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

REPLY BRIEF

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TABLE OF CASES CITED

A. The merits. The parties do not disagree on the substance of the two questions presented by this petition: Whether the Second Amendment protects the right of an individual to keep and carry a stun gun for purposes of lawful self-defense, and whether the petitioner's conviction under Massachusetts' statute outlawing the private possession of stun guns is compatible with the Second Amendment, as made applicable to the States by the Fourteenth Amendment. See Petition at i; Brief in Opposition at i.

On the merits, the Commonwealth contends that this case does not implicate the Second Amendment because (1) electronic weapons such as stun guns did not exist when the Second Amendment was ratified, and because (2) like the sawed-off shotgun at issue in *United States* v. *Miller*, 307 U.S. 174 (1939), stun guns are "not typically possessed by law-abiding persons for lawful purposes" and are "dangerous and unusual." Brief in Opposition at 7, citing *District of Columbia v. Heller*, 554 U.S. 570, 625, 627 (2008). Neither contention has merit.

1. It would "border[] on the frivolous" to say that stuns guns fall outside the Second Amendment for the reason that they did not exist at the time of the founding: "We do not interpret constitutional rights that way." *Heller*, 554 U.S. at 582, citing *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and *Kyllo v. United States*,

533 U.S. 27, 35-36 (2001). The electronic stun gun is not any more unlike the "arms" commonly used for lawful self-defense in the 18th century than the Internet "speech" held to be protected by the First Amendment in *Reno v. ACLU*, or the thermal imaging "search" held to fall within the Fourth Amendment in *Kyllo* are unlike those terms' revolutionary-era analogues. By its explicit reference to cases that have extended other provisions of the Bill of Rights to modern electronic variations of matters familiar to the Framers, *Heller* puts the electronic stun gun squarely on the continuum of "arms" covered by the Second Amendment. The petition should be granted so that the Court may make clear that, contrary to the SJC's opinion in this case, the Second Amendment right recognized in *Heller* has pertinence to the self-defense exigencies of modern American society.

2. Stun guns do not share any of the features that permit the government to criminalize the possession of such weapons as sawed-off shotguns. The sawed-off shotgun has been altered specifically to facilitate easy concealment and maximize lethality, making it "uniquely attractive to violent criminals." *Johnson v. United States*, 135 S. Ct. 2551, 2584 (2015) (Alito, J., dissenting). The stun gun, in contrast, is designed so that it will not kill or permanently injure, and is increasingly relied upon by law enforcement throughout the country and by law-abiding citizens for purposes of self-defense in the many

jurisdictions in which its possession has not been criminalized. See *Caetano v. Massachusetts*, No. 14-10078, *Brief of Arming Women Against Rape & Endangerment as Amicus Curiae in Support of Petitioner* at 2-3. Under these circumstances, any assertion that stun guns are "not typically possessed by law abiding persons for lawful purposes" amounts to a mere ipse dixit. That said, *Heller* had no occasion to amplify on what is meant in these circumstances by a weapon that is "dangerous and unusual." The petition should be granted so that the Court can clarify whether the "dangerous and unusual" limitation permits criminalizing the possession of weapons less lethal than firearms, and whether the term describes particular weapons rather than the manner in which a weapon is used or is intended to be used. Such clarification will enable the Court to explain why the SJC's conclusion below that stun guns are "dangerous and unusual" is mistaken and the Supreme Court of Connecticut's conclusion in *State v. DeCiccio,* 315 Conn. 79, 105 A.3d 165 (Conn. 2014), that dirk knives and police batons are not "dangerous and unusual" is correct.

B. Whether this case is a suitable vehicle to address questions left unanswered in *Heller*. The Commonwealth contends (1) that the petition should be denied because there is "need for further percolation in the lower courts" on what this Court meant by "dangerous and

unusual" and (2) that the petitioner's homelessness makes this case a poor candidate for certiorari review. Brief in Opposition at 5. Neither point has merit.

As *Heller* sought to make clear over seven years ago, "'[s]elf-defense is a basic right' and 'central component' of the Second Amendment's guarantee of an individual's right to keep and bear arms." *Jackson v. City & County of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., dissenting from denial of certiorari), quoting *McDonald v. Chicago*, 561 U. S. 742, 767 (2010). Notwithstanding "the clarity with which [this Court] described the Second Amendment's core protection for the right of self-defense, lower courts, including [the SJC] here, have failed to protect it." *Jackson v. City & County of San Francisco*, 135 S. Ct. at 2799 (Thomas, J., dissenting from denial of certiorari). In stating explicitly that it will "not extend the Second Amendment right articulated by *Heller* to cover stun guns" unless and until it receives "further guidance from [this Court] on the scope of the Second Amendment," *Commonwealth v. Caetano*, 470 Mass. 774, 779, 26 N.E.3d 688, 692 (2015), the SJC joins the many post-*Heller* courts which have made clear that no amount of lower court percolation will avail individuals like the petitioner here who seek the constitutional protection which *Heller* clearly requires.

Indeed, this case perfectly illustrates why the "further guidance" implicitly requested by the SJC from this Court is in fact necessary. This is a self-defense case. The petitioner is a diminutive woman who was prosecuted and convicted for possessing a stun gun which she obtained and employed to protect herself against further physical violence at the hands of her abuser. These facts are not disputed. Nonetheless, the sum and substance of Massachusetts' response to the petitioner's undisputed claim to her "ancient" right of armed self-defense, *Heller*, 554 U.S. at 599, is that she should have gotten herself a handgun or some pepper spray. 470 Mass. at 26 N.E.3d at 695; Brief in Opposition at 21. But, as the SJC elsewhere acknowledges, by affirming the petitioner's conviction, it has upheld Massachusetts's statutory prohibition of "a class of weapons entirely." 470 Mass. at 779, 26 N.E.3d at 692. And *Heller* itself makes clear that the Second Amendment does not permit a state to ban one class of protected arms by offering its citizens another more to its liking. *Heller*, 554 U.S. at 629. Thus, the question whether stun guns are Second Amendment "arms" could not be more starkly presented.

Nor does the petitioner understand why her homelessness could be an appropriate reason to deny this petition. The Commonwealth states that the petitioner's homelessness makes her case "atypical." Brief in Opposition at 18. Regrettably, this is not so. See generally,

U.S. Department of Housing and Urban Development's 2010 Annual Homeless Assessment Report to Congress (available at https://www.hudexchange.info/resources/documents/2010HomelessAssessmentReport.pdf) (last visited October 27, 2015). Moreover, the statute under which the petitioner was prosecuted and convicted draws no distinction between possession of a stun gun in the home and elsewhere. Thus, the operative facts of this case again raise the important question whether the right recognized in *Heller* is a "second-class right," *McDonald*, 130 S. Ct. at 3044, that is available to some citizens – e.g., those who have a hearth and home to protect – but not to others.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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