Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

Docket No. SJC-11718

Middlesex County

JAIME CAETANO,

Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE
FRAMINGHAM DISTRICT COURT

BRIEF *AMICUS CURIAE* OF ARMING WOMEN AGAINST RAPE & ENDANGERMENT

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Dated: August 29, 2014

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Arming Women Against Rape & Endangerment ("AWARE") is a Massachusetts non-profit, tax-exempt charitable organization registered under chapter 501(c)(3) of the Internal Revenue Code. AWARE was 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 this Court will decide whether Mass. Gen. Law. ch. 140 § 131J, under which the mere possession of a stun gun by a private citizen can result in up to two and one half years in prison, improperly abridges the right to keep and bear arms protected by the Second Amendment to the United States Constitution.

CONSENT TO FILE

Amicus curiae AWARE files this brief upon the invitation of the Supreme Judicial Court, along with its accompanying Motion for Leave. All parties have been notified of the filing of this brief. No party, or counsel thereof, to this action has assisted in writing this brief nor provided funds intended to assist with the preparation of this brief.

STATEMENT OF THE CASE

On September 30, 2011, Jaime Caetano (the Appellant) was charged with possession of a stun gun in violation of Mass. Gen. Law ch. 141 § 131J. On March 6, 2013, Caetano moved to dismiss the complaint on the grounds that section 131J violated the Second Amendment, as incorporated into the Fourteenth Amendment,

to the United States Constitution. On April 29, 2013, the court denied the motion. Caetano filed a motion for reconsideration, which the court denied following a hearing on June 4, 2013. Caetano waived the right to a jury and was found guilty following a bench trial on July 10, 2013. Caetano filed a timely notice of appeal and an application for direct appeal with this court. This court granted direct appellate review and filed an announcement soliciting *amicus* briefs.

ISSUES PRESENTED

This Court has solicited *amicus* briefs on the following two questions:

I. Whether G. L. ch. 140, s. 131J, which criminalizes the private possession of so-called stun guns, infringes on the Second Amendment right to keep and bear arms as defined by the Supreme Court's *Heller* and *McDonald* decisions.

II. Whether, and how, the Second Amendment protection applies outside one's home in the case of a homeless person.

SUMMARY OF ARGUMENT

Massachusetts recognizes residents' rights to possess and carry firearms for self-defense. Yet many people, for various reasons, including religious and

philosophical objections, would prefer to carry less deadly weapons for self-defense purposes. The Second Amendment to the United States Constitution protects the right to keep and bear *arms*, which includes more than just firearms. The right to keep and bear arms covers many weapons, including stun guns, and knives.

The Second Amendment right to keep and bear arms for self-defense necessarily includes the right to do so outside one's home. Although Second Amendment rights may be at their peak in the home, nothing in the text of the amendment nor in Supreme Court case law limits these rights to the home. And whatever justifications might be adduced for limiting the carrying of deadly weapons, such as firearms, outside the home, these justifications would not support restricting almost entirely nonlethal weapons such as stun guns.

ARGUMENT

I. Many people have good reason to choose stun guns as self-defense tools.

Massachusetts permits its citizens to possess and carry firearms subject to certain restrictions and li-

censing requirements. *See* Mass. Gen. Law ch. 140. But different people have different self-defense needs, and they should be free to choose other means to defend themselves, as well — especially when those means are much *less* deadly than firearms, as is the case for stun guns.[1]

Some people have religious or ethical compunctions about killing. 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.[2] Some members of other

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[1] Following this Court's lead in formulating the question, we will use "stun guns" to refer to both those weapons that administer an electric shock upon direct contact between the target and the weapon, and those (often called "Tasers") that shoot a probe that delivers the electric shock.

[2] *See* Yoder, *Nevertheless: The Varieties of Religious Pacifism* 31 (1971); Yoder, *What Would You Do?* 28-31 (1983); Bernard, *Practical Holiness: A Second Look* 284 (1985); Bernton, *Students Urged to Shape World: Dalai Lama Preaches Peace in Portland*, Seattle Times, May 15, 2001, at B1 (paraphrasing the Dalai Lama).

religious groups, such as Quakers, share this view.[3] Other religious and philosophical traditions, such as the Jewish and Catholic ones, believe that defenders ought to use the least violence necessary.[4] Some religious believers might therefore conclude that, when fairly effective nondeadly defensive tools are available, they are preferable to deadly tools.

Still others may feel emotionally unable to pull the trigger on a deadly weapon, even when doing so would be ethically proper. Thus, for instance, Cao, *et al.*, *Willingness to Shoot: Public Attitudes Toward Defensive Gun Use*, 27 Am. J. Crim. Just. 85, 96 (2002), reports that 35 percent of a representative sample of Cincinnati residents age 21 and above said

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[3] *See* Gastil, *Queries on the Peace Testimony*, Friends J, Aug. 1992, at 14, 15 (noting the views of some Quakers); *Czubaroff v. Schlesinger*, 385 F. Supp. 728, 739–40 (E.D. Pa. 1974) (describing a conscientious objector application that expressed such a view as a matter of humanist philosophy).

[4] *See Catechism of the Catholic Church*, http://www.vatican.va/archive/ENG0015/__P7Z.HTM, at ¶ 2264 (accessed November 30, 2011); *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).

they would *not* be willing to shoot a gun at an armed and threatening burglar who had broken into their home. (That fraction was higher for women. *Id.* at 100.) It seems likely that many of that 35 percent feel they would be psychologically unprepared to shoot an attacker, even if they were ethically permitted to do so.

Some 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. And even gun owners 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. (This, of course, is part of the reason that police officers often carry both kinds of weapons.)

These are not just aesthetic preferences. The preferences for nonlethal weapons stem from understandable and even laudable moral belief systems, emotional reactions, and pragmatic concerns. People who prefer using nonlethal weapons should be presumptively free to act on their beliefs without having to forgo effective self-defense tools.

II. The "right to keep and bear arms" extends beyond just firearms.

The Second Amendment to the United States Constitution protects the "right to keep and bear *arms*," not the right to keep and bear guns or firearms. U.S. Const., amend. II (emphasis added). And the United States Supreme Court and courts of other states have treated the right as extending beyond firearms.

A. The United States Supreme Court has treated the "right to keep and bear arms" as extending beyond just firearms.

In *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008), the Supreme Court explained the term "arms":

> The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "weapons of offence, or armour of de-

> fence." Timothy Cunningham's important 1771 legal dictionary defined "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."

(citations omitted). Three more times during the course of examining the phrase "keep and bear arms" in *Heller*, the Court expressly referred to weapons other than firearms as "arms." *Heller*, 554 U.S. at 581–92.

First, when explaining that "keep and bear arms" includes civilians possessing arms for self-defense, the Court referenced an "important 1771 legal dictionary" providing that "'Servants and labourers shall use bows and arrows on *Sundays,* and not bear other arms.'" *Id.* at 581 (citation omitted). The word "other" demonstrates that the contemporaneous understanding of "arms" was not limited to firearms. Later in that same section, the Court explained that various "legal sources frequently used 'bear arms' in nonmilitary contexts," and cited examples, one being the earlier dictionary quote referencing bows and arrows and other arms. *Id.* at 587–88. Again, this reference to arms other than bows and arrows would have been pointless

and counterproductive if the Court believed "arms" was limited to guns.

Later, responding to the dissent, the Court mentioned knives as "arms." The dissent pointed to an earlier proposed version of the Second Amendment that included a conscientious-objector provision in support of its view that the right to bear arms was limited to service in the military. The majority disagreed:

> [The deleted provision] was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of *arms* not just for militia service, but for any violent purpose whatsoever — so much so that Quaker frontiersmen were forbidden to use *arms* to defend their families, even though "[i]n such circumstances the temptation to seize a hunting rifle or *knife* in self-defense ... must sometimes have been almost overwhelming."

Id. at 590 (emphasis added) (citation omitted). The Court thus clearly included knives alongside rifles as examples of "arms" for Second Amendment purposes.

Of course, *Heller* speaks mostly about guns because the plaintiff in *Heller* challenged an absolute ban on handguns. But the Court's references to other

weapons show that Second Amendment rights are not limited to firearms. Easily-carried stun guns clearly constitute arms under the Second Amendment. The Court in *Heller* concluded that the Second Amendment codifies a preexisting "individual right to possess and carry *weapons* in case of confrontation." *Id.* at 592 (emphasis added). And later, in *McDonald v. Chicago*, 130 S. Ct. 3020, 3026 (2010), the Court held this right is incorporated against the states through the Fourteenth Amendment. Because the Commonwealth's ban significantly burdens citizens' rights to keep and bear the arms they seek to use for self-defense, it violates the Second Amendment.

B. Other courts have treated the "right to keep and bear arms" as extending beyond just firearms.

State courts in Michigan, Delaware, Ohio, and Oregon have likewise concluded that the right to keep and bear arms extends beyond just firearms, protecting stun guns, steak knives, and switch blades. *People v. Yanna*, 824 N.W.2d 241, 246 (Mich. Ct. App. 2012) (holding that stun guns constitute protected arms and overturning Michigan's complete ban as violating the

Second Amendment); *State v. Griffin*, 2011 WL 2083893, *7 n.62 (Del. Super. Ct., May 16, 2011) (following the *Heller* rationale, holding that the term "arms" encompasses "all instruments that constitute bearable arms" and therefore a "knife, even if a 'steak' knife, appears to be a 'bearable arm' that could be utilized for offensive or defensive purposes," and is protected under both the Second Amendment and the Delaware Constitution); *City of Akron v. Rasdan*, 663 N.E.2d 947, 951-52 (Ohio Ct. App. 1995) (treating a restriction on knife possession as implicating the "right to keep and bear arms" under the Ohio Constitution, though concluding that the restriction is constitutional because "[t]he city of Akron properly considered this fundamental right by including in [the knife restriction] an exception from criminal liability when a person is 'engaged in a lawful business, calling, employment, or occupation' and the circumstances justify 'a prudent man in possessing such a weapon for the defense of his person or family'"); *State v. Delgado*, 692 P.2d 610, 610-14 (Or. 1984) (holding that the "right to keep and bear arms" under the Oregon Constitution extends to

switch blade knives because they could be used for defensive purposes). While various cases differ on just which weapons can constitute "arms," we do not know of any recent cases that have read "arms" as limited to guns.

III. Section 131J's total ban violates the Second Amendment as incorporated into the Fourteenth Amendment.

As noted above, the one appellate case that considered whether the Second Amendment covers stun guns, the Michigan *People v. Yanna* decision, held that the Second Amendment did cover such weapons, and struck down Michigan's ban on possessing those weapons. The same is true of the one Attorney General opinion that considers the issue: Florida's Attorney General has expressly concluded that the right to keep and bear arms covers stun guns, determining that "the term ['arms'] is generally defined as 'anything that a man wears for his defense, or takes in his hands as a weapon.'" 1986 Fla. Op. Att'y Gen. 2, 1986 Fla. AG LEXIS 107. And the Attorney General relied on this to conclude that county-level regulation of stun guns is unconstitutional, because the Florida Constitution's

right to bear arms reserves regulation of arms — including stun guns — to the state legislature.

While the Supreme Court in *Heller* recognized certain limits to the right to keep and bear arms, none of those are applicable here. First, the Court noted that the Second Amendment does not extend to weapons "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. The Court also noted that "the sorts of weapons protected were those 'in common use.'" *Id.* at 627 (citation omitted). And the Court acknowledged "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* (citation omitted).

Thus, "dangerous and unusual" weapons are historically excluded from the scope of the right, but this exception, by the Court's own words, is indeed limited to weapons that are not only "unusual" but also "dangerous." Moreover, because all weapons are "dangerous" to some degree, the reference to "dangerous . . . weapons" must mean weapons that are more dangerous

than the norm — logically meaning weapons that are unusually dangerous.

Whatever else might fall under that description, stun guns are not unusually dangerous weapons. They are significantly less deadly than firearms, which are constitutionally protected and broadly allowed in Massachusetts. They are less dangerous even than knives, clubs, baseball bats, or bare hands and fists. *See Caldwell v. Moore*, 968 F.2d 595, 602 (6th Cir. 1992) ("It is not unreasonable for the jail officials to conclude that the use of a stun gun is less dangerous for all involved than a hand to hand confrontation").

To be sure, almost all attacks have the potential to turn deadly: even pushing or hitting back at an attacker could cause him to fall the wrong way and die. But stun guns are so rarely deadly that their use should be viewed as non-deadly force, much closer to a punch or a shove than a gun shot. Since the *Heller* Court concluded that handguns are not sufficiently dangerous to fall outside Second Amendment protection,

the less dangerous stun guns must be protected as well.

The best estimates show that deliberate uses of stun guns are deadly in less than 0.01% of all cases, as compared to an estimated 20% death rate from gun-shot wounds in deliberate assaults, and an estimated 2% death rate from knife wounds in deliberate assaults. Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 Stan. L. Rev. 199, 205 (2009). This is why stun guns are considered "nonlethal" or "nondeadly" weapons.

Nor are stun guns particularly unusual. Even expensive Tasers, which retail for $400 each, have been bought by 260,000 private citizens.[5] And these are just Tasers; there are no good estimates for the number of other stun guns in private hands, but given

[5] TASER International, *TASER to Release Second Quarter 2014 Earnings on July 30*, http://investor.taser.com/releasedetail.cfm?ReleaseID=859024 (last visited August 22, 2014).

that such stun guns sell for $11 and up[6] -- and given the proven market even for the much more expensive Tasers -- it seems likely that millions have been sold. Stun guns are legal for civilians in 44 states and are routinely used by nearly 94 percent of American police departments.[7]

Likewise, though stun guns can be used for crimes as well as for legitimate self-defense, that is true of any weapon. Private arms ownership always poses some risk, but our nation's founders agreed that people are entitled to keep and bear arms *despite* the risk that some will misuse them. If that is true for deadly weapons like handguns, it is especially true for weapons that are almost entirely nonlethal, including stun guns.

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[6] Search on amazon.com for "stun gun," Aug. 17, 2014.

[7] *See* Hardy, *Taser's Latest Police Weapon: The Tiny Camera and the Cloud*, N.Y. Times, February 21, 2012 (available at http://www.nytimes.com/2012/02/21/technology/tasers-latest-police-weapon-the-tiny-camera-and-the-cloud.html?_r=0&pagewanted=print (last visited August 27, 2014); Eugene Volokh, *Nonlethal Self-Defense*, 62 Stan. L. Rev. at 244.

Of course, stun guns were unknown when the Second Amendment was enacted, but *Heller* expressly rejected the view "that only those arms in existence in the 18th century are protected by the Second Amendment." 554 U.S. at 582. Instead, the Court held, "[j]ust as the First Amendment protects modern forms of communications [such as the Internet], and the Fourth Amendment applies to modern forms of search [such as heat detection devices], 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." *Id.* (citations omitted).

IV. The Second Amendment right to keep and bear arms necessarily includes the right to carry stun guns outside the home.

The Second Amendment protects "the right of the people to keep *and bear* Arms." U.S. Const. amend. II (emphasis added). Nothing in the text of the Second Amendment suggests its exercise is limited to the home. *Heller*, 554 U.S. at 592 (holding that the Second Amendment protects "the right to possess *and carry* weapons in case of confrontation.") (emphasis added). Moreover, had the amendment's drafters intended to

limit its reach to the home, they clearly could have done so, as they did in the Third Amendment.[8]

While Heller's claim was limited to his right to keep and use a handgun in his home, the Court was indeed required to construe the phrase "keep and bear Arms," since the District Court had construed "bear" as a military term limiting the right to bearing arms for military service. *See Parker v. District of Columbia*, 478 F.3d 370, 374, 384-86 (D.C. Cir. 2007), *aff'd sub nom.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Supreme Court spent 8 pages analyzing the meaning of "bear" when used in connection with "arms," concluding that the right to "bear Arms" is the right to carry weapons in case of confrontation:

> At the time of the founding, as now, to "bear" meant to "carry." When used with "arms," however, the term has a meaning that

[8] *See* U.S. Const. amend. III ("No Soldier shall, in time of peace be quartered *in any house*, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.") (emphasis added). *See also* U.S. Const. amend. IV ("The right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .") (emphasis added).

> refers to carrying for a particular purpose–confrontation . . . . Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

Id. at 584 (citations omitted). Later the Court explained that the textual elements of the Second Amendment "guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. Likewise, the Court characterized the right to "bear arms" as the right to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584, citing *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting).

Moreover, the Court's identifying as "presumptively lawful" a ban on carrying "in sensitive places such as schools and government buildings" and a ban on "concealed carry," *Heller*, 554 U.S. at 626-27 & n.26, implicitly recognizes that open carrying in other public places would be protected. Any mention of con-

cealed carrying and carrying in sensitive places would have been superfluous if the Second Amendment were limited to the home. Indeed, the Nineteenth Century authorities that the Court cited for the proposition that States could ban the *concealed* carry of firearms also said that people remained free to carry guns openly.[9] Likewise, the Court's explanation that, "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to *keep and carry* any weapon whatsoever in any manner whatsoever and for whatever purpose," *Heller*, 554 U.S. at 626 (emphasis added), presupposes the existence of a general right to keep *and carry* at least some weapons, in at least some manners, and for at least some purposes.

To be sure, post-*Heller* decisions are split on whether bans on carrying guns outside the home are

[9] *See State v. Chandler*, 5 La. Ann. 489, 489-90 (1850); *Nunn v. State*, 1 Ga. 243, 251 (1846); *The American Student's Blackstone*, 84 n.11 (G. Chase ed. 1884) 2 James Kent, *Commentaries on American Law*, *340 n.2 (O. Holmes ed. 1873).

constitutional,[10] and this Court has expressly noted that it has never "address[ed] whether *Heller* applied with equal force to circumstances outside the home," *Commonwealth v. Reyes*, 464 Mass. 245, 256 (2013). But whether or not *Heller* applies with equal force to carrying *firearms* in public places, there is no adequate justification for barring people from carrying non-deadly weapons in such public places (outside the "sensitive places" that the Supreme Court has identified).

As the Seventh Circuit has noted in holding that the Second Amendment protects a right to carry weap-

[10] The Seventh and Ninth Circuits have held that laws broadly restricting people from carrying guns outside the home are unconstitutional. *See Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012); *Peruta v. County of San Diego*, 742 F.3d 1144, 1172 (9th Cir. 2014). The Second, Third, and Fourth Circuits assumed that the Second Amendment extends in some measure outside the home, but concluded that restrictive licensing systems under which most people could not obtain a license to carry firearms were constitutional because of the pressing public interest in controlling *firearms*. *Kachalsky v. County of Westchester*, 701 F.3d 81, 89, 100-01 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426, 431, 440 (3d Cir. 2013); *Woolard v. Gallagher*, 712 F.3d 865, 876, 882 (4th Cir. 2013).

ons, the need for self-defense often arises outside the home:

> [A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent husband is more vulnerable to being attacked while walking to or from her home than inside. * * * To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald.*

Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012). Even if, as some circuits have held, pressing public safety needs justify restricting the carrying of guns outside the home, the public safety concerns are much less when nonlethal weapons are involved. Such lesser public safety concerns do not trump the individual's Second Amendment rights, including outside the home, even if the public concerns posed by firearms were found to trump such rights. Indeed, the only case to consider the issue, the Michigan *Yanna* decision, expressly held that "a total prohibition of the open carrying of protected arms such as a Taser or stun gun is unconstitutional." *Yanna*, 824 N.W.2d at 246.

To answer this Court's second question, people who are homeless especially need effective protection, since they lack the security of the home that the rest of us take for granted. But all of us lack that security whenever we are outside our own homes. Many of us often have to be outside our homes at night and in dangerous places. And many of us, especially women, face a high risk of sexual assault as well as other forms of assault, murder, and other serious crimes. The ability to have effective nonlethal weapons readily available for self-defense is thus a critical aspect of the right to keep and bear arms, for the homeless as well as for others.

V. This Court need not reach the question whether a narrower restriction on carrying in public might be constitutional.

While *amicus* believes that the right to keep and bear arms extends outside the home, this Court need not reach that question in this case. Section 131J is a categorical ban on all possession of stun guns. For reasons discussed in Parts I and II, this ban -- the law that Ms. Caetano is charged with violating -- is unconstitutional. Whether or not a ban on carrying of

stun guns in public would be constitutional, the Legislature has not enacted such a law.

The United States Supreme Court's decision in *Cohen v. California*, 403 U.S. 15 (1971), offers a helpful analogy. In *Cohen*, a defendant was convicted for disorderly conduct because he wore a jacket bearing a vulgarity. The defendant wore the jacket into a courthouse, and the opinion noted that such speech might be prohibitable by a rule targeted solely to courthouses. *Id.* at 19; *see also ISKCON v. Lee*, 505 U.S. 672, 679 (1992) (holding that speech in nonpublic fora may be restricted through reasonable viewpoint-neutral rules). But *Cohen* nonetheless held that

> [a]ny attempt to support this conviction on the ground that the [disorderly conduct] statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places.

403 U.S. at 19. Likewise, any attempt to support Ms. Cateano's conviction on the ground that the total stun gun ban applies only in public places and not in the

home must fail in the absence of any precedent that would have put Ms. Caetano on notice that certain kinds of otherwise constitutionally protected stun gun possession would be punishable in public places. *Cf. Shelby County v. Holder*, 133 S. Ct. 2612, 2629-30 (2013) (holding that jurisdiction could challenge formula that subjected it to preclearance requirement under Voting Rights Act even if a constitutionally permissible formula might apply to the jurisdiction); *City of Chicago v. Morales*, 527 U.S. 41, 57-58 (1999) (plurality op.) (holding that statute that prohibited conduct that included remaining in one place with "no apparent purpose" was facially invalid because it failed to give reasonable notice of the prohibited conduct).

Likewise, in *People v. Aguilar*, 2 N.E.3d 321 (Ill. 2013), the Illinois Supreme Court struck down a law that broadly banned a certain behavior, and left it to the Legislature to decide what narrower laws might be permitted. The behavior in that case was the carrying of guns in public places, the constitutionality of which this Court may prefer not to reach in

this case. But the Illinois Supreme Court's underlying analysis would indeed apply to this case. The court held,

> Of course, in concluding that the second amendment protects the right to possess and use a firearm for self-defense outside the home, we are in no way saying that such a right is unlimited or is not subject to meaningful regulation. That said, we cannot escape the reality that, in this case, we are dealing not with a reasonable regulation but with a comprehensive ban. . . .
>
> Accordingly, . . . we here hold that, on its face, the [statute] violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution.

Id. at 327. Likewise, this Court could hold that the total stun gun ban likewise "on its face . . . violates the right to keep and bear arms," even if "a reasonable regulation [rather than] a comprehensive ban" would be constitutional.

CONCLUSION

For these reasons, AWARE asks the Court to vacate Caetano's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including but not limited to, Mass. R. A. P. 16 (a), (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e), (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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Lisa J. Steele