No. A-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2008

JAMES M. MALONEY,

Petitioner,

v.

KATHLEEN A. RICE, in her official capacity as District Attorney of the County of Nassau,

Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Second Circuit:

Petitioner James M. Maloney ("Petitioner") respectfully requests a 59-day extension of time to file a petition for *certiorari* in this Court to and including Friday June 26, 2009. The Second Circuit rendered its decision on January 28, 2009 (Attachment A), *see* 554 F.3d 56 (2d Cir. 2009). Thus, Petitioner's time to petition for *certiorari* in this Court expires April 28, 2009. This application is being filed more than 10 days before that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

This case presents critical questions regarding the law of incorporation under the Fourteenth Amendment to the United States Constitution. Specifically, the issues to be presented in this case concern whether, in light of the recently decided case of *District of Columbia v. Heller*, 128 S. Ct 2783 (2008), this Court should revisit its nineteenth-century

holdings that the Second Amendment was not incorporated against the States by the passage of the Fourteenth Amendment. Those older cases predate the modern understanding of incorporation doctrine as it has developed in this Court through numerous Due Process Clause cases during both this and the twentieth centuries, and is at odds with the text and original intent of the Privileges and Immunities Clause of the Fourteenth Amendment. In addition, the applicable nineteenth-century precedent is at odds with the emphasis in *Heller* placed on the Second Amendment as conferring individual and not group rights.

In a *pro se* complaint filed on February 18, 2003, Mr. Maloney sought a declaration that New York Penal Law Section 265.01(1) violates the Second Amendment, insofar as the statute applies to ban the possession of a certain type of weapon in one's home. Section 265.01(1) makes it a misdemeanor (termed "criminal possession of a weapon in the fourth degree") to "possess[] . . . [a] chuka stick." Chuka sticks, also known as nunchaku, are a form of weapon usually consisting of two short clubs connected together by a length of chain.[1] Mr. Maloney's objection to Section 265.01(1) was more than merely hypothetical or philosophical, for on August 24, 2000 he had actually been arrested at his home and charged with possessing a chuka stick under that very statute, though that charge was later dismissed as part of an agreement to plead guilty to a violation, an offense not amounting to a crime under New York law.[2]

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1 New York Penal Law Section 265.00(14) formally defines a "chuka stick" as "any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking."

2 *See* New York Penal Law Sections 10.00(3) & 240.20. Additionally, the violation that was the subject of the plea was disorderly conduct that did *not* involve use of the chuka stick. Indeed, the chuka stick was found by the police in Mr. Maloney's home after Mr. Maloney had already been placed into custody.

The United States District Court for the Eastern District of New York dismissed Mr. Maloney's amended complaint (also filed *pro se*) on January 17, 2007. The Eastern District of New York premised its dismissal on controlling precedent in the Second Circuit, which had held that "the Second Amendment's right to keep and bear arms imposes a limitation on federal, not state, legislative efforts." *Bach v. Pataki* 408 F.3d 75, 84 (2d Cir. 2005). *Bach* in turn relied on this Court's decision in *Presser v. Illinois* 116 U.S. 252, 265 (1886). Agreeing with the district court that *Presser* tied its hands, the Second Circuit affirmed the dismissal of Mr. Maloney's complaint in a brief *per curiam* opinion, despite the much more recent intervening decision of this Court in *Heller*, 128 S. Ct 2783, which held that a local District of Columbia statute banning handgun possession in the home violated the Second Amendment. The ruling below was based on agreement with the statement in *Bach* that "[w]e must follow *Presser*. Where, as here, a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.'" *Bach* 408 F.3d at 86 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).[3] *See* Attachment A at 4. The Second Circuit acknowledged, however, that *Heller*

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[3] The view expressed by multiple panels of the Second Circuit that they were constrained by existing Supreme Court precedent to hold that the Second Amendment applies only against the federal government would have made seeking rehearing *en banc* futile. While the Second Circuit's emphasis on *Rodriguez de Quijas* was correct, its focus on *Presser* instead of the even older case of *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1875), is perhaps puzzling. As *Heller* explained, *Cruikshank* "held that the Second Amendment does not by its own force apply to anyone other than the Federal Government." 128 S. Ct. at 2812. By contrast, "*Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations." *Id.* at 2813. Private paramilitary organizations are not involved in this case. Moreover, *Cruikshank* (not *Presser*) was the focus of *Heller*, where this Court stated that "*Cruikshank*'s continuing validity on incorporation" is "a question not presented in this case." *Id.* at 2813 n.23. Mr. Maloney's forthcoming petition for *certiorari* will present that question.

"might be read to question the continuing validity" of *Presser*'s view on Second Amendment incorporation. *See id.*

In *Heller* this Court undertook its most robust analysis to date of the Second Amendment, analyzing both the pre- and post-ratification history of this constitutional provision and the text of that Amendment as it was understood at the time of ratification. *Heller* noted that when the Supreme Court decided *Presser*, it was during that period when "the Bill of Rights was not thought applicable to the states." *Heller*, 128 S. Ct at 2816. Since *Presser* was decided, however, this Court has, with limited exception, progressively incorporated against the States every individual right conferred by the first eight Amendments to the United States Constitution. The petition for *certiorari* that Mr. Maloney intends to file here will show that the individual right conferred by the Second Amendment should be held incorporated against the States by applying the approach to incorporation set out in this Court's modern cases. Moreover, given the existence of cases such as *Presser*, *Rodriguez de Quijas* clearly establishes that *only this Court* may reconsider that line of cases in light of *Heller* and the intervening century of incorporation precedent. Accordingly, the Petitioner Mr. Maloney now brings his case to this Court.

Petitioner respectfully requests an extension of time to file a petition for *certiorari* for the following reasons: First, while before the district court and the Second Circuit the Petitioner appeared *pro se*, Kirkland & Ellis LLP, has recently agreed to represent him on a *pro bono* basis in this matter. His new counsel requires additional time to analyze the issues presented. Second, Petitioner's lead counsel has recently and continues to be involved in a number of active and important matters before this Court, as well as other federal courts and agencies, including, but not limited to:

> (1) preparation for an April 29, 2009 oral argument to be held in the case of *New York v. Department of Energy*, No. 08-311ag(L), in the United States Court of

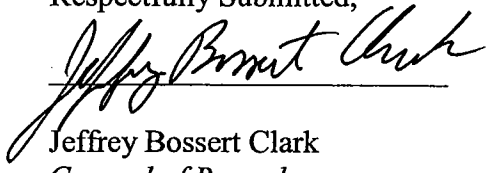
Appeals for the Second Circuit — a challenge brought by a collection of numerous States and nongovernmental organizations against a Department of Energy rulemaking setting efficiency standards for indoor furnaces; and

(2) preparation of extensive comments filed April 6, 2009 on reconsideration by the Environmental Protection Agency of its decision in 73 Fed. Reg. 12,156 (Mar. 6, 2008), concerning whether California can obtain a waiver of preemption for its first-ever attempted regulation of greenhouse gas emissions from new motor vehicles, *see* 74 Fed. Reg. 7,040 (Feb. 12, 2009).

Finally, given the general importance of the civil rights questions posed by this case, it is vitally important that a well-constructed petition be prepared. Additional time is necessary to do so.

Wherefore, Petitioner respectfully requests that an order be entered extending his time to petition for *certiorari* to and including June 26, 2009.[4]

Respectfully Submitted,



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[4] Pursuant to S. Ct. R. 29.4(c), 28 U.S.C. § 2403(b) may apply. Hence, we have served this application upon the Attorney General of New York. The Attorney General of New York was a party to this matter in the district court.

ATTACHMENT A

07-0581-cv
Maloney v. Cuomo

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: December 15, 2008 Decided: January 28, 2009)

Docket No. 07-0581-cv

JAMES M. MALONEY,

Plaintiff-Appellant,

—v.—

ANDREW CUOMO, in his official capacity as Attorney General of the State of New York, DAVID PATERSON, in his official capacity as Governor of the State of New York, KATHLEEN A. RICE, in her official capacity as District Attorney of the County of Nassau, and their successors,*

Defendants-Appellees.

Before:

POOLER, SOTOMAYOR, and KATZMANN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Spatt, *J.*) dated January 17, 2007, granting defendants-appellees Andrew Cuomo and David Paterson's motion to dismiss and defendant-appellee Kathleen A. Rice's motion for judgment on the pleadings, and from an order dated May 14, 2007, denying plaintiff-appellant's motion for reconsideration. Affirmed.

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Governor David Paterson is automatically substituted for former Governor Eliot Spitzer as a defendant in this case.

JAMES M. MALONEY, appearing *pro se, for Plaintiff-Appellant.*

KAREN HUTSON, Deputy County Attorney (Lorna B. Goodman, County Attorney, *on the brief*) *for Defendant-Appellee* Kathleen A. Rice, Nassau County District Attorney, Mineola, N.Y.

PER CURIAM:

Plaintiff-appellant James Maloney was arrested at his home on August 24, 2000, and charged with possessing a chuka stick in violation of N.Y. Penal Law § 265.01(1). A "chuka stick" (or "nunchaku") is defined as

> any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking.

Id. § 265.00(14).[1] This charge was dismissed on January 28, 2003, and Appellant pleaded guilty to one count of disorderly conduct. As part of the plea, he agreed to the destruction of the nunchaku seized from his home.

Appellant filed the initial complaint in this action on February 18, 2003, and then an amended complaint on September 3, 2005, seeking a declaration that N.Y. Penal Law §§ 265.00 through 265.02 are unconstitutional insofar as they punish possession of nunchakus in one's home. The district court dismissed the amended complaint as against the New York State

[1] There are two sections of the New York Penal Law numbered 265.00(14).

Attorney General and the Governor for lack of standing, concluding that neither official is responsible for enforcing the statutes at issue. The district court granted defendant Nassau County District Attorney Kathleen Rice's motion for judgment on the pleadings in relevant part because the Second Amendment does not apply to the States and therefore imposed no limitations on New York's ability to prohibit the possession of nunchakus. Appellant moved for reconsideration on the ground that the district court had failed to consider certain other claims raised in his amended complaint; the district court denied that motion.

On appeal, Appellant challenges only the district court's dismissal of his claims against Rice.[2] He argues, *inter alia*, that New York's statutory ban on the possession of nunchakus violates (1) the Second Amendment because it infringes on his right to keep and bear arms, and (2) the Fourteenth Amendment because it lacks a rational basis. Neither of these arguments has any merit.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court recently held that this confers an individual right on citizens to keep and bear arms. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008). It is settled law, however, that the Second Amendment applies only to limitations the federal government seeks to impose on this right. *See, e.g., Presser v. Illinois*, 116 U.S. 252, 265 (1886) (stating that the Second Amendment "is a limitation only upon the power of congress and the

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[2] Appellant makes no argument in his brief concerning the district court's dismissal of his claims against the Attorney General and the Governor. We therefore deem any challenges to that aspect of the district court's judgment waived. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n.1 (2d Cir. 2005).

national government, and not upon that of the state"); *Bach v. Pataki*, 408 F.3d 75, 84, 86 (2d Cir. 2005) (holding "that the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts" and noting that this outcome was compelled by *Presser*), *cert. denied*, 546 U.S. 1174 (2006). *Heller*, a case involving a challenge to the District of Columbia's general prohibition on handguns, does not invalidate this longstanding principle. *See Heller*, 128 S. Ct. at 2813 n.23 (noting that the case did not present the question of whether the Second Amendment applies to the states). And to the extent that *Heller* might be read to question the continuing validity of this principle, we "must follow *Presser*" because "[w]here, as here, a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.'" *Bach*, 408 F.3d at 86 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)) (alteration marks omitted); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Thus, N.Y. Penal Law §§ 265.00 through 265.02 do not violate the Second Amendment.

The Fourteenth Amendment similarly provides no relief for Appellant. "Legislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality and must be upheld if 'rationally related to a legitimate state interest.'" *Beatie v. City of New York*, 123 F.3d 707, 711 (2d Cir. 1997) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)). We will uphold legislation if we can identify "some reasonably conceivable state of facts that could provide a rational basis for the legislative action. In other words, to escape invalidation by being declared irrational, the

legislation under scrutiny merely must find some footing in the realities of the subject addressed by the law." *Id.* at 712 (internal quotation marks and citations omitted).

The legislative history of section 265.00 makes plain that the ban on possession of nunchakus imposed by section 265.01(1) is supported by a rational basis. Indeed, as Appellant concedes, when the statute was under consideration, various parties submitted statements noting the highly dangerous nature of nunchakus. For example, New York's Attorney General, Louis J. Lefkowitz, asserted that nunchakus "ha[ve] apparently been widely used by muggers and street gangs and ha[ve] been the cause of many serious injuries." Mem. from Attorney Gen. Louis J. Lefkowitz to the Governor (Apr. 8, 1974). And the sponsor of the bill, Richard Ross, stated that "[w]ith a minimum amount of practice, [the nunchaku] may be effectively used as a garrote, bludgeon, thrusting or striking device. The [nunchaku] is designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill." *See* N.Y. Penal Law § 265.00, practice commentary, definitions ("Chuka stick") (quoting Letter of Assemblyman Richard C. Ross to the Counsel to the Governor (1974)).

Appellant does not dispute that nunchakus can be highly dangerous weapons. Rather, his principal argument is that section 265.01(1) prevents martial artists from using nunchakus as part of a training program. But the fact that nunchakus might be used as part of a martial-arts training program cannot alter our analysis. Where, as here, a statute neither interferes with a fundamental right nor singles out a suspect classification, "we will invalidate [that statute] on substantive due process grounds only when a plaintiff can demonstrate that there is no rational relationship between the legislation and a legitimate legislative purpose." *Beatie*, 123 F.3d at 711. Appellant has not carried this burden. Consequently, in light of the legislature's view of the danger posed

by nunchakus, we find that the prohibition against the possession of nunchakus created by N.Y. Penal Law § 265.01(1) is supported by a rational basis.

We have considered Appellant's remaining arguments and find them to be without merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**. Appellant's pending motions to strike defendant Kathleen Rice's brief and material in her July 28, 2008 Rule 28(j) letter are hereby **DENIED**.