UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
JAMES M. MALONEY,

Plaintiff,

CV 03-786

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, GEORGE PATAKI, in his official capacity as Governor of the State of New York and his successors, DENIS DILLON, in his official capacity as District Attorney of the County of Nassau and their successors,

(Spatt, J.)

(Orenstein, M.J.)

Defendants.
----------X

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed brief, dated the 10th day of April, 2006, and upon all papers filed herein, a motion will be made by the Defendants to this Court, the Honorable Arthur D. Spatt presiding, at the courthouse located at 100 Federal Plaza, Central Islip, New York 11722-4448, on a date to be set by the Court, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for a judgment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the Amended Complaint, and for such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that in the event this motion is denied, it is respectfully requested that this Court permit the Defendants, in accordance with Rule 12(a)(4) of

the Federal Rules of Civil Procedure, to interpose an answer within sixty (60) days after notice of this Court's decision.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served within the time limits specified in the stipulation entered into by counsel for the parties.

Dated: April 10, 2006
Mineola, New York

Yours etc.,

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By: _____
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Assistant Attorney General

TO: James M. Maloney
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UNITED STATES DISTRICT COURT
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**STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS THE AMENDED COMPLAINT, PURSUANT TO FRCP RULES 12 (b)(1) & (6)**

Respectfully submitted,

ELIOT SPITZER
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## PRELIMINARY STATEMENT

New York State Governor George Pataki and New York State Attorney General Eliot Spitzer ("State Defendants") are named as party Defendants in this proceeding brought by Plaintiff *pro se* (an attorney and martial arts expert), in an Amended Complaint filed pursuant to the Memorandum of Decision and Order of this Court, dated August 31, 2005. In its Decision, the Court granted Plaintiff leave to serve and file a supplemental summons and complaint "adding the entity allegedly responsible for the potential prosecution of the Plaintiff under the statutes in question. . . ." Memorandum of Decision and Order, p. 10. In joining Governor Pataki as a party Defendant, and in failing to remove Attorney General Spitzer from this action in accordance with the Court's holding that it lacks subject matter jurisdiction over the claims brought against the Attorney General, Plaintiff again fails to state a claim against the State Defendants upon which relief may be granted by this Court, calling for dismissal of the Amended Complaint, as against Governor Pataki and Attorney General Spitzer, pursuant to FRCP Rule 12 (b) (1) and (6), because:

1. This Court lacks subject matter jurisdiction as against the State Defendants in this matter, as this is not a justiciable case and controversy under Article III of the Constitution;

2. Plaintiff does not have standing to pursue this case as captioned, because

(A) he cannot show that New York State Attorney General Eliot Spitzer is likely to enforce the provisions of Penal Law §§ 265.00 - 265.02 against Plaintiff, nor that Governor Pataki's duty to faithfully execute the state's laws is enough to render the Governor a proper party Defendant to this action challenging the constitutionality of Penal Law §§ 265.00 - 265.02;

(B) Plaintiff lacks standing to raise any claims with regard to Penal Law § 265.02, since based on the facts of this case, he could not be prosecuted under the provisions of Penal Law § 265.02;

(C) with regard to his Second Amendment claim, Plaintiff is not a member of a militia and therefore lacks standing to raise this particular constitutional challenge, as the Second Amendment does not guarantee a private individual's right "to keep and bear arms";

3. Plaintiff fails to state a cause of action for violation of any rights secured by the First, Second or Ninth Amendments; and

4. Plaintiff's claims against the State Defendants are barred by *res judicata*.

**STATEMENT OF FACTS**

Based on an incident occurring at Plaintiff's home on or about August 24, 2000, Plaintiff was arrested by the Nassau County Police and charged by the Nassau County District Attorney with six violations of the Penal Law. Included among the charges was a violation of Penal Law § 265.01, based on Plaintiff's possession of nunchuks (also known as "chuka sticks" or "nunchaku"), a martial arts weapon the possession of which in New York State is outlawed by Penal Law § 265.01 (1). Incidental to Plaintiff's arrest, the nunchuks were confiscated by the Nassau County Police. On or about August 24, 2000, The People of the State of New York, through the office of Defendant DENIS DILLON, charged Plaintiff with criminal possession of a weapon in the fourth degree, a Class A misdemeanor defined at § 265.01 of the Penal Law of the State of New York, based on Plaintiff's possession within his home of a nunchaku that was found by Nassau County Police in Plaintiff's home. The aforementioned criminal charge for

possession of a nunchaku remained pending against Plaintiff for a period of approximately 29 months, until it was eventually dismissed on or about January 28, 2003. *See* Amended Complaint, ¶¶ 9-12.

On or about February 8, 2003, Plaintiff commenced this action pursuant to 28 U.S.C.§§ 1331 and 2201 against Nassau County District Attorney Denis Dillon and New York State Attorney General Eliot Spitzer in their official capacities, seeking a declaratory judgment that New York State Penal Law §§ 265.00 through 265.02 are unconstitutional. More specifically, Plaintiff claimed that the provisions of those statutes, insofar as they apply to the possession of chuka sticks in the home, were an unconstitutional burden on rights secured to Plaintiff by the First, Second, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and in addition, "unjustly restrain and deprive Plaintiff and other residents of New York from pursuing and obtaining happiness and safety". On or about April 11, 2003, Plaintiff filed a stipulation of discontinuance with the Court, discontinuing the action as against Defendant Nassau County District Attorney Denis Dillon, without prejudice to restoring him to the action at a later date, if necessary, pursuant to FRCP Rule 41(a)(1)(ii).

Plaintiff brought a motion for summary judgment pursuant to FRCP Rule 56 against Attorney General Eliot Spitzer, seeking a declaratory judgment that the aforementioned statutes are unconstitutional. The Attorney General opposed the motion, and the Court denied Plaintiff's motion on the grounds that Plaintiff lacked standing to pursue this case against the Attorney General, in part because the Attorney General is not responsible for the enforcement of the Penal Law statutes at issue in this case. *See* Memorandum of Decision and Order, pp. 6-9.

**STANDARD OF REVIEW ON A MOTION TO DISMISS**

On a motion to dismiss pursuant to F.R.C.P. Rule 12 (b)(6), the Court will accept as true all claims raised in the complaint, drawing all reasonable inferences in favor of the party against whom dismissal is sought. Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir. 1998). The complaint will not be dismissed unless it can be shown that the plaintiff will be unable to set forth any facts which would allow him or her to prevail in the case. Nettis v. Levitt, 241 F.3d 186, 191 (2d Cir. 2001). The issue before the Court on such a motion is not whether the plaintiff would ultimately prevail, but more basically, whether plaintiff is entitled to offer any evidence to support the claims alleged in the complaint. King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999).

Where the motion to dismiss the complaint is predicated on a lack of subject matter jurisdiction, however, the standard of review is different. deBroize v. New York State, 2001 U.S.Dist.LEXIS 15256 at *6 (N.D.N.Y. 9/21/01). The court is not constrained to accept as true all allegations raised in the complaint, but rather, may refer to evidence which lies outside the pleadings. Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000). The plaintiff has the burden of showing the presence of subject matter jurisdiction, once the motion is made. Scelsa v. City Univ. of New York, 76 F.3d 37, 40 (2d Cir. 1996).

**STANDARD OF REVIEW FOR DECLARATORY JUDGMENT AND SUBJECT MATTER JURISDICTION UNDER ARTICLE III**

The Declaratory Judgment Act (28 USC § 2201 *et. seq.*) invests the district courts with discretionary authority to exert jurisdiction over an action in which the plaintiff seeks declaratory relief. ("In a case of actual controversy within its jurisdiction . . . any court of the

United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 USC § 2201 (a). In considering whether to exercise this authority, the court must compare the facts at issue against the two-prong standard adopted by the Second Circuit, to determine whether (1) a declaratory judgment in the case before it would serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether the judgment would finalize the controversy and offer relief from uncertainty. Dow Jones & Co. v. Harrods Ltd., 346 F.3d 357, 359-360 (2nd Circ. 2003). Preliminarily, however, three basic considerations must be examined by the court when deciding whether to exercise the discretionary authority granted by the Act. First, does the action set forth in the pleadings raise an "actual controversy"; second, does this case come within the ambit of cases for which the Act was intended, and third, are there circumstances present in this case that render it sufficiently compelling to induce the Court to exercise this discretionary authority? *See* Dow Jones & Co. v. Harrods Ltd., 237 F.Supp.2d 394 (S.D.N.Y. 2002), *affd.*, 346 F.3d 357 (2nd Circ. 2003).

Actions brought under the Declaratory Judgment Act are justiciable if, and only if, there is an "actual controversy" presented by the facts of the case. 28 U.S.C. § 2201 (a). This mirrors the criteria examined when determining whether a particular case satisfies the "case or controversy" requirement giving rise to federal court jurisdiction derived from Article III of the United States Constitution. "The judicial power does not extend to abstract questions . . . . claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention." *See* Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 241- 42 (1952). The Court will examine whether the facts as alleged by plaintiff support the notion that

there exists between the parties a "substantial controversy" of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment". *See* Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

This analysis also necessarily looks at whether the issue plaintiff brings before the federal court is ripe for its intervention. If the legal consequence feared by the plaintiff seeking declaratory relief merely is a possibility, or even a probability based on the occurrence of some future event that may not occur, the case is not ripe for federal court review and the Court should refrain from invoking its discretionary authority under 28 U.S.C. § 2201 (a). *See* Dow Jones & Co. v. Harrods Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *affd.*, 346 F.3d 357 (2nd Circ. 2003)(citing Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 580 - 81 (1985)).

The question of standing also informs the analysis of whether plaintiff correctly has invoked the court's jurisdiction under Article III and 28 U.S.C. § 2201 (a). Plaintiff can satisfy the standing analysis if he or she demonstrates (1) actual present harm or *a significant possibility of future harm*; and (2) a substantial and continuing controversy *between the parties to the lawsuit*; and (3) the ability of the court to issue relief that will redress plaintiff's grievance. *See* Bauer v. State of Texas, 341 F.3d 352, 357 (5th Circ. 2003)(emphasis added).

In any case, 28 U.S.C. § 2201 does not act as an independent source of jurisdictional power for the federal courts - rather, it may only be utilized where the federal court already possesses subject matter jurisdiction over the issues before it. Time, Inc. v. Regan, 539 F.Supp. 1371, 1373 (S.D.N.Y. 1982), *affd. in part, rev. in part*, Regan v. Time, 468 U.S. 641 (1984). The discretionary authority granted by 28 U.S.C. § 2201 (a) is reviewed deferentially on appeal, and generally will be set aside only where the lower court is found to have abused its

discretion by basing its ruling on a mistake in law or fact. *See* Dow Jones & Co. v. Harrods Ltd., 346 F.3d 357, 359-360 (2nd Circ. 2003)(citing Wilton v. Seven Falls Co., 515 U.S. 277, 289 (1995) and U.S. v. Couto, 311 F.3d 179, 185 (2nd Circ. 2002)).

## ARGUMENT

### Point I
### The Amended Complaint Must Be Dismissed, Because The Court Lacks Subject Matter Jurisdiction Under Article III

Based on the facts as alleged, Plaintiff cannot demonstrate that the Court possesses subject matter jurisdiction over his claims, as he does not possess an "actual case or controversy" involving either the Governor of the State of New York or the New York State Attorney General. In addition, Plaintiff lacks standing to bring this case, because he cannot show that he is likely to be prosecuted by the New York State Attorney General for violations of Penal Law §§ 265.00 - 265.02. Moreover, Plaintiff is not a member of a militia and therefore lacks standing to raise a constitutional challenge to the statutes under the Second Amendment (*see* **Point II**, *supra*).

#### A. Neither Governor George Pataki Nor Attorney General Eliot Spitzer Are Proper Party Defendants to this Action.

Article III requires a potential plaintiff seeking access to the federal courts to demonstrate an "actual case and controversy", such that he or she will be faced with actual present harm or a significant possibility of future harm, if the court doors are closed to him. The plaintiff must also demonstrate that there exists a substantial and continuing controversy between the parties the plaintiff seeks to bring before the court. This Plaintiff can satisfy neither

requirement.

**1. The Governor's Duty under the New York Constitution to "Take Care That the Laws Are Faithfully Executed" Is Insufficient to Render Him a Proper Party Defendant to this Action.**

"A state official's duty to execute the laws is not enough by itself to make that official a proper party in a suit challenging a state statute". Warden v. Pataki, 35 F. Supp. 2d 354, 359 (S.D.N.Y. 1999), *affd*., Chan v. Pataki, 201 F.3d 430 (2d Cir. N.Y. 1999), *cert. den*., Chan v. Pataki, 531 U.S. 849 (2000), citing 1st Westco Corp. v. School Dist., 6 F.3d 108, 113 (3d Cir. 1993) ("General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." (citing Rode v. Dellarciprete, 845 F.2d 1195, 1208 (3d Cir. 1988)); Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute."); *see also* Gras v. Stevens, 415 F. Supp. 1148, 1151-52 (S.D.N.Y. 1976); *see* Memorandum and Decision of the Court, Maloney v. Spitzer, CV 03-786, p. 8 (E.D.N.Y. 2005)(Spatt, J.).

Governor Pataki's general duty to enforce the laws and uphold the constitution is not enough to render him a proper party Defendant in this action, and the Amended Complaint should be dismissed as against him, accordingly.

**2. Plaintiff Is In No Danger Of Being Prosecuted By The New York State Attorney General For Possessing Nunchuks In His Home.**

As this Court held in the Memorandum and Decision, dated August 31, 2005, "In cases such as this, where a plaintiff seeks a declaration that a particular statute is unconstitutional, 'the proper defendants are the government officials charged with the

administration and enforcement of the statute." *See* Memorandum and Decision of the Court, Maloney v. Spitzer, CV 03-786, p. 8 (E.D.N.Y. 2005)(Spatt, J.), citing to Curtis v. Pataki, No. 96 CV 425, 1997 WL 614285, at *5 (Oct. 1, 1997 N.D.N.Y.); *accord*, Warden v. Pataki, 35 F. Supp. 2d 354, 359 (S.D.N.Y. 1999), *affd*., Chan v. Pataki, 201 F.3d 430 (2d Cir. N.Y. 1999), *cert. den*., Chan v. Pataki, 531 U.S. 849 (2000). The New York State Attorney General is not about to enforce the statutes at issue in this case, rendering him an unnecessary and improper party Defendant to this lawsuit.

It is well settled that in New York State, the local district attorneys alone generally decide whom to prosecute, when and in what manner the prosecution should be conducted. Baez v. Hennessy, 853 F.2d 73, 77 (2nd Circ. 1988), *cert. den.*, 488 U.S. 1014 (1989). Under certain limited circumstances, however, the Attorney General may undertake enforcement of criminal statutes. Such action is taken rarely, however, and only after the proper statutory authority has been invoked to vest the Attorney General with such powers.

The question of the New York State Attorney General's prosecutorial powers was examined by the New York State Court of Appeals in People v. Gilmour, 98 NY2d 126 (Ct. App. 2002). As explained by the Court:

> "The New York State Constitution establishes the offices of Attorney General (*see* NY Const, art V, § § 1, 4) and District Attorney (*id.* at art XIII, § 13), but does not specify or allocate the powers of the respective offices. . . . Since 1796 the Legislature has never accorded general prosecutorial power to the Attorney General (*see People v DiFalco, 44 N.Y.2d 482, 486, 377 N.E.2d 732, 406 N.Y.S.2d 279* [1978] [per curiam]). . . . The Attorney-General has no general authority [to conduct prosecutions] and is '*without any prosecutorial power* except when specifically authorized by statute'" (People v Romero, 91 N.Y.2d 750, 754, 675 N.Y.S.2d 588, 698 N.E.2d 424 [1998], quoting Della Pietra v State of New York, 71 N.Y.2d 792, 797, 530 N.Y.S.2d 510, 526 N.E.2d 1 [1988] [emphasis in original).

People v. Gilmour, 98 NY2d 126, 127 (Ct. App. 2002).

The Gilmour Court went on to note that:

> The Attorney General enjoys a sweeping statutory array of prosecutorial and other law-enforcement authority: to prosecute business frauds and other deceptive practices (*see Executive Law § 63* [12]; *General Business Law § § 349 et seq.*); commence civil investigations in the public interest (*see Executive Law § 63* [8]); bring actions to remove persons unlawfully in public or corporate office (*see Executive Law § 63-b*); enforce the State's anti-discrimination and human rights laws (*see Executive Law § 63* [9]-[10]); enforce statutes regulating toxic substances in the workplace (*see Labor Law § 882*); prosecute "all persons indicted for corrupting or attempting to corrupt any member or member-elect of the legislature, or the commissioner of general services" (*Executive Law § 63* [4]); bring actions to recover public funds (*see Executive Law § 63-c* [1]); defend the State's remainder interest in certain trusts (*see Executive Law § 63* [11]; *Social Services Law § 366* [2] [b] [2]); and other powers too numerous to mention (*see generally 96 NY Jur 2d, State of New York § 24 et seq.*).

Gilmour, 98 NY2d 126, 131.

Pursuant to Executive Law § 63 (3), the head of any department, authority, division or agency may activate the Attorney General's "latent powers [of prosecution]", by requesting the Attorney General to commence a prosecution under the authority of Executive Law § 63 (3). When this occurs, the Attorney General has the prosecutorial powers otherwise held by the District Attorney. Gilmour, 98 NY2d 126, 131. Absent such a specific request, the Attorney General's powers are strictly derived from the statute, and the state courts strictly interpret the source and nature of that prosecutorial authority. *See* People v. Romero, 91 N.Y.2d 750 (Ct. App. 1998)(*held*: although the district attorneys had plenary prosecutorial power in the counties where they were elected, the attorney general had no such general authority and was without any prosecutorial power except when specifically authorized by statute). The fact that the Attorney General is charged with defending the constitutionality of challenged state statutes

and defending the state's interests from suit does not imbue him with authority to enforce statutes and concomitantly, does not make him a proper party defendant to an action challenging the constitutionality of a statute. *See* Warden v. Pataki, 35 F. Supp. 2d 354,359 (S.D.N.Y. 1999), *affd.*, Chan v. Pataki, 201 F.3d 430 (2nd Circ. 1999), *cert. den.*, Chan v. Pataki, 531 U.S. 849 (2000). Plaintiff has failed to allege that the head of any state agency has requested the Attorney General to prosecute Plaintiff for violations of the Penal Law at issue in this case. Moreover, the possibility that such a request might be made is so remote as to be practically nonexistent. Indeed, after Plaintiff was arrested by the Nassau County Police, the individual who prosecuted Plaintiff in this case was the Nassau County District Attorney.

Notwithstanding Plaintiff's sweeping statement that the Attorney General's recent investigation into the illegal transport of and sales of illegal weapons indicates his willingness or intention to invade the homes of purchasers of nunchuks in an effort to confiscate the items and prosecute them under the state's criminal statutes (*see* Plaintiff's Memorandum of Law, pp. 4 -6), neither Plaintiff nor any other nunchuk aficionado appear to be in imminent danger of a raid by the Attorney General's office. A review of the Assurance of Discontinuance executed in the Bud-K investigation shows that the Attorney General did not seek to prosecute individual owners of nunchuks (such as Plaintiff), but rather brought civil proceedings against the manufacturer of those items, to redress that company's widespread consumer abuses and stop it from engaging in fraudulent practices in the future. In that instance, the Attorney General was acting *on behalf of* the victims/purchasers (*i.e.*, people such as Plaintiff) of the contraband items. The Assurance of Discontinuance includes provisions calling for Bud-K to issue a recall notice to New York consumers and to provide the Attorney General with a list of the names of New York State

consumers who had purchased the prohibited items through Bud-K's misleading marketing practices. The ability to reach out to the numerous defrauded consumers allowed the Attorney General to monitor Bud-K's compliance with the terms of the Assurance. *See* Appendix "B" to the Brief in Opposition, Assurance of Discontinuance In the Matter of Bud-K.

There is no reference, nor any indication in that document, that the Attorney General intended then, or does now, to prosecute the individual purchasers/owners of these contraband items. Furthermore, Plaintiff also cannot show that any agency or authority has triggered the Attorney General's latent prosecutorial powers by requesting the Attorney General to do so. In the absence of such a request and given the strict limitation on the Attorney General's prosecutorial powers, Plaintiff's fear of prosecution by this named Defendant simply is unrealistic. The New York State Attorney General simply is the wrong party Defendant in this action. Plaintiff lacks standing to bring this suit against the New York State Attorney General.

**B. Based On The Facts As Alleged, Plaintiff Should Be In No Danger Of Prosecution For Violation of Penal Law § 265.02**

Penal Law § 265.02 provides that a person is guilty of criminal possession of a weapon in the third degree (a class D felony) when he possesses contraband weapons under certain conditions. However, none of the provisions describing the elements of a crime under Penal Law § 265.02 fit the facts of this case as alleged by Plaintiff, since Plaintiff pled guilty to only one count of disorderly conduct (Penal Law § 240.20 (7)). Disorderly conduct is a violation, not a crime, which by definition is limited to felonies and misdemeanors. *See* Penal Law § 10.00 (6). Absent some specific factual averment by Plaintiff that would bring him within any subsection of Penal Law § 265.02, Plaintiff lacks standing to sue anyone under this statute,

let alone the Attorney General.

### C. Based On The Facts As Alleged, Plaintiff Does Not Possess A Valid Claim Under The Second Amendment

It has long been established that the protections of the Second Amendment inure to the benefit of a state militia, do not guarantee an individual right to bear arms and/or own weapons, do not apply to anything other than firearms and do not apply to state actions, but only prevent federal government encroachment upon rights secured thereunder. *See* Bach v. Pataki, 289 F. Supp. 2d 217 , *affd*., 408 F.3d 75, 84-87 (2nd Circ. 2005), *cert. den.*, 126 S. Ct. 1341 (2006)(*see* **Point II**, *infra).* Plaintiff has not alleged that he belongs to a state militia, is not challenging actions by the federal government to infringe upon the right of a state militia to bear arms and asks the Court to equate nunchuks with the type of firearms arguably envisioned by the Framers when they wrote the Constitution and Bill of Rights. Plaintiff lacks standing to bring this suit asking for a declaration that Penal Law §§ 265.00 - 265.02 violates the Second Amendment.

## Point II

## The Amended Complaint Must Be Dismissed, Because Plaintiff Fails To State A Cause of Action For Violations of Rights Secured By The First, Second or Ninth Amendments

### A. The First Amendment

The First Amendment secures to the individual the right, *inter alia*, to freedom of speech, and encompasses within its penumbra that which may fairly be characterized as an expression of ideas, whether communicated in speech, via the printed word, or in the form of

conduct designed by the actor to convey a particular meaning. The government may circumscribe the individuals' right to express those ideas, however, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States V. O'Brien, 391 U.S. 367, 377 (1968). "States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action.'" California v. Larue, 409 U.S. 109, 117 (1972), citing Hughes v. Superior Court, 339 U.S. 460 (1950) and Giboney v. Empire Storage Co., 336 U.S. 490 (1949).

The Penal Law statutes under which Plaintiff were prosecuted by the Nassau County District Attorney were validly enacted by the New York State Legislature in order to further the important government interest of protecting the health and safety of its citizens. The language of the statutes contains no restrictions that would effect a regulation of the free expression of ideas in any manner. It is highly unlikely that Plaintiff could demonstrate that the act of brandishing nunchuks contains a sufficient "communicative element" that would trump the state's interest in safeguarding its citizens' welfare by outlawing these martial arts weapons, the possession of which are considered by the state to be *malum per se.*

**B. The Second Amendment**

The Second Amendment to the United States Constitution states: "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." NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 462 - 63

(EDNY 2003). Currently, there are two schools of judicial thought interpreting the applicability and reach of the Second Amendment. The overwhelming majority of federal courts follow the long-standing Supreme Court interpretation of the Second Amendment: namely, that the Second Amendment does not secure a fundamental, private right of gun ownership, but rather, protects the right of state militias to bear arms, unfettered by constraints issued by the United States Congress. To that end, the term "arms" is deemed to include those firearms that would reasonably be expected to form part of the arsenal of an organized militia. *See, e.g.*, United States v. Miller, 307 U.S. 174, 178 (1939); Bach v. Pataki, 289 F. Supp. 2d 217 , *affd*., 408 F.3d 75, 84-87 (2nd Circ. 2005), *cert. den.*, 126 S. Ct. 1341 (2006); United States v. Toner, 728 F.2d 115, 128 (2nd Circ. 1984)(*see also* subsequent unpublished decisions of the 2nd Circuit, following Toner ( United States v. Sanchez-Villar, 99 Fed. Appx. 256, 258 (2004); United States of America v. Manuel, 64 Fed. Appx. 823, 827 (2003); United States v. Scanio, 165 F.3d 15 (Table), (1998); Lawson v. Kirschner, 152 F.3d 919 (Table), (1998). *See also, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1875); Presser v. Illinois, 116 U.S. 252 (1886); Miller v. Texas, 153 U.S. 535 (1894); Lewis v. United States, 445 U.S. 55 (1980). *But see* United States v. Emerson, 270 F.3d 203 (5th Circ. 2001), *cert. den.*, 536 U.S. 907 (2002). Consistent with the view that the right to own and bear arms is not a fundamental right, the Supreme Court has repeatedly rejected the proposition that the entire Bill of Rights has been incorporated through the 14th Amendment Due Process clause to apply to the states, Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1317 - 1318 (EDNY 1996), as recently as 1964. *See* Malloy v. Hogan, 378 U.S. 1, 4 fn. 2 (1964), citing Presser v. Illinois, 116 U.S. 252, 265 for the proposition that Second Amendment guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other

provision of the Fourteenth Amendment.

Until the Supreme Court reconsiders and explicitly rules on the Second Amendment issues raised by Plaintiff, the law to be followed is the law that was expressed by the Supreme Court in United States v. Miller, 307 U.S. 174, 178 (1939), United States v. Cruikshank, 92 U.S. 542 (1875), Presser v. Illinois, 116 U.S. 252 (1886), Miller v. Texas, 153 U.S. 535 (1894) and Lewis v. United States, 445 U.S. 55 (1980).

**C. The Ninth Amendment**

The Ninth Amendment states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Ninth Amendment provides a rule of construction for interpretation of the applicability and reach of those rights and powers enumerated in the Constitution and Bill of Rights. "The full scope of the specific guarantees is not limited by the text, but embraces their purpose to provide broad freedom from all 'arbitrary impositions and purposeless restraints'". United States v. Bifield, 702 F.2d 342, 349 (2nd Circ. 1983), *cert. den.*, Bifield v. United States, 461 U.S. 931 (1983).

The Ninth Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1125 (9th Circ. 1996), citing Schowengerdt v. United States, 944 F.2d 483, 490 (9th Circ. 1991) (rejecting Navy civilian engineer's Ninth Amendment claim arising out of allegedly improper investigation and discharge), *cert. den.*, 503 U.S. 951 (1992); *see also* Strandberg v. City of Helena, 791 F.2d 744, 748-49 (9th Circ. 1986) (rejecting plaintiffs' § 1983 claim based on the penumbra of the Ninth Amendment in the absence of some specific constitutional guarantee); *accord* LAURENCE H. TRIBE, AMERICAN

CONSTITUTIONAL LAW 776 n.14 (2nd ed. 1988) ("It is a common error, but an error nonetheless, to talk of 'ninth amendment rights.' The ninth amendment is not a source of rights as such; it is simply a rule about how to read the Constitution.")(emphasis in original).

Although the Supreme Court has yet to consider this question, the Fifth, Sixth, Seventh, Ninth and Tenth Circuits have explicitly rejected the theory that the Ninth Amendment encompasses a right to bear arms independent of the Second Amendment. *See* United States v. Broussard, 80 F.3d 1025, 1041 (5th Circ.) ("We are not persuaded to discover or declare a new constitutional right to possess weapons under the Ninth Amendment on the basis of Merritt's proffered 'authority' [a law review article]."), *cert. den.*, Merritt v. U.S., 519 U.S. 906 (1996); United States v. Warin, 530 F.2d 103, 108 (6th Circ.) (rejecting defendant's Ninth Amendment challenge because "we simply do not conceive of the possession of an unregistered submachine gun as one of those 'additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments'") (quoting Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring)), *cert. den.*, 426 U.S. 948 (1976); Quilici v. Village of Morton Grove, 695 F.2d 261, 271 (7th Circ. 1982) ("Appellants may believe the ninth amendment should be read to recognize an unwritten, fundamental, individual right to own or possess firearms; the fact remains that the Supreme Court has never embraced this theory."), *cert. den.*, 464 U.S. 863 (1983); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1125, (9th Circ. 1996)("We join our sister circuits in holding that the Ninth Amendment does not encompass an unenumerated, fundamental, individual right to bear firearms. *See* William Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L.J. 1236, 1248 n.43 (1994)

("Recourse to the same materials to fashion a Ninth Amendment ('unenumerated') right is not only largely replicative of the Second Amendment inquiry, but also singularly inappropriate under the circumstances - the right to bear arms is not left to the vagaries of Ninth Amendment disputes at all."); United States v. Baer, 235 F.3d 561, 564 (10th Circ. 2000)("We reject Mr. Baer's contention that the federal firearms statutes violate the Ninth Amendment").

Plaintiff asks this Court to hold that unenumerated liberty rights fall within the ambit of the Ninth Amendment and provide him with a "liberty interest" - the freedom to own and possess within his home, weapons the ownership of which has been unconstitutionally prohibited by Penal Law §§ 265.00 - 265.02. The Court should reject Plaintiff's invitation to forge new paths in the interpretation of the Ninth Amendment, particularly in light of the holdings in sister circuits that the right to bear arms is encompassed in the Second Amendment, not the Ninth Amendment.

## Point IV

### The Doctrine of *Res Judicata* Compels The Dismissal Of The Amended Complaint As Against The State Defendants

In its Memorandum of Decision and Order, the Court held that Plaintiff lacked standing to sue because he failed to sue the government officials charged with the administration and enforcement of the statutes in question - here, the Nassau County District Attorney alone. *See* Memorandum of Decision and Order, pp. 8-10. The Amended Complaint should be dismissed as against Governor George Pataki and Attorney General Eliot Spitzer, based on the Court's prior holding.

**CONCLUSION**

For the foregoing reasons, the Amended Complaint should be dismissed as against the State Defendants.

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Mineola, New York

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