switch. Once the switch was thrown, an electrical current appeared between the prongs. Stun guns are designed to stun a person with an electrical current after the prongs are placed in direct contact with the person and the switch is thrown." *Commonwealth v. Caetano*, 470 Mass. 774, 775 n.2, 26 N.E.3d 688, 689 n.2 (2015).

[2] A violation of Section 131J may result in "a fine of not less than $500 nor more than $1,000 or by imprisonment in the house of correction for not less than 6 months nor more than 2½ years, or by both such fine and imprisonment." Mass. Gen. Laws ch. 140, § 131J.

[3] The parties stipulated at trial that the stun gun was a device that fell within the ambit of Section 131J. *Caetano*, 26 N.E.3d at 690.

obtained it. *Id.* The trial judge found her guilty and eventually placed the case on file, over her objection.[4] *Id.* She filed a notice of appeal, and the Supreme Judicial Court ("SJC") granted her request for direct appellate review.

4. The SJC affirmed the petitioner's conviction, rejecting her contentions that the Second Amendment guarantees her the right to possess a stun gun and that Section 131J is therefore unconstitutional as applied to her. *Caetano*, 26 N.E.3d at 689; Pet. App. A. The key question, the SJC recognized, was whether a stun gun is "the type of weapon that is eligible for Second Amendment protection." *Caetano*, 26 N.E.3d at 689. *Heller* and *McDonald*, the SJC noted, held that the possession of operative firearms in the home for self-defense is the "core" right protected by the Second Amendment, and that there are certain permissible limitations on the right. *Id.* at 691. The SJC focused in particular on one "'important limitation on the right to keep and carry arms'" identified in *Heller*: That the "'sorts of weapons protected'" by the Second Amendment are those that were "'in common use at the time' of enactment." *Id.* at 692 (quoting *Heller*, 554 U.S. at 627). That limitation on the scope of the Second Amendment, as *Heller* explained, was "'fairly supported by the historical tradition of prohibiting [the] carrying of dangerous and unusual weapons.'" *Id.* at 692 (quoting *Heller*, 554 U.S. at 627).

---

[4] Massachusetts Rule of Criminal Procedure 28(e) describes the process that must be followed when a case is placed "on file." *See generally Commonwealth v. Simmons*, 448 Mass. 687, 693, 863 N.E.2d 549, 554–55 (2007) (explaining the process of placing a case on file and characterizing it as "a predecessor to modern probation").

Applying that limitation, the SJC determined that "there can be no doubt that a stun gun was not in common use at the time of enactment," and therefore "is not the type of weapon that is eligible for Second Amendment protection." *Caetano*, 26 N.E.3d at 693. Unlike handguns, whose "basic function has not changed" since "the time of the enactment of the Second Amendment," the SJC explained, the stun gun is "a thoroughly modern invention." *Id.* at 693–94. The SJC also concluded that the stun gun is both dangerous and unusual. *Id.* at 692–94. At common law, the SJC reasoned, the stun gun would have been regarded as "dangerous per se" because it is designed "'for the purpose of bodily assault or defense.'" *Id.* at 692–93 (quoting *Commonwealth v. Appleby*, 380 Mass. 296, 303, 402 N.E.2d 1051, 1056 (1980)). And the stun gun is an unusual weapon, the SJC continued, because it was not in existence at the time the Second Amendment was enacted and because the number of stun guns in circulation today "is dwarfed by the number of firearms." *Caetano*, 26 N.E.3d at 693–94 (internal quotation marks omitted).

Because Section 131J did not burden a Second Amendment right, the SJC applied rational basis review to assess its constitutionality. *Caetano*, 26 N.E.3d at 694. Stun guns, the SJC observed, cause "disabling pain, uncontrolled muscular contractions, and general disruption of the central nervous system" by shocking a victim with an electrical charge of up to 50,000 volts. *Id.* Unlike handguns, stun guns can be deployed without leaving marks on the victim. *Id.* The SJC determined that, in the interest of public health, safety, and welfare, Section 131J

permissibly "[r]emov[es] from public access devices that can incapacitate, injure, or kill a person by disrupting the central nervous system with minimal detection." *Id.*

ARGUMENT

This Court should deny the petition. The SJC's decision is consistent with this Court's decisions in *Heller* and *McDonald* and does not conflict with the decision of any state court of last resort or federal court of appeals. Even if the Court did wish to address the questions presented notwithstanding the need for further percolation in the lower courts, this case is not a suitable vehicle. First, the petitioner cannot obtain relief from her conviction unless this Court addresses a further question concerning the extent to which the Second Amendment protects the right to carry arms outside the home. But the particular facts of this case—involving a homeless person living in a hotel—are ill-suited for crafting a general rule on that issue. Second, the decision below is independently supportable on the ground that, even if stun guns qualify as "arms" under the Second Amendment, any burden that Section 131J imposes on Second Amendment interests is *de minimis*.

I. The Supreme Judicial Court's Decision Is Consistent With *Heller* And *McDonald*.

The SJC's determination that stun guns do not qualify as "arms" eligible for Second Amendment protection is consistent with *Heller* and *McDonald*. In *Heller* and *McDonald*, this Court held that the Second Amendment secures an individual right, incorporated against the states, to possess a handgun in the home for self-defense. *See Heller*, 554 U.S. at 635; *McDonald*, 561 U.S. at 791 (plurality); *id.* at

806 (Thomas, J., concurring in part and concurring in the judgment). But *Heller* and *McDonald* also explained that the Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786. Rather, "the Second Amendment right, whatever its nature, extends only to certain types of weapons." *Heller*, 554 U.S. at 623.

Heller offered guidance on what types of weapons are protected by the Second Amendment. "[T]he Second Amendment confers an individual right to keep and bear arms," *Heller* explained, "though only arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia.'" 554 U.S. at 622 (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)). "'[O]rdinarily when called for [militia] service'" in the colonial and revolutionary war period, the Court recounted, "'[able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.'" 554 U.S. at 624 (quoting *Miller*, 307 U.S. at 179). Traditional militias were "formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Id.* (quoting *Miller*, 307 U.S. at 179). This history illustrated how "the Second Amendment's operative clause further[ed] the purpose announced in its preface": At the time the Second Amendment was ratified, "'[small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.'" *Id.* at 625 (quoting *State v. Kessler*, 289 Or. 359, 368, 614 P.2d 94, 98 (1980)).

From this history, *Heller* derived two limitations on the types of weapons protected by the Second Amendment. First, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. Second, the "sorts of weapons protected" by the Second Amendment are "those 'in common use at the time'" the amendment was ratified. *Id.* at 627 (quoting *Miller*, 307 U.S. at 179). This latter limitation, the Court explained, is "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual' weapons." *Id.*

A. Stun Guns Are Not The Sorts Of Weapons That Were In Common Use At The Time The Second Amendment Was Ratified.

The SJC correctly determined that, under the second limitation announced in *Heller*, a stun gun is not an "arm" covered by the Second Amendment because it is not the sort of weapon that was in common use at the time of ratification. Stun guns are, as the SJC recognized, "a thoroughly modern invention." *Caetano*, 26 N.E.3d at 693–94. First patented in 1972, they were not widely available for private purchase until the early 1990s. *Id.* They operate by shocking the intended victim with an electrical current that runs between two metal prongs. *Id.* at 689 n.2. As the petitioner concedes, a weapon designed to kill, injure, or incapacitate with electricity is not the sort of weapon that was in common use at the time the Second Amendment was ratified. Pet. 8. Nor does such a weapon have any conceivable "'relationship to the preservation or efficiency of a well regulated militia.'" *Heller*, 554 U.S. at 622 (quoting *Miller*, 307 U.S. at 178).

The SJC's reasoning does not, as the petitioner contends, conflict with *Heller*'s instruction that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." 554 U.S. at 582. *Heller* rejected the notion that "only those arms in existence in the 18th century are protected by the Second Amendment," but it also made clear that the "sorts of weapons protected" by the Second Amendment are those that were "'in common use at the time'" of ratification. *Id.* at 582, 627 (quoting *Miller*, 307 U.S. at 179). Those propositions are easily reconciled: The Second Amendment is not limited to the precise models of weaponry in existence at the time of the founding, but neither does it protect novel weapons or weapons with features that bear scant resemblance to weapons that were common at the time of ratification. *Cf. State v. Delgado*, 298 Or. 395, 400, 692 P.2d 610, 612 (1984) ("The appropriate inquiry . . . is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during . . . the revolutionary and post-revolutionary era.").

It follows that modern-day handguns, which resemble 18th and 19th century pistols and revolvers and have long been regarded as "the quintessential self-defense weapon," qualify as arms under the Second Amendment. *Heller*, 554 U.S. at 629. But "M-16 rifles and the like"—whose features do not resemble the features of lawful firearms that founding-era Americans carried at home and on militia duty—"may be banned." *Id.* at 627; *see Friedman v. City of Highland Park, Ill.*, 784

F.3d 406, 410 (7th Cir. 2015), *cert. pending*, No. 15–133 (upholding municipal ordinance banning possession of assault weapons and large capacity magazines, which have "features . . . [that] were not common in 1791").

Stun guns and other portable electrical weapons fall in the second category. Because stun guns kill, injure, and incapacitate victims with electricity, leaving little to no trace of their use, they are a wholly distinct sort of weapon, one that has no 18th-century analogues. It is no answer to say, as the petitioner does, that stun guns can be kept in a location easily accessible in case of emergency and can be used by persons lacking the upper-body strength to lift a heavier weapon. Pet. 9. Those features bear on the utility of such weapons, not on the factors with which *Heller* was concerned. And they are shared by short-barreled shotguns—weapons that, *Miller* held, and *Heller* confirmed, are not protected by the Second Amendment. *See Heller*, 554 U.S. at 622, 625; *Miller*, 307 U.S. at 178–79. Accordingly, the SJC's determination that stun guns are not arms protected by the Second Amendment follows directly from *Heller*.[5]

[5] Similarly, the SJC's reasoning is not, as the petitioner contends, inconsistent with *Heller*'s citation to a 1771 dictionary definition of "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 554 U.S. at 581 (quoting 1 T. Cunningham, A New and Complete Law Dictionary (1771)). Taken literally, that definition would encompass short-barreled shotguns and M-16 rifles, weapons that are not protected by the Second Amendment. *Id.* at 625, 627. The 1771 definition provides a starting point for *Heller*'s analysis of which weapons constitute "arms"; it must be read in light of *Heller*'s subsequent discussion of the limitations on the types of weapons protected by the Second Amendment.

B. Stun Guns Are Among Those Dangerous And Unusual Weapons That May Be Prohibited Consistent With The Second Amendment.

The common law "tradition of prohibiting the carrying of 'dangerous and unusual' weapons" further supports the SJC's determination that stun guns are not protected by the Second Amendment. *Heller*, 554 U.S. at 627. *Heller* invoked that tradition in aid of its conclusion that only the sorts of weapons commonly used at the time of ratification are covered by the Second Amendment. *See id.* (citing, among other sources, 4 Commentaries on the Laws of England 148–49 (1769) ("The offence 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.")).

At common law, as the SJC explained, weapons that were "'designed and constructed to produce death or great bodily harm' and 'for the purpose of bodily assault or defense'" were "dangerous per se." *Caetano*, 26 N.E.3d at 692 (quoting *Appleby*, 402 N.E.2d at 1056). Examples of such weapons include "'firearms, daggers, stilettos and brass knuckles' but not 'pocket knives, razors, hammers, wrenches and cutting tools.'" *Id.* (quoting *Appleby*, 402 N.E.2d at 1056). Stun guns—like daggers, stilettos, and brass knuckles—are designed for the purpose of bodily assault, and therefore rank as dangerous. Indeed, accounts of people tragically tortured and killed by stun guns and other portable electrical weapons are all too common, particularly given the small numbers of stun guns in circulation. *See, e.g.*, *Thomas v. Nugent*, 539 Fed. Appx. 456 (5th Cir. 2013), *vacated and remanded*, 134 S. Ct. 2289 (2014); *Fontenot v. Taser Int'l, Inc.*, 736 F.3d 318

(4th Cir. 2013); *Russell v. Wright*, 916 F. Supp. 2d 629 (W.D. Va. 2013); *Lee v. Metropolitan Govt. of Nashville & Davidson Cnty.*, 596 F. Supp. 2d 1101 (M.D. Tenn. 2009); *Neal-Lomax v. Las Vegas Metropolitan Police Dept.*, 574 F. Supp. 2d 1170 (D. Nev. 2008); *People v. MacCary*, 173 A.D.2d 646 (N.Y. App. Div. 1991). And courts have had little trouble concluding that stun guns are dangerous weapons. *See, e.g., United States v. Agron*, 921 F.2d 25, 26 (2d Cir. 1990) (per curiam); *United States v. Wallace*, 800 F.2d 1509, 1513 (9th Cir. 1986); *State v. Geier*, 484 N.W.2d 167, 171–72 (Iowa 1992); *MacCary*, 173 A.D.2d at 647.

Stun guns are also unusual. Viewed from the perspective of the common law or of ratification-era America, stun guns were not just uncommon—they were nonexistent. *See supra*, at 7; *Caetano*, 26 N.E.3d at 693–94. Viewed from today's perspective,[6] stun guns are quite rare: As of 2009, approximately 200,000 civilians owned stun guns,[7] compared with approximately 30% of Americans who personally

---

[6] It is unlikely that *Heller* intended for courts to look to present-day popularity of weapons to determine whether they are "unusual," as that concept was understood at common law. Doing so would imply that weapons could gain and lose Second Amendment protection as their popularity waxes and wanes. *See Friedman*, 784 F.3d at 408 ("During Prohibition the Thompson submachine gun . . . was all too common in Chicago, but that popularity didn't give it a constitutional immunity from the federal prohibition enacted in 1934."). In any event, the question whether a weapon is an "arm" under the Second Amendment does not turn on whether it is "dangerous and unusual." The rule that "the sorts of weapons protected were those 'in common use at the time'" of ratification, *Heller* said, "*is fairly supported by* the historical tradition of prohibiting the carrying of 'dangerous and unusual' weapons." 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179) (emphasis added). *Heller* did not say that a weapon's dangerousness and unusualness is a standalone test for determining whether it is an "arm" covered by the Second Amendment.

[7] *See* E. Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 212 (2009).

owned guns in the same time period.[8] As the petitioner conceded below, "the 'number of Tasers and stun guns is dwarfed by the number of firearms.'" *Caetano*, 26 N.E.3d at 693 (quoting petitioner's motion to dismiss).

II. The Supreme Judicial Court's Decision Does Not Conflict With The Decision Of Any State Court Of Last Resort Or Federal Court Of Appeals.

The petitioner alleges no conflict between the decision below and a state court of last resort or federal court of appeals that warrants this Court's review. She cites only two decisions that, she claims, conflict with the SJC's decision. *See* Pet. 8 (citing *State v. DeCiccio*, 315 Conn. 79, 105 A.3d 165 (2015); *People v. Yanna*, 297 Mich. App. 137, 824 N.W.2d 241 (2012)). The first decision, involving a ban on dirk knives and police batons, is readily distinguishable. The second decision, rendered by an intermediate appellate court, does not create a split with a state court of last resort.

1. In *State v. DeCiccio*, the Connecticut Supreme Court invalidated Connecticut's statute prohibiting the possession of dirk knives[9] and police batons in a motor vehicle, as applied to the defendant. *See* 105 A.3d at 209. The defendant was charged with possessing both weapons in his car while he transported them

---

[8] *See* J. Jones, *Men, Married, Southerners Most Likely to Be Gun Owners*, GALLUP (Feb. 1, 2013), available at http://www.gallup.com/poll/160223/men-married-southerners-likely-gun-owners.aspx (polls conducted between 2007 and 2012).

[9] The Connecticut Supreme Court defined "dirk knife" as "a knife that is designed primarily for stabbing purposes, rather than utilitarian purposes, has a blade with sharpened edges that tapers to a point, and has a handle with guards intended to facilitate the act of stabbing or thrusting." *DeCiccio*, 105 A.3d at 178.

from a former residence to a new residence. *Id.* at 172. The court concluded that dirk knives and police batons are entitled to Second Amendment protection, and that a ban on transporting such weapons between homes does not survive intermediate scrutiny. *Id.* at 188–210.

In determining that dirk knives qualify as "arms" protected by the Second Amendment, the Connecticut Supreme Court asked whether the weapons were "'of the sort commonly used by individuals for personal defense during . . . the revolutionary and post-revolutionary era.'" *DeCiccio*, 105 A.3d at 191 (quoting *Delgado*, 692 P.2d at 612); *see also id.* at 190, 192 (examining the "traditional military utility" and "military origins" of dirk knives). After a lengthy historical analysis, the court concluded that dirk knives bear close resemblance to knives, like bayonets and swords, that "were common and were arms for militia purposes." *Id.* at 192–94. The court also reasoned that dirk knives were neither dangerous nor unusual, which "provide[d] strong support for the conclusion that dirk knives are entitled to protected status." *Id.* at 193–94.

That analysis aligns with the analysis conducted by the SJC in the decision below. Both courts examined whether the weapons at issue were of the sort commonly used in militia service and in the home for self-defense around the time of the founding. The courts simply reached different conclusions on different facts. Because dirk knives and stun guns are markedly different weapons—and because dirk knives in America date to the 1700s, while stun guns date to the mid-to-late-twentieth century—the courts reasonably arrived at differing answers on whether

the weapons are protected by the Second Amendment. Faced with the same facts, the SJC could conclude that dirk knives qualify for Second Amendment protection, while the Connecticut Supreme Court could conclude that stun guns do not.[10]

In determining that police batons qualify as "arms" protected by the Second Amendment, the Connecticut Supreme Court rejected the arguments that police batons are not typically possessed by law abiding citizens for lawful purposes, and are not the sorts of weapons commonly used at the time of ratification because they were dangerous and unusual. *DeCiccio*, 105 A.3d at 197–201. With respect to the lawful-purpose limitation announced in *Heller*, the court concluded that law-abiding citizens typically possess police batons for lawful purposes because the batons "are instruments manufactured specifically for law enforcement purposes as nonlethal weapons." *Id.* at 200. That conclusion does not conflict with the SJC's decision below: The SJC did not reach the question whether stun guns are typically possessed by law-abiding citizens for lawful purposes, because it concluded that they were not the sorts of weapons commonly used at the time of ratification. *See Caetano*, 26 N.E.3d at 693. Moreover, neither the district court nor the SJC made

---

[10] Indeed, the Connecticut Supreme Court stressed that its holding was limited to dirk knives and did not address other types of weapons. *See DeCiccio*, 105 A.3d at 196 n.33 ("We emphasize that our conclusion is limited to knives with characteristics of the dirk knife at issue in the present case, and we do not decide whether the second amendment embraces knives generally. . . . Thus, we do not consider whether the right to keep and bear arms under the second amendment extends to other types of knives, including those identified in [the challenged statute], such as switchblades and stilettos.").

any finding about whether stun guns are nonlethal weapons and whether they are specifically manufactured for law enforcement purposes.[11]

The Connecticut Supreme Court also concluded that the second limitation announced in *Heller*—that only the sorts of weapons in common use at the time of ratification are "arms" under the Second Amendment—was inapplicable because police batons had "traditional military utility" and are not dangerous and unusual. *DeCiccio*, 105 A.3d at 200–01. Departing from the method it used with respect to dirk knives, the court did not undertake a detailed historical analysis concerning whether a police baton is the sort of weapon commonly used at the time of ratification, nor whether a police baton would have been considered dangerous or unusual and therefore unprotected. *See id.* To the extent *DeCiccio* tacitly conducts the "dangerous and unusual" inquiry differently than the SJC's decision below, further percolation is warranted on the question whether a weapon may be said to have been "in common use" at the time of ratification simply because, today, it is not considered dangerous and unusual, or rather whether, as *Heller* said, a finding that a weapon is dangerous and unusual is simply further support for the conclusion that the weapon is not the type of weapon in common use by militias at the time of ratification. *See* 554 U.S. at 627.

---

[11] The SJC could hardly have concluded that stun guns are nonlethal, given the large numbers of civilians killed by stun guns and Tasers. *See supra*, at 10–11; Amnesty Int'l, *Less Than Lethal? The Use of Stun Weapons in US Law Enforcement* 1 (2008), available at http://www.amnesty.ch/de/themen/weitere/taser/dok/2008/taser-bericht/Taser-Report-Less-than-lethal_USA.pdf (between June 2001 and August 2008, more than 330 people in the U.S. died after being shocked by police Tasers and stun guns, and coroners listed the Taser or stun gun as the cause or contributory factor in the death in at least 50 of those cases).

DeCiccio is additionally distinguishable because it directly implicated the right to possess arms for self-defense in the home. The Connecticut Supreme Court stressed that its "analysis focuse[d] solely on whether [the challenged statute] unduly infringes on the right to keep protected weapons in the home for self-defense by prohibiting the transportation of such weapons from one home to another." *DeCiccio*, 105 A.3d at 201 n.40. The court viewed "the safe transportation of weapons" between residences as "an essential corollary of the right to possess them in the home for self-defense." *Id.* at 207. It did not, however, determine whether a ban on dirk knives and police batons that did *not* burden the right to self-defense inside the home would survive scrutiny.

Here, by contrast, the petitioner was arrested while possessing a stun gun in a car in the parking lot of a grocery store. She did not contend that she was transporting the stun gun between homes, nor did she contend that her possession of the stun gun outside a grocery store was an essential corollary of a right to possess the weapon in the home for self-defense.[12] Unlike *DeCiccio*, then, this is not a case about possession of weapons inside the home, where "the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628; *see infra*, at 17–18.

---

[12] Because the petitioner lived in a hotel room at the time she was arrested, there was some debate in the courts below whether the hotel room was the defendant's "home" for Second Amendment purposes. *See Caetano*, 26 N.E.3d at 695. The SJC and district court declined to address the issue, however, because the defendant possessed the stun gun in a car parked outside a supermarket, not in her hotel room. *Id.*; Pet. App. C.

2. The petitioner also alleges a conflict between the SJC's decision below and *People v. Yanna*, which struck down a Michigan statute that prohibited the possession and sale of stun guns. *See* 824 N.W.2d at 245–46. *Yanna* does not represent the settled law of Michigan because it was decided by the Court of Appeals of Michigan, an intermediate appellate court. *See* Mich. Const. Art. 6, § 1 (establishing Michigan's three-tiered court system). The Michigan Supreme Court has not addressed whether stun guns and other portable electrical weapons qualify as "arms" under the Second Amendment or whether prohibitions on such weapons are constitutional. Were it to do so, the Michigan Supreme Court could eliminate any disagreement between the Michigan Court of Appeals and the SJC on those questions. Certiorari is therefore unwarranted. *See* Sup. Ct. Rule 10(b).[13]

III. This Case Is Not A Suitable Vehicle To Decide Whether Stun Guns Are Entitled To Protection Under The Second Amendment.

Even if this Court wished to decide whether stun guns qualify as "arms" under the Second Amendment, this case is a poor vehicle for doing so. The petitioner cannot obtain relief from this Court or the SJC unless this Court were to reach the further question whether, and to what extent, the Second Amendment

---

[13] Before the Court of Appeals decided *Yanna*, the Michigan legislature revised its statute to permit possession of portable electrical weapons by individuals who have valid licenses to carry concealed pistols and have received appropriate training. *Compare* Mich. Comp. Laws § 750.224a(1)–(2) (2006) *with* Mich. Comp. Laws § 750.224a(2)(b) (2012); *see Yanna*, 824 N.W.2d at 242 n.1 ("This opinion considers *only* the complete ban implemented by the statute under which defendant was arrested, not the partial ban of the new statute."). Thus, *Yanna* only directly affected the small class of individuals arrested for possessing a portable electrical weapon in Michigan before the statute was amended.

protects possession of arms outside the home. But that issue was not the basis of the SJC's decision below, and the facts of this case would complicate this Court's review of that question.

Guided by *Heller*'s description of the Second Amendment as "the right to keep and bear arms for defense of the home," 554 U.S. at 632, the SJC has previously concluded that the unlawful possession of a firearm in a motor vehicle "does not implicate" the Second Amendment or "infringe on constitutionally protected conduct." *Commonwealth v. Gouse*, 461 Mass. 787, 802, 965 N.E.2d 774, 786 (2012). The petitioner, as mentioned, was charged with possessing a stun gun in a car parked in the parking lot of a grocery store, outside the hotel room she lived in at the time of her arrest. *Caetano*, 26 N.E.3d at 689–90. According to SJC precedent, then, the petitioner's conduct did not implicate the Second Amendment, even if the stun gun she possessed is eligible for Second Amendment protection.

Thus, in order for the petitioner to obtain relief from her conviction, this Court would have to take up the question whether, and to what extent, the carrying of an arm outside the home implicates the Second Amendment. But this case is ill-suited for addressing that issue, as it involves a defendant who, at the time of her arrest, was homeless and living in a hotel room. Given this atypical factual scenario, this case is especially fact-bound and a poor candidate for determining, as a general matter, whether, and to what extent, the Second Amendment extends outside the home.

IV. Even If Stun Guns Are "Arms" Within The Meaning Of The Second Amendment, The SJC's Decision Is Independently Supportable Because Any Burden On The Exercise of Second Amendment Rights Is *De Minimis*.

Even if this Court were to grant review and conclude that stun guns are "arms" within the meaning of the Second Amendment, Section 131J is nonetheless consistent with the Second Amendment because any burden it imposes on Second Amendment interests is *de minimis*.

Since *Heller* and *McDonald*, courts have adopted a two-step test to analyze Second Amendment claims, and, applying that test, have found no Second Amendment violation where, as here, a regulation narrowly prohibits a certain type of weapon but preserves access to a wide array of other weapons. *See infra*, at 22. These courts first ask whether the challenged enactment burdens conduct falling within the Second Amendment's protection; if so, they review the challenged enactment under an appropriate level of means-end scrutiny. *See, e.g.*, *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252–53 (D.C. Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

As to the first step, *Heller* distinguished between laws that impose a substantial burden on the ability of law-abiding citizens to possess protected weapons for self-defense in the home, and laws that modestly affect ownership or use of protected weapons, but nevertheless are "presumptively lawful" or do not

infringe the right at all. *See Heller*, 554 U.S. at 626–27 & n.26 (referring to "presumptively lawful regulatory measures" such as "laws imposing conditions and qualifications on the commercial sale of arms"); *id.* at 632 ("Nothing about [eighteenth-century gunpowder storage and] fire-safety laws undermines our analysis" because "they do not remotely burden the right of self-defense as much as an absolute ban on handguns."); *id.* at 629 (distinguishing the handgun ban from colonial laws that imposed minor fines for unauthorized discharge of weapons, and stating that "[t]hose [colonial] laws provide no support for the severe restriction in the present case").[14] By making room for such "presumptively lawful" regulations and declaring that they do not impermissibly burden the Second Amendment, *Heller* foreclosed the suggestion that "any marginal, incremental or even appreciable restraint on the right to keep and bear arms [is] subject to heightened scrutiny." *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012); *accord Kwong v. Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013).

In prohibiting civilians from possessing stun guns, Section 131J does not impose a substantial burden on the exercise of Second Amendment rights. Massachusetts affords law-abiding, responsible citizens extensive alternatives for acquiring weapons for self-defense and other lawful purposes. In particular, as a recent decision confirmed, Massachusetts residents can acquire and use "a wide

---

[14] *See also Heller*, 554 U.S. at 629 (citing a nineteenth-century Alabama Supreme Court case for the proposition that "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

array of firearms." *Draper v. Healey*, --- F. Supp. 3d ---, 2015 WL 997424, at *7 (D. Mass. Mar. 5, 2015), *appeal filed* (Apr. 14, 2015); *see also Hightower v. City of Boston*, 693 F.3d 61, 66 (1st Cir. 2012) (explaining that, subject to certain licensing requirements, Massachusetts residents may possess several different types of firearms). Indeed, the state's Executive Office of Public Safety and Security ("EOPSS") maintains lists of hundreds firearms that, subject to certain regulations, may be made available for purchase in the Commonwealth. *See* EOPSS, Approved Firearms Roster (Sept. 2015), available at http://www.mass.gov/eopss/docs/chsb/firearms/approvedfirearmsroster05-2015.pdf. Massachusetts residents may also obtain other types of weapons for self-defense including, for example, mace and pepper spray. *See Caetano*, 26 N.E.3d at 695; Mass. Gen. Laws ch. 140, § 122D. All of these options were available to the petitioner. Accordingly, if Section 131J burdens any Second Amendment interests, that burden is *de minimis* and did not meaningfully jeopardize the petitioner's right to bear arms in self-defense.[15]

De minimis burdens, courts have recognized, are like the permissible limitations recognized in *Heller*: They do not infringe the Second Amendment. *See, e.g., Heller v. District of Columbia (Heller III)*, No. 14–7071, 2015 WL 5472555, at *6 (D.C. Cir. Sept. 18, 2015) (laws that have only a *de minimis* effect on the right to bear arms or that do not meaningfully affect individual self-defense do not impinge

[15] Furthermore, as the petitioner acknowledges, stun guns are not a preferred or common weapon for personal self-defense nationwide. *See Caetano*, 26 N.E.3d at 693–94; Pet. 11 & n.10. And, as the petitioner also acknowledges, stun guns are relatively unpopular despite the fact that only a handful of states have banned them. Pet. 11 & n.10. There could be no claim that their scarcity may be explained by a high number of bans across the nation.

on the Second Amendment); *Heller II*, 670 F.3d at 1253–55 (same); *Decastro*, 682 F.3d at 164 ("heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment"). Indeed, courts have determined that where, as here, a state narrowly prohibits a certain type of weapon in the interest of public safety, but preserves access to a wide array of other weapons, there is no Second Amendment violation. *See, e.g.*, *Draper*, --- F. Supp. 3d ---, 2015 WL 997424, at *7 ("The regulation does not substantially burden the right to bear arms in self-defense in one's home because the ban on two kinds of Glock pistols in no way prevents citizens from obtaining a wide array of firearms."), *appeal filed* (Apr. 14, 2015); *Kampfer v. Cuomo*, 993 F. Supp. 2d 188, 196 (N.D.N.Y. 2014) ("[B]ecause the provisions at issue attempt only to decrease in number certain firearms deemed particularly dangerous by the legislature for the sake of public safety, . . . they do not infringe the Second Amendment"), *appeal filed* (Jan. 14, 2014). The petitioner's conviction under Section 131J is entirely consistent with these principles.

The pending appeals in these cases provide an additional reason for this Court to deny this petition: Doing so will allow the cases to proceed to decisions in the courts of appeals, and thereby enable this Court to assess whether review is warranted after the issues are better developed at the appellate level. Decisions from the courts of appeals may produce a clear conflict, or show that this Court's guidance in *Heller* and *McDonald* has been adequate to allow the lower courts to develop and apply a consistent (and correct) body of law. By contrast, granting

certiorari at this stage would "deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984).[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

---

[16] In any event, even if Section 131J were examined under means-end scrutiny, the statute would pass muster. Section 131J is substantially related to the Commonwealth's important interest in protecting the "health, safety, [and] welfare" of its citizens. *Caetano*, 26 N.E.3d at 694; *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981) ("Protection of the health and safety of the public is a paramount governmental interest."). Without leaving marks on a victim, stun guns "deliver a charge of up to 50,000 volts," causing "disabling pain, uncontrolled muscular contractions, and general disruption of the central nervous system." *Caetano*, 26 N.E.3d at 694. The Massachusetts legislature was so concerned about the dangerousness of stun guns that it banned everyone—including police officers—from carrying them when it first enacted Section 131J. *See* Massachusetts Acts and Resolves, 1986, ch. 212. And even when the legislature amended Section 131J to allow law enforcement personnel to carry stun guns, it required the compilation of data on police use of stun guns, required law enforcement personnel to undergo training before carrying stun guns, and required any stun guns sold in the state to have a device for tracking the number of times the weapon is fired. *See* Mass. Gen. Laws ch. 140, § 131J; Massachusetts Acts and Resolves, 2004, ch. 170, § 2. By permitting only well-trained law enforcement personnel, but not civilians, to possess stun guns, Section 131J is substantially related to the government's interest in protecting the public safety.

Respectfully Submitted,

MAURA HEALEY
Massachusetts Attorney General

Thomas E Bocian

THOMAS E. BOCIAN*
JULIA KOBICK
Assistant Attorneys General
OFFICE OF THE MASSACHUSETTS
ATTORNEY GENERAL
One Ashburton Place
Boston, MA 02108
thomas.bocian@state.ma.us
(617) 727-2200, ext. 2617

Counsel for the Respondent
**Counsel of Record*

October 13, 2015