No. 08-1592

IN THE
Supreme Court of the United States

JAMES M. MALONEY,

Petitioner,

v.

KATHLEEN A. RICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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Nassau County offers scant reason to deny the Petition. The County does not contest the importance of the questions presented. Instead, it focuses on the claim that certiorari should be denied because even if this Court were to hold that the Second Amendment applies against the States, the County would prevail below on its wholly un-adjudicated defense that nunchaku are "dangerous and unusual," *District of Columbia v. Heller*, 128 S.Ct. 2783, 2817 (2008), and hence not constitutionally protected "arms." But the Second Circuit did not rule on that issue. This case went off at the motion-to-dismiss stage, cutting short Petitioner's opportunity to contest the County's factual claims about the alleged dangers of nunchaku.

The County well knows that a prediction it will win on an un-adjudicated defense that the Petitioner had no opportunity to address is no reason to deny certiorari. The County cites no authority for its claim, since all authority is to the contrary. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 492 (1987) ("This issue may be resolved on remand; its status as an alternative ground for denying arbitration does not prevent us from reviewing the ground exclusively relied upon by the courts below."); *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1819 (2009) ("This Court . . . is one of final review, not of first view.") (internal quotation marks omitted). Indeed, the County invited the Second Circuit to rule on that defense, but the Second Circuit declined. The County acknowledges this, but responds only with rhetoric. Opp. 14-15 n.14 ("specious" to point out the scope of the Second Circuit's decision).

The County's attempt to demonize nunchaku, through a hodgepodge of ominous-sounding quips, is a cynical attempt to convince the Court that this case is not the right vehicle to resolve the pressing questions of Second Amendment incorporation. The County apparently hopes that dark language and the foreign-sounding name, "nunchaku," will convince the Court that no ordinary citizen would ever touch such a weapon. That approach inherently concedes the worthiness of the Petition and difficulty of denying its logic.

Petitioner had no opportunity below to develop a record showing the reality that nunchaku are: (i) frequently used for lawful defensive and recreational purposes; (ii) not unusual in a country where countless thousands peaceably practice martial arts; (iii) far safer than the handguns *Heller* held are protected; and (iv) highly useful in non-lethally disarming or subduing assailants. These facts, as alleged in Petitioner's complaint, 48a-54a (¶¶ 14-18, 23-27, 33, 35, 37-39), must be taken as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Mr. Maloney was put out of court solely because the Second Amendment was held not to apply against the States. 3a-5a. Given the Court's decision in *Heller* that the Second Amendment is an individual right of great import in protecting the liberties of a free nation, 128 S.Ct. at 2821 (the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"), Mr. Maloney cannot be denied the right to press his case here because of the County's unripe and untested factual assertions. *Id.* ("[T]here will be time enough to expound upon the historical

justifications for the exceptions we have mentioned if and when those exceptions come before us.").

A. The County Does Not Assail the Core Contentions of the Petition.

1. The County does not contest the Petition's statement of facts or procedural history. Pet. 9-14. The County notes that after the events at Mr. Maloney's home in 2000, authorities had him spend the night at a mental hospital. Opp. 2. But that only underscores the County's abuse of authority: Nassau County apparently considers a citizen who stands on his rights to refuse a warrantless police entry into his home to be lacking full possession of his faculties. Mr. Maloney's practice of law in good standing and his status as an officer in the Naval Reserve belie the County's baseless and irrelevant attempts to cast aspersions on his character.

2. The County highlights that the Ninth Circuit recently granted *en banc* review in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), vacating the panel decision and retracting the circuit split. Opp. 5-8. But the County ignores that the Petition anticipated this possibility. Pet. 22. The Petition suggested that judicial restraint and *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989), counsel against creating a Circuit split: only this Court can hold that *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); and *United States v. Cruikshank*, 92 U.S. 542 (1876), have been overtaken by *Heller* and by the twentieth-century's tectonic shifts in incorporation doctrine. Pet. 22. Tellingly, the County provides no real response to that point.

One of two outcomes can come of *Nordyke*: (1) the circuit split reemerges because the *en banc* court agrees with the panel decision, or (2) the court finds that *Rodriguez de Quijas* requires continued adherence to *Miller*, *Presser*, and *Cruikshank*, and a split cannot develop. Either way, the need for certiorari remains. Residents of the fifty States should not be forced to wait for a circuit to risk disobedience with this Court's decisions before they may enjoy the same liberties as District of Columbia residents.

3. The County leaves untouched the following points in the Petition: (i) the Fourteenth Amendment was adopted, in important part, to prevent the States from stripping citizens of the right to keep and bear arms for self-defense (Pet. 23-24); (ii) the Second Amendment is logically indistinguishable from the provisions in the Bill of Rights establishing personal rights that have been incorporated against the States (Pet. 24-25); and (iii) if the Court deems it prudent, this case could be consolidated with a grant of certiorari in the two pending petitions arising out of *National Rifle Association v. Chicago*, 567 F.3d 856 (7th Cir. 2009) (Pet. 25).

4. Nor does the County specifically contest the Petition's analysis regarding the Privileges or Immunities Clause: (i) the Clause was specifically intended to apply the personal rights in the Bill of Rights against the States (Pet. 30-31); (ii) the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), decision is fully consistent with applying the Second Amendment against the States (Pet. 31-33); (iii) later Supreme Court cases interpreting *Slaughter-House* either misconstrue it or have no bearing on whether the Second Amendment affords a right of

national citizenship (Pet. 34-36); and (iv) the Second Amendment must be deemed a right of national citizenship, and thus a protected privilege or immunity, because it was partly intended to protect local militias from federal incursion (Pet. 36).

5. The County tries to adopt by reference the arguments of Chicago and Oak Park in their opposition to certiorari in Nos. 08-1497 & 08-1521. Opp. 8 n.4, essentially conceding that if those petitions are granted, certiorari should also be granted here. But a Respondent cannot oppose certiorari by incorporating arguments made elsewhere. *See* S.Ct. R. 15.2 ("Counsel are admonished that they have an obligation to the Court to point out ***in the brief in opposition***, and not later, any perceived misstatement made in the petition.") (emphasis added).[1]

6. Implicitly conceding the cert-worthiness of this case, the County protests that the Seventh Circuit cases are equivalent vehicles for review. Opp. 6-7 & n.3. The County stresses that, like the New York statute, the Chicago and Oak Park ordinances also restrict possession of the relevant

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[1] The County argues that the Chicago and Oak Park opposition shows that the Second Amendment is not "implicit in the concept of ordered liberty," Opp. 8. n.4. The extensive historical review undertaken by the Court in *Heller* clearly shows that for the Founders, the English thinkers preceding them, and the legislators who debated the Fourteenth Amendment, the right of self-defense was not only "implicit" in the "concept of ordered liberty," but was indispensable to avoiding tyranny. *See, e.g.*, 128 S.Ct. at 2801 (citing FEDERALIST 29).

weapons. *Id.* at 7. But the County ignores that those ordinances ***do more*** than restrict possession in the home. *Id.* at n.3. Those ordinances restrict the ***carrying*** and ***registration*** of weapons, and thus implicate a much greater number of state and local enactments than this Petition. Pet. 25-27 & n.17. Certiorari can be granted here limited to whether the Second Amendment right ***to keep arms in the home*** applies against the States.

B. The County's Un-Adjudicated Claim That Nunchaku Are "Dangerous and Unusual" Provides No Basis for Denying Certiorari.

1. The County's anecdotes regarding the supposed special dangers of nunchaku are irrelevant, as that issue was not passed on below, and Petitioner had no opportunity to create a factual record. Nevertheless, to combat the misimpressions created in the Opposition, Petitioner notes as follows:

2. In contrast to the County's anecdotes and rhetoric, data from the Federal Bureau of Investigation ("FBI") and the Centers for Disease Control ("CDC") reveal that the dangers associated with nunchaku are far less than those associated with handguns, which *Heller* recognized as protected by the Second Amendment.

2a. According to the FBI's CRIME IN THE UNITED STATES, murder statistics reflect that in 2007 (the most recent available year) ***all forms of blunt weapons*** ("clubs, hammers, etc.") were used in 4.4% of murders. The FBI does not keep separate

statistics on nunchaku, obviously because their use in murders is *de minimis*.[2] By contrast, handguns were used in 49.6% of murders (68.0%, counting all firearms). Knives were used 12.1% of the time (nearly three times more often than blunt objects). Body parts ("hands, fists, feet, etc."), at 5.8%, were more likely to be used than blunt objects. The statistics for 2003-2006 were not appreciably different.[3] The data also reveal that there is no epidemic of criminal blunt weapon usage by youth: in 2007, blunt weapons were used in 1.0% of juvenile gang slayings, compared to 81.2% for handguns (92.2% for all firearms).[4]

Statistics for other crimes show a similar pattern. For instance, the FBI tracks usage of four kinds of "weapons" in robberies. In 2007, the percentage by weapon type used in robberies was: firearm 42.7%, "strong-arm" 40.0%, ***other weapon 9.1%*** (aggregating all forms of blunt weapons ***and*** non-

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[2] Pursuant to a note on the FBI's website to contact the Bureau directly about the availability of data not posted on their website, http://www.fbi.gov/ucr/word.htm, one of our researchers did so on September 2, 2009 and was informed that the FBI does not keep statistics on criminal use of nunchaku.

[3] FBI, 2007 CRIME IN THE UNITED STATES, ("2007 CRIME IN THE UNITED STATES ") http://www.fbi.gov/ucr/cius2007/offenses/expanded_information/data/shrtable_07.html (Expanded Homicide Data Table 7, Murder Victims by Weapon, 2003-2007).

[4] *Id.* (Expanded Homicide Data Table 10, Murder Circumstances By Weapon), http://www.fbi.gov/ucr/cius2007/offenses/expanded_information/data/shrtable_10.html.

firearm weapons), and knife or other cutting instruments 8.3%.[5]

2b. Weapon safety data also fail to rebut the Petitioner's assertion in paragraph 26 of his complaint that "nunchaku, in comparison with most other arms, including firearms, is relatively safe and innocuous, such that a child or person untrained in the weapon's proper use would be unable to inflict serious injury." Pet. 51a.

The CDC maintains a site that can dynamically access its Web-based Injury Statistics Query and Reporting System ("WISQARS"), to show statistics for unintentional deaths by a range of causes or mechanisms. A query to that website for total unintentional deaths by firearm for 2004-2006 (the latest years available), returns the number 2,080. The corresponding number for unintentional cut or piercing deaths is 325.[6] A query for unintentional deaths caused by "non-firearm" weapons does not return a statistic.[7] Just as there is no demonstrable social problem concerning nunchaku use in crime, there is also no demonstrable safety problem.

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[5] 2007 CRIME IN THE UNITED STATES (Table 15, Crime Trends, Additional Information About Selected Offenses by Population Group, 2006-2007), http://www.fbi.gov/ucr/cius2007/data/table_15.html.

[6] WISQARS http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html.

[7] The CDC only keeps such statistics for suicides and homicides. WISQARS, Table 5.1.1, at http://www.cdc.gov/ncipc/wisqars/fatal/help/definitions.htm#cause.

Courts therefore cannot assume that nunchaku are especially dangerous.

2c. The County concedes that the test in *Heller* focuses on use of a particular weapon "at the time" of its use. Opp. 9. The FBI and CDC data show no present evidence of a serious nunchaku problem, especially in comparison with constitutionally-protected handguns. The New York Legislature's 1974 finding that nunchaku were "widely used by muggers and street gangs," Opp. 11, is thus obsolete, if it were ever true. The newspapers are not filled with stories of muggers or gangs bearing nunchaku for the simple reason, as the statistics bear out, that nunchaku are not a weapon of choice for criminals. And even if the Legislature's findings were entitled to full rational basis deference (a question not presented here), such findings can be set aside if they are irrational. *See, e.g., United States v. Morrison*, 529 U.S. 598, 614-15 (2000). Denial of certiorari would deprive Mr. Maloney of any opportunity to expose those findings as baseless.

3. The County argues that nunchaku are unique because they can deliver a powerful blow without the user feeling its force, Opp. 1, but the same is even more true of handguns. The County also argues that nunchaku strike with a force 200 times greater than required to break bones. *Id.* at 2. The point is self-evidently misleading,[8] as the swing of a golf club

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[8] *Cf.* DARRELL HUFF, HOW TO LIE WITH STATISTICS 100 ("statisticulation") (1954).

generates more force than nunchaku,[9] yet not everyone hit by a golf club experiences a fracture. By contrast, handguns explode metal projectiles out of their barrels at speeds faster than the human eye can see, to penetrate deep into the body. David B. Adams, *Wound Ballistics*, 147 MILITARY MEDICINE 831-35 (1982).

Citing hyperbole about nunchaku cracking coconuts, Opp. 2, the County argues that nunchaku are deadly weapons. But that is not in dispute (though nunchaku are more frequently used in a non-lethal fashion, *see* complaint Pet. 51a). The same is true of any weapon worth wielding in self-defense. Kitchen knives can kill. A child's baseball bat can kill.

Nunchaku are also called "dreaded . . . garrote[s] from hell," Opp. 10. This is the kind of overblown balderdash that an evidentiary record could have readily dispelled had the complaint not been dismissed on the ground that the Second Amendment did not apply to the States. There is nothing magical in the power of two sticks connected by a cord. It is alarmism, at best, to suggest that there is any serious contemporary problem involving the use of nunchaku as a weapon of strangulation.

4. The County argues that nunchaku are "unusual," though the test the Court established in *Heller* requires that a weapon otherwise meeting the definition of an "arm" be "dangerous ***and*** unusual"

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9 http://www.howstuffworks.com/golf-club.htm/printable (average golf swing generates "nearly 3,000 pounds of force").

to lose protected status. Beyond the fact that this question is not presented by this case in its current posture, the demonstration above that nunchaku are not unusually dangerous should suffice to dispose of the County's argument. In any event, nunchaku are not unusual in the constitutionally-intended sense. The martial arts have become extremely popular in the United States and around the world. Practitioners are not uncommon. The Olympic-affiliated World Nunchaku Association calls "nunchaku-do a well-known martial art." http://www.nunchaku.org/. The popularity of nunchaku has only grown since 1974, when New York's own Criminal Services Division stated that "[i]n view of the current interest and participation in [such] activities by ***many members of the public***, it appears unreasonable—and perhaps even unconstitutional—to prohibit those who have a legitimate reason for possessing chuka sticks from doing so." Pet. 78a (emphasis added).

Surely, taken as a group, martial arts weapons are thus undoubtedly not "uncommon." An entire form of recreation and physical fitness should not be hampered, under pain of criminal sanction, by atomizing the types of weapons used for training and exercise, anymore than handguns could be broken down by make, model, or color, and thereby stripped of constitutional protection. Numerous types of nunchaku, including toy versions for children, are

available on Shopping.com, Amazon.com, and elsewhere.[10]

The County's anecdotal material self-refutes the claim that martial arts weapons are "uncommon" in the United States. The County's principal source is MARTIAL ARTS FOR DUMMIES. Opp. 12 n.8. The best-selling series of bright-yellow DUMMIES books is designed to instruct uninitiated readers about topics of widespread interest. The "dangerous and unusual" precedent in the lower courts should, and likely will, evolve based on data and analysis, *see, e.g.*, *Chambers v. United States*, 129 S.Ct. 687, 693 (2009) (using data to determine whether "failure to report" is a "violent felony"), instead of a stray, purple-prose reference in MARTIAL ARTS FOR DUMMIES. For instance, courts may construe the unprotected category of weapons to include weapons of mass destruction, explosives, weapons designed to be hidden in common objects or to conceal evidence of their use, and the like. Nunchaku are simply not in that class of questionable or intensely destructive weapons. The examples the County cites from the sparse post-*Heller* case law, involving pipe bombs, machine guns, and silencers, show the courts to be proceeding in just such a reasonable fashion. Opp. 9 n.6.

5. Finally, the County does not dispute that clubs and even articulated clubs were long recognized as soldiers' weapons. Pet. 27. The most common

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10 *See* http://www.shopping.com/xCC-Nunchaku; and http://www.amazon.com/s/ref=nb_ss?url=search-alias%3Daps&field-keywords=nunchaku.

articulated club is a flail (larger and more dangerous than nunchaku), which arose from farming. "The old agricultural flail, consisting of an iron shod club hinged to a long staff, needed no modification to turn it into a very formidable weapon. It was widely used for this purpose by foot soldiers, usually peasant levies, from not later then the thirteenth century until the second half of the seventeenth century." CLAUDE BLAIR, EUROPEAN AND AMERICAN ARMS C. 1100-1850, at 24 (1962). Accordingly, flails and other articulated clubs have a historical relationship to the preservation or efficiency of a well-regulated militia. *Compare* Opp. 15.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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