

## **PRELIMINARY STATEMENT**

Plaintiff raises three arguments in opposition to the State's motion to dismiss the Amended Complaint. First, Plaintiff seeks Fourteenth Amendment due process protection for the "liberty and privacy interest" of "simple in-home possession" of a martial-arts instrument, or alternatively, asks the Court to find that same interest inherent in those unenumerated rights that are implicit in the Ninth Amendment. Second, Plaintiff argues that New York State has no legitimate state interest to be safeguarded by Penal Law § 265.00. Finally, Plaintiff maintains that the Attorney General remains a proper party Defendant in this case at its present juncture, simply because Plaintiff seeks *contingent* relief that is predicated on a favorable outcome in the future (*i.e.*, a declaratory judgment that the statute is unconstitutional). None of these arguments will successfully rebut the reasons advanced by the State Defendants in favor of dismissal of the Amended Complaint, nor will they provide the Court with subject matter jurisdiction to adjudicate Plaintiff's claims, as against Governor George Pataki or Attorney General Eliot Spitzer.

## **ARGUMENT**

### **Point I**

#### **NEITHER OF THE STATE DEFENDANTS ARE PROPER PARTIES TO THIS ACTION, PURSUANT TO ARTICLE III OF THE CONSTITUTION, THE ELEVENTH AMENDMENT, AND THE DECLARATORY JUDGMENT ACTS**

Plaintiff acknowledges that the District Attorney is the government official charged with prosecuting individuals for violating the criminal statutes at issue here.

*See* Amended Compl., ¶ 6. Governor Pataki's only nexus to Plaintiff's claims would appear to

derive from his general duty, under Article IV, section 3 of the New York State Constitution, “to take care that the laws are faithfully executed”. *See* Amended Compl., ¶ 4. Moreover, the continued presence of the New York State Attorney General in this lawsuit as a defendant is based merely on Plaintiff’s belief that should the Court declare the penal law statutes in question unconstitutional, the Court would then possess subject matter jurisdiction over the Attorney General that would permit the Court to grant affirmative injunctive relief against the Attorney General. The facts as alleged in this case show that this Court lacks subject matter jurisdiction over the State Defendants.

To the extent that Plaintiff seeks relief as against the State Defendants, this Court lacks subject matter jurisdiction over his claims under the “actual case and controversy requirements” of Article III of the Constitution and The Declaratory Judgment Act. The Declaratory Judgment Act (28 U.S.C. §§ 2201-2202) does not provide the federal district courts with subject matter jurisdiction where none otherwise would exist. Smith v. Lehman, 533 F. Supp. 1015, 1018 (EDNY 1982)(McLaughlin, J.), *affd.*, 689 F.2d 342 (2d Cir. 1982), *cert. den.*, 459 U.S. 1173 (1983). Article III of the constitution requires that “there must be an independent basis of federal jurisdiction before the Court may render a declaratory judgment . . . . and the question in each case ‘is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment’”. Paulsen v. Lehman, 839 F. Supp. 147, 157 (EDNY 1993)(Spatt, J.), citing Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 562, (2<sup>nd</sup> Circ. 1991), *cert. den.*, 511 U.S. 1218 (1991).

This Court already has determined that it lacks subject matter jurisdiction over the

Attorney General in this case, *see* Maloney v. Spitzer, 03 Civ. 0786, Memorandum of Decision and Order, pp. 8-9 (August 31, 2005), and the Declaratory Judgment Acts cannot supply Plaintiff with the missing jurisdictional predicate he needs to obtain the relief he seeks against the Attorney General, based on the premises laid out in the Amended Complaint at ¶¶ 55-64. Furthermore, the Court is equally bereft of subject matter jurisdiction where Plaintiff's claims against the Governor are concerned.

"The vast majority of courts . . . have held . . . that 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. . . . Where the legislative enactment provides that entities other than the executive branch of the state are responsible for implementation of the statute no claim against the Governor lies." Wang v. Pataki, 164 F. Supp.2d 406, 410, 359 (S.D.N.Y. 2001). "The general duty to faithfully execute the laws does not, standing alone, make the Governor a proper party in an action challenging a state statute as unconstitutional. Romeu v. Cohen, 121 F. Supp.2d 264, 272 (S.D.N.Y. 2000), *affd.*, 265 F.3d 118 (2d Cir. 2001). Plaintiff's failure to state any affirmative duty on the part of the Governor to ensure the enforcement of this statute, or the prosecution of those accused of violating it, cloaks the Governor with immunity from suit under the Eleventh Amendment, even though Plaintiff seeks only equitable relief. *See* N.Y. State Motor Truck Association. v. Pataki, 2004 U.S. Dist. LEXIS 25519, pp. \*37-39 (S.D.N.Y. Dec. 16, 2004), citing Ex Parte Young, 209 U.S. 123, 157 (1908) and Star Distrib., Ltd. v. Marino, 613 F.2d 4 (2d Cir. 1980). Indeed, in his Brief in Opposition, Plaintiff offers no rebuttal to the State Defendants' contention that Governor Pataki is not a proper party Defendant to this action.

Moreover, Plaintiff's failure to provide any other rationale for holding the

Attorney General in as a Defendant, other than Plaintiff's bid to obtain affirmative, injunctive relief as against the Attorney General (*see* Plaintiff's Brief in Opposition, p. 19, 3<sup>rd</sup> paragraph; Amended Compl., ¶¶ 55-64) also provides the Attorney General with the same Eleventh Amendment protections that prevent state officials from being forced into federal court every time the constitutionality of a state statute is challenged:

In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the State in litigation involving the enforcement of its statutes. . . . It is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. . . . [S]uch officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

Ex Parte Young, 209 U.S. 123, 157 (1907).

**Point II**  
**THE STATE'S LEGITIMATE INTEREST IN PROMOTING  
PUBLIC HEALTH AND SAFETY MUST TRUMP PLAINTIFF'S  
"LIBERTY AND PRIVACY" INTERESTS IN OWNING NUNCHUKS**

Plaintiff asks the Court to elevate the possession and use in the home of a prohibited martial arts weapon, to the realm of activities fundamental to our existence as human beings, over which the Supreme Court has extended the substantive due process protections of the Fourteenth Amendment. Alternatively, Plaintiff asks the Court to extend Ninth Amendment unenumerated rights-status to nunchuk ownership and in-home brandishment, as "activities

involving non-sexual physical exercise or *self-preservation*". Plaintiff's Brief in Opp., pp. 14-15. By either standard, Plaintiff argues, his right to own and wield nunchuks within his own home prevails in a balancing test that weighs his liberty interest against the state's interests, *if any*, in criminalizing these activities.

The Supreme Court reiterated in Lawrence v. Texas its prior holdings on which personal activities should be accorded constitutional protection under the substantive provisions of the Due Process Clause:

Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

Lawrence v. Texas, 539 U.S. 558, 574 (2003), citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992). Furthermore, the Fourteenth Amendment does not incorporate the Ninth Amendment so as to proscribe the actions of non-federal actors, Sylla v. City of New York, 2005 U.S. Dist. LEXIS 31817, p. \*7 (EDNY 2005)(Glasser, J.), citing Rini v. Zwirn, 886 F.Supp. 270, 289-290 (E.D.N.Y.1995), further vitiating Plaintiff's claims against both the Governor and the Attorney General of the State of New York.

Likewise, Plaintiff's proposed possession and use of nunchuks within his home does not enjoy the "protection" afforded by the Ninth Amendment. "The Ninth Amendment is recognized as a rule of construction, not one that protects any specific right. Laurence H. Tribe, *American Constitutional Law* § 11-3, at 774-75 (2d ed. 1988). No independent constitutional protection is recognized which derives from the Ninth Amendment." Rini v. Zwirn, 886 F.Supp. 270, 289-290 (E.D.N.Y.1995). "Rights under the Ninth Amendment are only those 'so basic and

fundamental and so deep-rooted in our society’ to be truly ‘essential rights,’ and which nevertheless, cannot find direct support elsewhere in the Constitution.” United States v. Choate, 576 F.2d 165, 181 (9<sup>th</sup> Circ. 1978), cert. den., Choate v. United States, 439 U.S. 953 (1978), citing Griswold v. Connecticut, 381 U.S. 479, 488-489, 491, 85 S. Ct. 1678, 1685, 14 L. Ed. 2d 510 (Goldberg, J., concurring). It is difficult to contemplate how wielding nunchuks, either inside or outside of the home, would fall within one of those categories of fundamental human behavior over which the Supreme Court has extended either substantive due process protection, courtesy of the Fourteenth Amendment, or the right to privacy implicit in the Ninth Amendment. There simply is no basis at law for such extensions of current jurisprudence.

Plaintiff’s argument that the state lacks a legitimate interest in prohibiting simple possession of nunchaku in the home, because nunchaku, in Plaintiff’s view, are not “inherently dangerous, is equally unavailing. Plaintiff repeatedly refers to nunchaku as a weapon, noting that they may be “particularly effective” in defending one from a knife-wielding intruder. *See* Pl.’s Memorandum in Opp., pp. 17-18. New York State has regulated the possession of weapons since 1849. Bach v. Pataki, 408 F.3d 75, 79 (2<sup>nd</sup> Circ. 2005), cert. den., Bach v. Pataki, 126 S. Ct. 1341 (2006). The important state interest in safeguarding the health and safety of its citizens by regulating the possession of weapons must trump Plaintiff’s questionable “liberty and privacy” interests in possession and use of nunchuks within his home.

## CONCLUSION

For the foregoing reasons, as well as the reasons enunciated in the State Defendants’ Brief in Support of the Motion to Dismiss Pursuant to FRCP Rule 12 (b), the

Amended Complaint should be dismissed as against the State Defendants.

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Mineola, New York

ELIOT SPITZER  
Attorney General of the State of New York

By: \_\_\_\_\_  
Dorothy Oehler Nese (DON9327)  
Assistant Attorney General, of counsel  
200 Old Country Road, Suite 460  
Mineola, New York 11501  
(516) 248 - 3302

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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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

(Spatt, J.)

Governor of the State of New York and his  
successors,

(Orenstein, M.J.)

DENIS DILLON, in his official capacity as District

Attorney of the County of Nassau and their  
successors,

Defendants.

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**STATE DEFENDANTS' BRIEF IN REPLY, IN  
FURTHER SUPPORT OF MOTION TO DISMISS THE AMENDED  
COMPLAINT, PURSUANT TO FRCP RULES 12 (b)(1) & (6)**

Respectfully submitted,

ELIOT SPITZER

Attorney General of the State of New York

200 Old Country Road, Suite 460

Mineola, New York 11501

(516) 248-3302

DOROTHY OEHLER NESE (DON9327)

Assistant Attorney General

Of Counsel