UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JAMES M. MALONEY,

Plaintiff,

03 CV 786 (PKC)

- against -

MADELINE SINGAS,

Defendant.

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**PLAINTIFF'S MEMORANDUM OF LAW**

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August 24, 2018

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## STATEMENT AS TO LIST OF PLAINTIFF'S EXHIBITS

Plaintiff includes this page only in order to parallel Defendant's brief, and intends to file via ECF, with hard copies to follow, a separate list of exhibits with pdf copies of all but the first YouTube video listed on the previous page (the sole additional exhibit offered by Plaintiff in the continued trial), which is directly accessible to the Court via the Internet.

## PRELIMINARY STATEMENT

As this brief is responsive to that submitted by the Defendant (DE 199), it is organized in parallel fashion for the Court's convenience.

In Defendant's Preliminary Statement, the recent procedural history is adequately summarized, but some commentary on Defendant's reference to "(2) an incorrect burden of proof" is in order. When this matter went to trial in January 2017, both parties and the Court were acting on the belief that Plaintiff had the burden of proving that nunchaku were in common use for lawful purposes (or some consistent iteration of that basic test for the eligibility of a weapon or "arm" for Second Amendment protection). Although *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo* ("*NYSRPA*"), 804 F.3d 242 (2d Cir. 2015), had by then been decided, and although Plaintiff was well aware of the decision, Plaintiff did not believe that it represented a reversal or other dramatic change in the law regarding burden of proof on the issue of weapon eligibility.[1] (Plaintiff's reasoning is articulated at pages 4-5 of the brief (DE 195), *q.v.*, that Plaintiff submitted contemporaneously with the second proposed pretrial order on May 23, 2018, and that reasoning, in turn, relies in part on inferences to be gleaned from footnote 73 of *NYSRPA*.)

But reasonable minds may differ, and here that difference requires deference to the reasonable mind deciding the case. In its Memorandum and Order of July 23, 2017 (ECF Doc. No. 184), this Court interpreted *NYSRPA* as having read *Heller* to require that "a presumption in

[1] Indeed, in Plaintiff's two virtually identical letters to the Court of April 4 and 6, 2016 (DE 162, 163, the latter electronically filed as a motion), which were written well after the Second Circuit had handed down *NYSRPA*, Plaintiff wrote: "I write today not to argue that this court should shift the burden to the defendant to show that nunchaku are *not* covered arms, but to argue . . ." (emphasis in original).

favor of Second Amendment protection applies, and the government, i.e., Nassau County, has the burden of producing evidence that nunchakus are not 'in common use' or not 'typically possessed by law-abiding citizens for lawful purposes.'" *Id*. at 4 (citing *NYSRPA*, 804 F.3d at 257 n.73; Fed. R. Evid. 301). As Plaintiff's cause presumably will benefit from that ruling (at least in the short run), the foregoing is included less as argument than as a conceptual backdrop to the evolving jurisprudence of the Second Amendment. Finally, and relatedly, it is respectfully submitted that: (1) as that jurisprudence develops, it is very possible that the shifting burdens of showing that a given arm is entitled to protection by virtue of its being in common use, etc., and, relatedly, by virtue of its also not being "dangerous and unusual," will be comparable to the Harter/COGSA burden-of-proof structure that is well known in maritime law, where, as presumptions are overcome, burdens shift back and forth upon various showings, *see, e.g.*, Robertson et al., *Admiralty and Maritime Law in the United States* (3d ed. 2015) at 297; and (2) even if the burden of showing that the nunchaku is in common use and typically possessed by law-abiding citizens for lawful purposes was/is/will be Plaintiff's, Plaintiff has met that burden here.

Defendant's Preliminary Statement next posits that "nunchaku are dangerous and unusual weapons and are not typically used by law abiding citizens for lawful purposes," propositions with which Plaintiff disagrees. Defendant's Preliminary Statement further argues that "[n]unchaku have the potential to cause serious injury or death and have been repeatedly recognized by various courts as dangerous and deadly weapons." The latter compound proposition is quite correct as to both parts, but is wholly irrelevant here because (a) handguns have far greater such potential and yet are protected arms, *see Heller*, and because (b) many

courts and others have also explicitly held, recognized and/or opined (notwithstanding that nunchaku are capable of causing serious injury or death, as Defendant points out) that nunchaku have socially acceptable uses and may and should be amenable to some lawful possession absent criminal intent, *see, e.g.*, *Commonwealth v. Adams*, 369 A.2d 479 (Pa. Superior Ct. 1976); *State v. Muliufi*, 64 Haw. 485, 643 P.2d 546 (Haw. 1982); *In re S.P., Jr.*, 465 A.2d 823 (D.C. 1983); *see also* sources cited or provided in or with the Second Amended Verified Complaint, DE 116, at ¶¶ 32, 34, 36(a) and (d), and as Exhibits 1 and 2 thereof (memoranda).

Finally, Defendant's Preliminary Statement states that it incorporates by reference Defendant's Proposed Findings of Fact and Conclusions of Law. Plaintiff does likewise, and also incorporates by reference the brief (DE 195) that Plaintiff submitted roughly contemporaneously with the filing of the second proposed pretrial order on May 23, 2018, and which focused mainly on burden-of-proof and public policy issues. (That brief was submitted because prior orders seemed to imply that a new trial brief might also have been due then, and Plaintiff informed Defendant through counsel that he would file it in advance of his having done so. Of course, Defendant will still have the opportunity to address that brief (DE 195) further in her forthcoming reply if she has overlooked it and/or omitted responsive arguments from her main brief (DE 199). Plaintiff anticipates that any final reply on his part that might thereby be needed would be amenable to coverage at oral argument.)

RELIEF SOUGHT BY PLAINTIFF

It is worth emphasizing at the outset that Plaintiff seeks, and has always sought throughout this 15-year-old litigation, a declaration that § 265.01 is unconstitutional *only* to the extent that it prohibits simple in-home possession of nunchaku, a weapon consisting of two sticks connected by a cord or chain. No argument has ever been made in this case to the effect that state bans on the carriage of nunchaku on the street, or in one's car, or otherwise outside the home, are constitutionally infirm. Additionally, no effort has been made in this litigation to show that *three* connected sticks (i.e., the Kung Fu three-section staff) is a weapon in common use, although the statutory term "chuka stick" includes that weapon. See footnote 1 of the brief (DE 195) that Plaintiff submitted on the same day as the second proposed pretrial order (May 23, 2018), which is described more fully in the preceding section.

Simply put, the relief sought by Plaintiff is a vindication of his right and that of others to possess nunchaku, a weapon that may be used for *both* home defense and martial-arts practice, in their New York homes (as may freely be done in virtually all other states) notwithstanding the total ban on possession of the instrument that will have been operative and infringing upon the Second Amendment right of New Yorkers for forty-four years as of September 1 of this year.

Finally, because what is being sought in this action (and has been sought in it for more than a third of the time that the statute has been operative) is a **declaration** of that right, the relief that Plaintiff seeks is—by definition—being sought on behalf of other New Yorkers—and potentially eventually of Californians as well—who would choose to exercise that right notwithstanding state laws that prohibit them from possessing nunchucks in their homes.

## "STANDARD OF REVIEW"

Plaintiff has already commented in the foregoing Preliminary Statement about the burden-of-proof issues, which Defendant addresses in the first paragraph of the parallel section of her brief to which this one responds (DE 199 at page 6 of 17). No more will be said here.

Defendant next proposes (page 7 of 17) that the recent (July 10, 2018) Second Circuit decision in *United States v. Jimenez* "further tailored" the standards for determining whether a weapon is eligible for Second Amendment protection by virtue of the court's having used the phrase "in common use" in putative contradistinction to "commonly used for lawful purposes."[2] But in neither instance that *Jimenez* uses the phrase "in common use" is there any indication that the Second Circuit intended to further restrict the universe of arms eligible for protection. In its first use of that phrase, at page 8, line 14 of the Slip Opinion,[3] the phrase is in quotes and is ultimately attributed to *Heller* as part of a passage quoted from *NYSRPA*. Thus, "in common use" has been part of the standard since *Heller*, and *Jimenez* did nothing to alter its meaning. In the second use of the phrase, at page 12, lines 9-11 of the Slip Opinion, the *Jimenez* court writes: " It is clear from *Heller* and our decisions applying it that protecting oneself in one's home with a weapon in common use is at the core of the Second Amendment." Nowhere does the *Jimenez* court imply that "in common use" is substantially different or more restrictive than the phrase "commonly used for lawful purposes." Further, although Defendant "disputes that nunchaku is a

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[2] Defendant writes that "the standard of review has been further tailored in a recent decision from the Second Circuit. The applicable standard of review is not simply whether nunchaku is commonly used for lawful purposes. Rather, the analysis is more circumscribed; to wit, whether the weapon utilized is in common use." DE 199 at page 7 of 17 (citing *Jimenez*).

[3] A true copy of the *Jimenez* Slip Opinion is being filed as an Appendix hereto.

bearable arm within the meaning of the Second Amendment because, she says, it is not used by law abiding responsible citizens for the defense of hearth and home,"[4] DE 199 at page 7 of 17, the word "purposes" in the phrase "commonly used for lawful purposes" by definition must encompass more than just home defense. The Supreme Court in *Heller* could easily have articulated the standard as "commonly used for home defense" if that were its intended meaning.

As established at trial, the nunchaku is commonly used in martial arts practice. **Whether its use as a home defense weapon is widespread or rare, that is not the relevant inquiry in determining whether it is entitled to Second Amendment protection**. As an illustrative hypothetical, consider a target rifle that is capable of firing a single shot, in the context of a Second Amendment challenge to a state law that bans only possession of single-shot target rifles but not other rifles. Because it is likely that few citizens would choose to arm themselves with such a limited-use firearm, the challenge to the law would, under Defendant's theory, probably fail because even though single-shot target rifles may be in common use for a lawful purpose (target shooting), that purpose is not, and is not likely to include in a manner that may be described as "common," home defense. Yet the owner of such a weapon may well have chosen the single-shot target rifle specifically for home defense for valid, sensible, and humanitarian reasons, such as the consideration that if the rifle is taken from her she has not armed dangerous individuals with a repeat-fire weapon, or the desire to have the rifle on hand to control an intruder at gunpoint but to shoot only if absolutely necessary. But Defendant's proffered logic,

[4] The phrase "defense of hearth and home," which Defendant correctly attributes to *Heller* albeit with a gloss that without foundation implies restrictions on the scope of the right, appears in that case in the following sentence: "And whatever else it [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635.

which if applied would allow that hypothetical ban to escape constitutional scrutiny, would be flawed, and would be inconsistent with *Heller* and its progeny. Relatedly, as the concurrence in *Caetano* wrote, "Courts should not be in the business of demanding that citizens use more force for self-defense than they are comfortable wielding." *Caetano v. Massachusetts*, 577 U.S. ___, 2016 WL 1078932 (2016), at *6 (Alito, J., concurring). The two principles are related because, like all Bill of Rights provisions, the Second Amendment is protective of both the rights of minorities and of those related to individual freedom of choice and of conscience. Plaintiff's choice of nunchaku as a weapon for possible home defense may be unusual, but that should not be a basis for denying the vindication of a right expressly provided for in the Bill of Rights where the standards for applicability of that right to the weapon of choice have been met.

Defendant next argues, DE 199 at page 7 of 17, that "[l]egislative enactments enjoy a strong presumption of constitutionality . . . [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt" (citing state court cases). While is indisputable that such a presumption exists (although it is not clear that the "reasonable doubt" rubric in that context is a part of federal law), it is equally true that the statute's infringement of an enumerated right would overcome any such presumption.

Plaintiff will next address a relevant set of issues not touched upon in Defendant's briefing in the sole point heading in this brief that does not parallel or paraphrase Defendant's.

THIS COURT'S POWER TO "REFORM" THE STATUTE

At the telephonic conference of June 5, 2018, in the context of a discussion about the applicable level of scrutiny, Plaintiff pointed out that since all that was being challenged was the ban on nunchaku as applied to simple in-home possession, the highest level should apply. Defendant countered essentially that the appropriate level of scrutiny would be that for a challenge to the constitutionality of the entire statute as written. This led to a brief side discussion of the Court's power, if any, to "reform" the statute by declaring only a single application (i.e., that to simple in-home possession) unconstitutional.

It is submitted that determination of the level of scrutiny to be applied (which will be addressed *infra*) is inextricably intertwined with the question of the Court's power to "reform" the statute by declaring simple in-home possession—and only that much—unconstitutional.

Such power is, of course, inherent in the federal courts of the United States, because with the combined power to interpret statutes and to assess their constitutionality must follow the power to discern specific unconstitutional applications of an otherwise "presumed-constitutional" statute of more general application, and consequently either to declare the offending application unconstitutional or to "read" the statute as not reaching the application that would be unconstitutional. Perhaps the best-known articulation of this federal judicial power in American Supreme Court jurisprudence is to be found among the seven principles of constitutional construction and adjudication set forth in the famous Brandeis concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), where Justice Brandeis wrote:

> The Court developed . . . a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

> 1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.
>
> 2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."
>
> 3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."
>
> 4. The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.
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> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.
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> 6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.
>
> 7. When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (citations omitted).

Although the above "Ashwander rules" nominally are principles developed by the Supreme Court for its own use, they apply to the lower federal courts by virtue of those courts' duty to adhere to jurisprudential principles articulated by the high court (and also, as a practical matter, by virtue of the fact that the lower courts' decisions are subject to Supreme Court review

that would end up applying those seven principles). Indeed, as to the lower courts they are prescriptive (thus, the "will" in each principle could be read as a "should" or "must"), while presumably the Supreme Court could itself deviate from them if it so chose.

In the present context, the third and seventh principles are most relevant. The third states that a court should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Here, Plaintiff was criminally charged only for his simple in-home possession of nunchaku. *See Maloney v. Cuomo*, 470 F. Supp. 2d 205 (E.D.N.Y. 2007):

> The criminal charges for possession of nunchaku w[ere] based solely on in-home possession, and not supported by any allegations that the plaintiff had used the nunchaku in the commission of a crime; that he carried the nunchaku in public; or engaged in any other prohibited conduct in connection with said nunchaku. Thus, the only criminal activity alleged against the plaintiff was his possession of the nunchaku in his home.

*Id*. at 208.

Thus, the facts do not require this Court to formulate any rule of constitutional law that addresses applications of the statute to possession outside the home or to possession with criminal intent. They require the Court only to reach the question of the constitutionality of the statute as applied to simple in-home possession. Correspondingly, Plaintiff has sought no broader relief than a declaration that the statute as applied to simple in-home possession is unconstitutional. Thus, for the Court even to consider broader constitutional review than that which Plaintiff seeks (and, more importantly, that which the facts would support) would be violative of the third Ashwander rule. Given the foregoing, it follows that the Court must have the power to address the limited application of simple in-home possession and, if appropriate, to declare that application (and no more) unconstitutional, i.e., to "reform" the statute.

A corollary of this same power is expressed in the seventh Ashwander rule: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." If one equates "act of the Congress" with "act of a legislature" (thereby including that of a state), it follows that the Court has the power to construe or "read" the statute as not applying to simple in-home possession. Although this method smacks of legal fiction and appears to sidestep deciding the constitutional issue, it has largely the same practical effect and is not without acceptance as a valid jurisprudential method (but more so in Europe than the U.S., *see infra*). For example, here, the legislative history of the enactment makes it clear that the use of nunchaku in street crime following the Bruce Lee movies of the early 1970s was the impetus for the legislative decision to include "chuka sticks" within the list of prohibited weapons. This, coupled with the faulty legislative assumption that nunchaku lacked any legitimate use whatsoever, lends considerable credence to the proposition that the statute should not be construed to reach simple in-home possession. The difficulty that might arise (which is probably related to Justice Brandeis's specification of "act of the Congress" instead of "act of a legislature") is that a mere interpretation of a state statute by a federal court, as opposed to an outright declaration of unconstitutionality as to the application, might leave open problems of authority that could encourage state courts to disregard the federal courts' interpretation. Nevertheless, the seventh Ashwander rule, like the third, shows that federal courts indeed have the power to "reform" a statute by limiting the scope of its constitutional application.

(It is worth noting that in European constitutional jurisprudence, particularly that of the

German Federal Constitutional Court or *Bundesverfassungsgericht*, the foregoing principle of "interpreting" a statute—even in some cases to the extent of creating a legal fiction—so as to render inoperative the unconstitutional application is well-established under the principle of *verfassungstreue*, a term that roughly translates as "fidelity to the constitution." *See generally* Dieter Grimm, *Constitutionalism: Past, Present and Future* (Oxford University Press 2016).[5] It is fair to say, though, that German dual sovereignty differs from the American variety in several important respects, such that the appropriate course in the United States is simply to declare the specific application of a state statute unconstitutional rather than to "interpret" the statute as not reaching the application that would be unconstitutional.)

Finally, as a concrete example of a federal court finding only specific applications of state statutes unconstitutional in the context of a Second Amendment challenge, one need look no further than *NYSRPA*:

> We hold that the core provisions of the New York and Connecticut laws prohibiting possession of semiautomatic assault weapons and large-capacity magazines do not violate the Second Amendment, and that the challenged individual provisions are not void for vagueness. The particular provision of New York's law regulating load limits, however, does not survive the requisite scrutiny. One further specific provision Connecticut's prohibition on the non-semiautomatic Remington 7615 unconstitutionally infringes upon the Second Amendment right.

804 F.3d at 247.

Here, of course, the "core" provisions of New York's nunchaku ban (i.e., the prohibition against carrying the nunchaku in public) are not being challenged, so the Court need not reach questions related to the constitutionality of those applications.

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[5] In 2002, Plaintiff studied comparative constitutional law with Grimm at NYU Law School, where Grimm was a visiting professor after his term (1987-1999) on the German Federal Constitutional Court had recently ended.

## ARGUMENT

### POINT I

### NUNCHAKU ARE "IN COMMON USE"

It can scarcely be disputed that nunchaku—or "nunchucks" as the instrument is more commonly known—are in common use in modern America.[6] The dispute with Defendant appears to be whether they are *weapons* in common use (see DE 199 at page 8 of 17). This, in turn, begs the question of what things constitute "weapons." But since the actual constitutional term is "arms," the Supreme Court's definition of that term may be a useful starting point. After stating that "[t]he 18th-century meaning is no different from the meaning today" and quoting a short 18th-century definition, *Heller*, 554 U.S. at 581, the Court continues with the longer, more specific definition:

> any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.

*Id.* (quoting Timothy Cunningham, *A New and Complete Law Dictionary* (1771) and citing Noah Webster, *Dictionary of the English Language* (1828) (reprinted 1989), for a similar definition).

Examining each of the above definitional elements in turn, we may extract the following:

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[6] As the video of the Subaru commercial that Plaintiff offers as an additional exhibit, https://www.youtube.com/watch?v=CHYZtPA2Tss, makes apparent, nunchucks are as familiar to Americans as are such other potentially dangerous instrumentalities as skis, long fluorescent light bulbs, and sledgehammers. At the January 2017 trial, Sensei Pellitteri testified that after considerable study he has concluded that "nunchucks seem to be the most popular arts weapon." Tr. 238: 5-10. That testimony is unrebutted. A Google search of the term "nunchucks" or "nunchaku" yields myriad results relating to interests in the instrument in America (a fact of which this Court may take judicial notice), and the very fact that the Anglicized term "nunchucks" has come into existence in our language and is widely understood leads toward the conclusion that the instrument is well known and in common use in our culture. *See also* the memorandum attached as Exhibit 1 to the Second Amended Verified Complaint, DE 116, nad which was marked as Plaintiff's Exhibit B at the January 2017 trial.

(1) *An "arm" is "any thing that a man wears for his defence."*

An arm (obviously appropriate for use by any human being rather than merely a "man" in all but perhaps the last example given below) could therefore be a suit of armor, a bullet-proof vest, a spiked wristband, a helmet, or even a jockstrap. But no court has yet reached any of those specific examples, and it would seem that nunchaku, even if used as an apparel accessory, would not be of any defensive utility while employed in that mode. However, if "wears" is read more broadly to include "carries" (as by wearing a holster to carry a pistol, or a sling to carry a rifle), nunchaku would be an arm under this definition. As yet the case law is too lean to offer any authority on that last proposition either way.

(2) *An "arm" is "any thing that [a person] takes into his [her, their] hands."*

It is indisputable that nunchucks may be taken into one's hands. Indeed, they are fairly useless as arms (weapons) unless one does exactly that.

(3) *An "arm" is "any thing that [a person] useth in wrath to cast at or strike another."*

Presumably, "wrath" here is meant as something akin to "the state of mind of battle" rather than the word's somewhat more restrictive synonym, "anger."[7] It is also reasonable to assume that "cast at" and "strike" are used in contradistinction, such that "cast at" refers to the

[7] It is submitted that it is possible to engage in combat without anger. For example, one may be deeply fearful and still fight bravely, as is likely the case with many soldiers who have died in battle and as is undoubtedly the case with any mother (human or otherwise) defending her young against harm by a more formidable adversary. Indeed, the mindset of defending another (as is often the case in one's own home) with compassion even for the opponent is the combat mindset of Plaintiff's "Shafan HaLavan." See Tr.72:16-73:24. *Cf.* Yamamoto Tsunetomo, *Hagakure: The Book of the Samurai* (1716), translated by William Scott Wilson (1979) at 57 ("The wisdom and courage that come from compassion are real wisdom and courage.").

act of throwing or firing a projectile, whether it is a stone, a spear, an arrow, or a bullet, while "strike" has the obvious meaning of hitting an opponent with, for example, a club. a baton, or one of a pair of batons joined together by a cord or chain (i.e., a nunchaku).

Taken together, it is clear that nunchaku satisfy at least two and possibly all three of the above disjunctive (connected by "or') definitional elements.

It is, of course, indisputable that nunchaku are not firearms. Therefore, Defendant's argument to the effect that the Second Amendment contemplates only firearms must be briefly addressed. Defendant writes:

> Examining *Heller*, the Second Circuit pointed out that "[t]he Supreme Court [ ] identified the core of Second Amendment protections by reference . . . to . . . particular weapons." (Emphasis added). *Jiminez [sic]*, 2018 WL 3352599, at *4. Notably the weapon at issue in *Heller* was a firearm while ammunition for a firearm was at issue in the *Jiminez [sic]* case. In *NYSRPA* the Second Circuit observed that "[n]either *Heller* nor *McDonald* [ ] delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearms restrictions." *NYSRPA*, 804 F.3d at 254 (emphasis added).
>
> Defendant reads this interpretation to mean that the Supreme Court's intent relates to firearms.

DE 199 at 9 of 17.

In addition to the analysis of the Supreme Court's own proffered definition that began this section, as well as the trite truism that the word "arms" does not presume the prefix "fire-" there is, in the end, the very significant legal historical fact that the Supreme Court, apparently unanimously, took the trouble to grant *certiorari* on—and then to reverse and remand—a decision of the high court of Massachusetts, in *Caetano v. Massachusetts*, 577 U.S. ___, 2016 WL 1078932 (2016), a case that involved not a firearm but a stun gun.

Finally, it is submitted that all "weapons" are "arms" for Second Amendment purposes, although "arms" may be broader by virtue of the term's apparently including wearable items.

POINT II

COUNTER-ANALYSIS OF "TYPICAL USE BY LAW-ABIDING CITIZENS"

As noted in the previous section, the gravamen of Defendant's argument appears to be that nunchaku are not weapons in common use specifically as weapons of (lawful) self-defense in the home. Yet the evidence at the January 2017 trial showed that they are in common use as martial-arts weapons and have also enjoyed some use as weapons or "tools" (Orcutt's term, *see, e.g.*, Tr. 117:19, 132:9, 135:12, 140:13-17, 141:7) of law enforcement and corrections, particularly useful in that setting for the purpose of subduing a combative and/or dangerous suspect or inmate without resultant serious physical injury to either the officer or the suspect/inmate, *see, e.g.*, Tr. 139:10-141:2, 154:10-23, 214: 8-216:22.

In the case of the former (martial-arts use), such use appears to be a "lawful purpose" in virtually all states but New York (in California, such use under the applicable statute must be limited to a dojo or martial-arts studio), while in the case of the latter (police and correction officer use), such use is to be presumed lawful, although, to be candid, isolated cases of (presumably unlawful) misuse in that context have occurred.[8] But the same would be true of any protected weapon except perhaps a so-far-imaginary one that could be used only for "good" and not for "evil." (As yet, it appears that the human brain is the only weapon with that potential

[8] A particularly egregious example of apparently unjustified infliction of pain on a prisoner by two correction officers (who apparently did not know or forgot that their actions were being videorecorded) is publicly available at https://www.youtube.com/watch?v=j_SbZ46SGH8 and is included here not as 11th-hour evidence (since it in no way supports Plaintiff's cause) but simply because Plaintiff, having been aware of it for some time, prefers to share it with the Court and opposing counsel in the spirit of open and fair litigation.

capability, but its overall performance in that regard over the millennia has been rather shoddy.)

By narrowing the "common use for lawful purposes" element to virtually the narrowest possible construction and framing it as "typical use," thereby implying a requirement that Plaintiff's use be "typical" of the overall common use of the nunchaku (which use undeniably exists and overlaps with Plaintiff's in the martial-arts sphere but not necessarily as to home defense), Defendant essentially eviscerates the Second Amendment's applicability to any but the nation's most popular home-defense weapons (which include semiautomatic firearms but perhaps not nunchaku). Whether endorsing such an argument would be sound jurisprudence in the long run remains to be seen, but it is submitted that: (1) such arguments are inconsistent with *Heller*, see discussion at 6-7, *supra*, beginning with the sentence, "The Supreme Court in *Heller* could easily have articulated the standard as 'commonly used for home defense' if that were its intended meaning."; and (2) to the extent that the more lethal weapons are the more popular for home defense (as indeed appears to be the case in America today, and which makes sense because lethality translates to "effectiveness" so long as such considerations as mercy, compassion, and respect for human life are left out of the universe of desired "effects"), such a jurisprudence would put courts squarely "in the business of demanding that citizens use more force for self-defense than they are comfortable wielding," *Caetano v. Massachusetts*, 577 U.S. ___, 2016 WL 1078932 (2016), at *6 (Alito, J., concurring), which, at root, is antithetical to the essential role of the provisions of the Bill of Rights in protecting both the rights of minorities and of those related to individual freedom of choice and of conscience, see discussion at 7, *supra*.

## POINT III

## NUNCHAKU ARE NOT "DANGEROUS AND UNUSUAL" WEAPONS

In her brief, DE 199 at 12-14 of 17, Defendant conflates *Heller*'s refined (and hopefully yet to be refined further) term of art "dangerous and unusual" with such concepts as potential lethality and dangerousness, citing several cases that recognize that nunchaku can be dangerous or even lethal, a potential that Plaintiff does not deny. Indeed, a weapon that can never be used in a dangerous manner is not much of a weapon. The handgun, that quintessential home defense weapon that was accorded Second Amendment protection in *Heller*, is undeniably far more dangerous than nunchaku because the former contains stored energy in the form of gunpowder in the cartridges, works by inflicting penetrating trauma that can be and often is lethal, and is capable of both accidental discharge and the taking of innocent lives either intentionally by malice or accidentally by "friendly fire." None these attributes ascribe to the nunchaku.

Many items in common use in America today would, under Defendant's sweeping rubric, be "dangerous and unusual," perhaps even including such items as skis, long fluorescent light bulbs, and sledgehammers (*cf.* discussion of the Subaru commercial at 13 n.6, *supra*). Certainly that ubiquitous bludgeon that is a proud symbol of American culture, the **baseball bat**, is in many ways far more dangerous than the nunchaku: both Orcutt (Tr. 168:8-168:4) and Pellitteri (Tr. 256:5-8) testified that a bat is a far better tool for breaking a skull than is a nunchaku. (The comparative combat advantage of nunchaku is that in skilled hands it allows for targeted strikes and quick recovery while also keeping the lower limbs protective of the groin and free to throw kicks, Tr. 32:15-71:19-72:3, whereas the bat both leaves the wielder of that weapon vulnerable if he or she swings and misses or fails to deliver a definitive blow, and also requires that the legs be

in a "batter's stance" that is neither protective of the groin nor amenable to quick kicking.) In any event, the foregoing discussion, meant to illustrate the fallacy of conflating the term of art "dangerous and unusual" with such concepts as potential lethality and dangerousness, nevertheless leaves open the question of precisely what the *Heller* Court meant in introducing the term.

It is perhaps illustrative of the genius of the late Justice Scalia that the opinion leaves open wide possibilities for later interpretation as the long-arrested jurisprudence[9] of the Second Amendment evolves. Forward-looking public-policy arguments relating to sensible gun-control measures and the conditions necessary for their enactment in the context of the "dangerous and unusual" rubric have already been addressed in the brief (DE 195) that Plaintiff submitted on the same day as the second proposed pretrial order (May 23, 2018), and will not be repeated here. Instead, *Heller* itself will first be parsed for clues as to the intended meaning of "dangerous and unusual." The Court first writes:

> We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U.S., at 179, 59 S.Ct. 816. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

554 U.S. at 627.

Here, it is made clear that "dangerous and unusual" is essentially antithetical to "in [lawful] common use," and it would appear that a weapon that is "dangerous and unusual" would

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[9] The term "arrested jurisprudence" in this context is taken from a law review article in which the author contrasted the striking non-development of the Second Amendment as of 14 years before Heller with the robust development of the parameters of the First Amendment that existed by then. William Van Alstyne, "The Second Amendment and the Personal Right to Arms," 43 Duke L.J. 1236 (1994).

not usually be in lawful common use, although it is unclear whether a weapon that is in lawful common use (e.g., a semiautomatic rifle) could still be "dangerous and unusual" (*cf.* DE 184 at ¶ 45; DE 195 at 5 of 6). Indeed, the Second Circuit seems to have acknowledged legal uncertainty regarding these inversely correlated tests when that court wrote in *NYSRPA*:

> Looking solely at a weapon's association with crime . . . is insufficient. We must also consider more broadly whether the weapon is "dangerous and unusual" in the hands of law-abiding civilians. *Heller* expressly highlighted "weapons that are most useful in military service," such as the fully automatic M–16 rifle, as weapons that could be banned without implicating the Second Amendment. But this analysis is difficult to manage in practice. Because the AR–15 is "the civilian version of the military's M-16 rifle," defendants urge that it should be treated identically for Second Amendment purposes. But the Supreme Court's very choice of descriptor for the AR-15—the "civilian version"—could instead imply that such guns "traditionally have been widely accepted as lawful."
>
> Ultimately, then, neither the Supreme Court's categories nor the evidence in the record cleanly resolves the question of whether semiautomatic assault weapons and large-capacity magazines are "typically possessed by law-abiding citizens for lawful purposes."

804 F.3d at 256-257 (footnotes omitted).

The sentence, "We must also consider more broadly whether the weapon is 'dangerous and unusual' in the hands of law-abiding civilians." is instructive. It means that, in addition to considering the weapon's use in criminal activity, its tendency to cause disproportionate harm even in the hands of the law-abiding is also a relevant consideration. *Heller* itself gives some clues in this regard: the sawed-off shotgun at issue in *Miller* was the paradigmatic example of a "dangerous and unusual" weapon that was not in common use for lawful purposes, and among the attributes of a sawed-off shotgun is its tendency to blast shot over wide area, potentially causing harm to persons other than the intended target and thereby also causing disproportionate

harm even in the hands of the law-abiding and even if it were to have been lawfully possessed. The Court also wrote (in the passage that gave rise to the NYSRPA court's above-quoted commentary about fully automatic M-16 rifles not implicating the Second Amendment):

> It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

Heller, 554 U.S. at 627-628.

Such military-style "sophisticated arms that are highly unusual in society at large" that would indisputably be " 'dangerous and unusual' [even] in the hands of law-abiding civilians," *NYSRPA*, would include grenades and grenade-launchers, fully automatic repeat-fire rifles with large magazine capacities, and perhaps even semi-automatic rifles. While only the lattermost of these examples is now "in lawful common use," all share the characteristics that they are: (1) efficient at killing large numbers of people very quickly; and (2) readily capable of causing serious injury or death to persons other than the intended target and thereby also capable of causing disproportionate harm to innocent persons even in the hands of the law-abiding.

The nunchaku has neither of these characteristics. It is already in common use for lawful purposes (martial arts) in modern America, and it is less effective than the ubiquitous baseball bat in causing the fatal or permanently disabling injury of fracturing a skull. It contains no stored energy as do all firearms, nor does it cause penetrating injury as do guns, spears, swords and knives, but, rather, is capable of being used in a restrained manner that respects human life. In the end, "dangerous and unusual" may be a "fuzzy logic" exercise, weighing many factors, but none of those factors favor placing the nunchaku in that protectionless category.

POINT IV

RESPONSE TO "PUBLIC POLICY ARGUMENTS"

In her brief, DE 199 at 14 of 17, Defendant writes that Plaintiff "is not seeking permission for others to possess or have access to nunchaku for these purposes [i.e., possession within the home for self-defense and martial arts training]." While it is technically correct that Plaintiff is not "seeking permission" (his position being that he has an enumerated constitutional right, such that "permission" would be a tragicomic misnomer), the gravamen of Defendant's statement appears to be that Plaintiff is purportedly acting solely in his own self-interest and/or that considerations of the right sought to be vindicated as it applies to others are beyond the view of this Court in deciding this case. Neither proposition would be correct. As explained at page 4, *supra* ("Finally, because what is being sought . . ."), declaratory judgment applies to all. Further, Plaintiff's having commenced other actions within the federal courts sitting in New York (*see, e.g.*, *Nuccio v. Duvé*, 13-CV-1556 (N.D.N.Y.) (currently stayed pending the final outcome of this case)) speaks to his true motives (to the extent they are relevant) in a way that perhaps gives a new spin to the old adage, "Actions speak louder than words." In any event, this Court has a duty to consider the effects of its decision on all affected persons, not just Plaintiff.

Defendant appears to be applying something akin to a "class of one" analysis to Plaintiff's Second Amendment claim, which is hardly appropriate given that the right sought to be vindicated is not equal protection, but, rather, an enumerated and far less amorphous individual right that, for various reasons, was not meaningfully interpreted by the Supreme Court until it was 217 years old (*Heller* in 2008 having come 217 years after the ratification of the Bill of Rights in 1791).

Building upon her inappropriate "class of one" approach, Defendant also launches a relatively mild *quasi-ad-hominem* attack on Plaintiff, reciting irrelevant and in some cases not entirely correct "facts" describing events that occurred, as it happens, 18 years ago today.[10]

Returning to the "typical use" rubric introduced in Point II of her brief (see Plaintiff's response in the parallel section *supra*), Defendant writes:

> Assessment of typical use must be that typical use of a "law-abiding, responsible citizen." In *Jiminez [sic]* the Second Circuit noted that Jiminez' unfavorable military record justified the ban against his possession of ammunition. *Jiminez*, 2018 WL 3352599, at *4. In the case presented, Defendant asks the Court to consider the circumstances under which Plaintiff Maloney's nunchaku was discovered.

DE 199 at 14 of 17.

But the proffered *Jimenez* analysis is inappropriate, simply because § 265.01 contains no element that relates to the "status" of the possessor, whereas the statute at issue in *Jimenez* did. (In contrast, § 265.02 does have a "status" element, but Plaintiff is not challenging that provision because he has not previously been convicted of any crime and thus lacks standing.)

Were this Court to accept Defendant's invitation to "consider the circumstances under

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[10] August 24, 2000, was the date on which Plaintiff left his home and surrendered to police, who had failed to obtain a warrant during the 12 hours that they surrounded his home. Defendant states that "Maloney refused to speak with police who responded to his home to investigate the phone company employee's claim, choosing instead to maintain his *Peyton [sic]* rights," as if either such action would be culpable conduct. In fact, Plaintiff spoke with police over the telephone intermittently during virtually the entire 12-hour ordeal, a fact of which Defendant's counsel was once well aware but has perhaps forgotten, see Tr. 331:4-332:16. As to his rights under *Payton v. New York*, 445 U.S. 573 (1980), Plaintiff chose to remain in his home demanding that police obtain a search or arrest warrant, which they never did. After Plaintiff, exhausted and fearful, finally "came outside," police executed numerous warrantless searches and seizures within his home, seizing not only firearms that were in a locked safe that the police opened with explosives and long guns in a separate locked box that they broke open, but also books and papers, Tr. 104:12-23 and "effects" as innocuous as a chess set, see Tr. 106:23. But none of these facts are relevant to the Second Amendment analysis.

which Plaintiff Maloney's nunchaku was discovered," it is submitted that an additional trial would be required, because the details relating to those circumstances are very much in dispute and have never been subjected to the factfinding of a trial.

Finally, Defendant argues that because there is no licensing scheme or other regulatory control of nunchaku possession in New York, there would be "no safeguard for the State to ensure that this weapon would be possessed by *law abiding citizens*[,]" DE 199 at 15 of 17 (emphasis in original), and for that reason the Court should not hold the challenged application unconstitutional. But if the New York legislature believes that a "premises permit" is needed to ensure that only the law abiding may legally have two sticks connected by a cord or chain in their homes, a favorable declaratory judgment would almost certainly compel it to act in the public interest in that regard. It is neither the province nor the duty of a federal court to refrain from constitutional adjudication in perceived deference to prior state legislative inaction, especially where, as here, such prior inaction can readily be remedied if the legislature deems it necessary to take appropriate regulatory action in the wake of the federal court's constitutional pronouncement.

Plaintiff's own public policy arguments are set forth in the brief (DE 195), *q.v.*, that Plaintiff submitted contemporaneously with the second proposed pretrial order on May 23, 2018.

POINT V

ANALYSIS OF LEVEL OF CONSTITUTIONAL SCRUTINY TO BE APPLIED

As explained beginning at page 8, *supra*, determination of the level of scrutiny to be applied in this case is inextricably intertwined with the question of the Court's power to "reform" the statute by declaring simple in-home possession—and only that much—unconstitutional. That question having been examined, it is urged that the appropriate level of scrutiny is the highest available in Second Amendment jurisprudence because the only challenged application is simple in-home possession and because, as the Second Circuit recently reaffirmed in *Jimenez*, " It is clear from *Heller* and our decisions applying it that protecting oneself in one's home with a weapon in common use is at the core of the Second Amendment." Slip Opinion, at page 12, lines 9-11 (copy annexed as Appendix).

Whether one describes that level of scrutiny as "strict" or "intermediate" remains to be clarified by the Supreme Court, and Defendant's assertion, DE 199 at 16 of 17, that an "overriding and compelling interest in continued public safety and crime prevention continues to justify the prohibition against nunchaku" may be correct as to possession on the street, justifying that continuing prohibition if it were to be challenged. But it is not being challenged here.

Defendant correctly states, *id*., that "[t]he legislative history of the 1974 amendment to Penal Law § 265.01 (See Exhibit A) cited to concern that nunchaku would be used by gangs and by individuals who would emulate the famed martial artist actor, Bruce Lee." But there is no reason to believe that recognizing the right to keep and bear nunchaku solely in one's home, a right that most citizens of the United States already enjoy, would trigger any criminal resurgence of such emulation of a long-dead actor by "gangs" or other wrongdoers. If the Court were to

grant the declaratory judgment sought, the prohibitions on public carriage of nunchaku, and on use of nunchaku in the home with criminal intent, would still stand.

Simply put, there is neither a compelling state interest nor even a substantial relationship to the achievement of an important governmental objective in maintaining a ban on the simple in-home possession of nunchaku. In the words of the late Archibald R. Murray, written in 1974, "in view of the current interest and participation in [martial arts] 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."

Perhaps it is.

## CONCLUSION

For all of the foregoing reasons, this Court should declare that § 265.01 of the Penal Law of the State of New York, to the extent that it defines the simple possession of nunchaku in one's home as a crime, is of no force and effect.

Dated: August 24, 2018
Port Washington, New York

_____

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# Appendix

17-287-cr
United States v. Jimenez

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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August Term, 2017

(Argued: March 8, 2018 Decided: July 10, 2018)

Docket No. 17-287-cr

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UNITED STATES OF AMERICA,

*Appellee*,

v.

JOSE JIMENEZ,

*Defendant-Appellant*.

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Before: POOLER, RAGGI, and DRONEY, *Circuit Judges*.

Jose Jimenez pled guilty to possession of ammunition after having been dishonorably discharged from the military, in violation of 18 U.S.C. § 922(g)(6). Having properly objected at the district court and reserved his right to appeal, he now challenges the validity of Section 922(g)(6) under the Second Amendment.

Assuming that he is entitled to Second Amendment protection, we find that Section 922(g)(6) as applied to Jimenez withstands intermediate scrutiny.

Affirmed.

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DANIEL HABIB, Federal Defenders of New York, Inc., New York, N.Y., *for Defendant-Appellant.*

SAMUEL RAYMOND, Assistant United States Attorney (Margaret Garnett, Assistant United States Attorney, *on the brief*), *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, N.Y., *for Appellee*.

POOLER, *Circuit Judge*:

Jose Jimenez pled guilty to possession of ammunition after having been dishonorably discharged from the military, in violation of 18 U.S.C. § 922(g)(6). Having properly objected at the district court and reserved his right to appeal, he now challenges the validity of Section 922(g)(6) under the Second Amendment. Assuming he is entitled to Second Amendment protection, we find that Section 922(g)(6) as applied to Jimenez withstands intermediate scrutiny. Accordingly, we AFFIRM the judgment of the district court.

## BACKGROUND

On June 3, 2015, Jose Jimenez was arrested in unlawful possession of a bullet retrieved from his person following an attempted undercover firearms purchase. Jimenez had agreed to drive Oscar Sanchez to the parking lot of a fast food restaurant in the Bronx on June 3, 2015 in exchange for $40. Sanchez had arranged to sell 20 handguns to a person who was, in fact, an undercover detective from the New York Police Department ("NYPD"). Jimenez claims that Sanchez did not inform him of the purpose of the trip.

After arriving at the parking lot, the detective and Sanchez got out of their cars, whereupon Sanchez showed the detective a 9-millimeter handgun and transferred a black bag into the trunk of the detective's car. At the detective's request, Sanchez opened the bag. Inside was a box of Capri Sun and a carjack but no guns. No deal having been done, Sanchez removed the bag from the detective's trunk, got back in the car with Jimenez and an unnamed woman, and they drove away.

But that was not the end of the matter. As part of a plan with the undercover NYPD purchaser, two agents from the Department of Alcohol, Tobacco, and Firearms ("ATF") had followed Jimenez's car. After the sale did not

occur, these agents ordered Jimenez to pull over several blocks from the parking lot. As the law enforcement officials approached the car, Sanchez removed a round from the chamber of his 9-millimeter handgun and handed it to Jimenez. The officials searched Jimenez's car, found Sanchez's weapon—which was loaded with 12 rounds of ammunition—and brought everybody to the ATF office in the Bronx for questioning. At the office, ATF agents patted down Jimenez and discovered the 9-millimeter round in his pocket.

Further investigation revealed that Jimenez had been dishonorably discharged from the Marines in 2012 after serving 18 months in a military prison for conspiracy to sell military property, wrongful disposition of military property, use and possession of a controlled substance, and conduct of a nature to bring discredit upon the armed forces, in violation of 10 U.S.C. §§ 881, 908, 912a, 934. He had been convicted of these offenses after confessing to using and dealing ecstasy and to possessing and selling firearms and night vision goggles that had been stolen from the military.

Federal law prohibits anybody who "has been discharged from the Armed Forces under dishonorable conditions" from possessing firearms or ammunition

"in or affecting commerce." 18 U.S.C. § 922(g)(6). On July 6, 2015 Jimenez was arrested, and on July 28 he was indicted, for violating this law.

In the district court, Jimenez filed a motion to dismiss the indictment challenging the constitutionality of Section 922(g)(6) under the Second Amendment. After the district court denied this motion, *United States v. Jimenez*, 15-cr-496, 2016 WL 8711451 (S.D.N.Y. June 3, 2016), he pled guilty pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, preserving his right to appeal the denial of his motion to dismiss. The district court sentenced him principally to three years' supervised release and entered judgment on January 11, 2017. Jimenez filed a notice of appeal the next day.

## DISCUSSION

### I. The Nature of the Challenge

The sole question in front of us is whether Jimenez's prosecution and conviction for possessing ammunition after having been dishonorably discharged violates the Second Amendment. Jimenez presents his argument as a facial challenge to the statute under which he was convicted, but it is not.

"When a defendant has already been convicted for specific conduct under the challenged law," we will "examine the complainant's conduct before

analyzing other hypothetical applications" of that law. *United States v. Decastro*, 682 F.3d 160, 163 (2d Cir. 2012) (internal quotation marks omitted); *see also Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012). If a defendant's conviction presents constitutional problems, those problems may be with the face of the statute or they may pertain only to the application of the statute to certain situations. But if the statute is constitutionally applied to the defendant, we follow the principal that "[f]ederal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical state of facts." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (alterations and quotation marks omitted). Contrary to Jimenez's urgings, a defendant to whom a statute constitutionally applies has no standing to challenge the statute's constitutionality as it applies to others differently situated. *See United States v. Farhane*, 634 F.3d 127, 138 (2d Cir. 2011). Because we find that Jimenez's Second Amendment rights were not violated, we will not hear his arguments about alleged constitutional problems with other potential applications of the statute under which he was convicted. He has "necessarily failed to state a facial challenge." *Decastro*, 682 F.3d at 163 (internal punctuation omitted).

## II. Evaluating Second Amendment Challenges

Since the Supreme Court announced that the Second Amendment protects an "individual right to possess and carry weapons in case of confrontation," *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), we have developed a two-step framework for determining whether legislation infringes on this right, *see New York State Rifle & Pistol Association, Inc. v. Cuomo*, 804 F.3d 242, 254-55 (2d Cir. 2015) ("*NYSRP v. Cuomo*"). First, "we must determine whether the challenged legislation impinges upon conduct protected by the Second Amendment." *Id.* at 254. Second, if we find that a law implicates the Second Amendment as *Heller* instructed us to interpret it, we determine the appropriate level of scrutiny to apply and evaluate the constitutionality of the law using that level of scrutiny. *See id.* at 257-58, 261. We review de novo a district court's determination that the application of a law does not violate the Second Amendment. *See New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45, 54 (2d Cir. 2018) ("*NYSRP v. City*").

## III. Step One: Whether the Second Amendment Applies to Jimenez

There is some reason to think the Second Amendment does not apply to Jimenez. As far as we can tell, no other federal appellate court in the post-*Heller*

era has examined the ban we review today. *But see United States v. Day*, 476 F.2d 562, 568 (6th Cir. 1973) (before *Heller*, finding that 18 U.S.C. § 922(g)(6) complies with the Second Amendment). But precedent does provide some guidance. *Heller* instructed that its reading of the Second Amendment not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill" and other "presumptively lawful regulatory measures." 554 U.S. at 626, 627 n.26. We have previously relied on this passage to uphold the federal ban on ex-felons' access to firearms and ammunition. *United States v. Bogle*, 717 F.3d 281, 281-82 (2d Cir. 2013); *see also United States v. Stuckey*, 317 F. App'x 48, 50 (2d Cir. 2009) (a previous non-precedential summary order coming to the same conclusion). *Heller* also emphasized that not all gun regulations implicate the right it announced. *See* 554 U.S. at 595, 626. The individual right that *Heller* found in the Second Amendment "protects only 'the sorts of weapons' that are (1) 'in common use' and (2) 'typically possessed by law-abiding citizens[1] for lawful

[1] Although the Court uses "citizens", presumably at least some non-citizens are covered by the Second Amendment. *Heller* quoted favorably *Verdugo-Urquidez*'s reading that "'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with

purposes.'" *NYSRP v. Cuomo*, 804 F.3d at 254-55 (quoting *Heller*, 554 U.S. at 627, 625). Applying this limitation, we have held that "the Second Amendment does not protect the unlawful purpose of possessing a firearm in furtherance of a drug trafficking crime." *United States v. Bryant*, 711 F.3d 364, 370 (2d Cir. 2013) (emphasis omitted). Some of our sister circuits have found that individuals who have failed to abide by the law or are otherwise "unvirtuous," as that word was understood by the political elite of the Founding generation, are not entitled to *Heller*'s protections. *See United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) ("[T]he concept of a right to arms was inextricably and multifariously tied to that of the 'virtuous citizen,' such that the right to arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue…" (internal quotation marks omitted)); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) ("[F]elons are categorically different from the individuals who have a

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this country to be considered part of that community." *Heller*, 554 U.S. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). It would seem, then, that at least members of the "national community" or those with a "sufficient connection" with that community are part of the "people" covered by the Second Amendment.

fundamental right to bear arms, and Vongxay's reliance on *Heller* is misplaced…"); *see also Binderup v. Attorney General United States of America*, 836 F.3d 336, 348-49 (3d Cir. 2016) (discussing the exclusion of "unvirtuous citizens" from Second Amendment protection); *Hamilton v. Pallozzi*, 848 F.3d 614, 625 (4th Cir. 2017) (same); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) ("While felons do not forfeit their constitutional rights upon being convicted, their status as felons substantially affects the level of protection those rights are accorded.").

However, we have never determined which particular conduct or characteristics can disqualify some individuals from the right that *Heller* recognized. Beginning to elaborate a test for who qualifies for the Second Amendment's protections risks introducing difficult questions into our jurisprudence, including questions that have divided other courts. *See*, *e.g.*, *Binderup*, *supra*; *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016). Given the "vast *terra incognita*" that *Heller* left in its wake, *Kachalsky*, 701 F.3d at 89 (internal quotation marks omitted), we have routinely assumed that the Second Amendment applies to a given application of a firearms (or ammunition) regulation in order to determine whether the law being challenged would withstand the requisite level of scrutiny. If it would, we need not grapple

with whether the law actually implicates the Second Amendment, since it would comport with that Amendment's dictates in any case. *See NYSRP v. City*, 883 F.3d at 61-62; *NYSRP v. Cuomo*, 804 F.3d at 257; *Kwong v. Bloomberg*, 723 F.3d 160, 168 (2d Cir. 2013); *Kachalsky*, 701 F.3d at 89. Proceeding with our usual caution, we find that it is unnecessary to determine whether Jimenez can claim any Second Amendment protections because even if we assume (without deciding) that he can, we conclude that those protections do not preclude his conviction under Section 922(g)(6).

## IV. Step Two: Scrutinizing Section 922(g)(6)

### A. Determining the Appropriate Level of Scrutiny

On the assumption that Jimenez maintained an individual right to bear arms under the Second Amendment, we must first determine the appropriate level of scrutiny to apply. In doing so, "we consider two factors: (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." *NYSRP v. Cuomo*, 804 F.3d at 258 (internal quotation marks omitted). Laws that place substantial burdens on core rights are examined using strict scrutiny. *See NYSRP v. City*, 883 F.3d at 56. But laws that place either insubstantial burdens on conduct at the core of the Second Amendment or

substantial burdens on conduct outside the core of the Second Amendment (but nevertheless implicated by it) can be examined using intermediate scrutiny. *See id.*, 883 F.3d at 57-58 (applying intermediate scrutiny to non-substantial burden on core conduct); *id.* at 58-59 (applying intermediate scrutiny to substantial burden on non-core conduct); *NYSRP v. Cuomo*, 804 F.3d at 258-60 (substantial burden on non-core conduct); *Kwong*, 723 F.3d at 167-68 (non-substantial burden on core conduct); *Kachalsky*, 701 F.3d at 96 (substantial burden on non-core conduct).

It is clear from *Heller* and our decisions applying it that protecting oneself in one's home with a weapon in common use is at the core of the Second Amendment. *See Heller*, 554 U.S. at 634-35; *NYSRP v. City*, 883 F.3d at 56; *Kachalsky*, 701 F.3d at 93-94. Jimenez argues that this precedent establishes that a categorical ban on firearms or ammunition possession based on an individual's unfavorable military record necessarily places a substantial burden on core Second Amendment protections because it will always prevent those subject to the ban from any use of any weapon for any purpose, including self-defense within the home. This argument rests on a misunderstanding of the relevant precedent. *Heller* reads the Second Amendment as "elevat[ing] above all other

interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home." 554 U.S. at 635 (emphasis added). The Supreme Court thus identified the core of Second Amendment protections by reference not only to particular uses and particular weapons but also to particular persons, namely, those who are "law-abiding and responsible." Since *Heller*, our court has consistently included the "law-abiding and responsible" qualification when identifying the Second Amendment's core protections. *See Decastro*, 682 F.3d at 166 (observing that heightened scrutiny is triggered only by restrictions that operate as a "substantial burden" on "ability of law-abiding citizens to possess and use a firearm for lawful purposes"); *NYSRP v. City*, 883 F.3d at 56 (quoting *Decastro*); *NYSRP v. Cuomo*, 804 F.3d at 259 (same). Other circuits have emphasized *Heller*'s specific concern for the rights of law-abiding and responsible individuals. *See United States v. Chester*, 628 F.3d 674, 682-83 (4th Cir. 2010) ("Although Chester asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in *Heller*—the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense…"); *Tyler*, 837 F.3d at 691 (Because "the risk inherent in firearms and other weapons distinguishes the Second Amendment

right from other fundamental rights…we should caution against imposing too high a burden on the government to justify its gun safety regulations, particularly where Congress has chosen to rely on prior judicial determinations that individuals pose a risk of danger to themselves or others." (internal citation and quotation marks omitted)); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) ("That *some* categorical limits are proper is part of the original meaning, leaving to the people's elected representatives the filling in of details.").

Consistent with this precedent, we hold that those who, like Jimenez, have been found guilty of felony-equivalent conduct by a military tribunal are not among those "law-abiding and responsible" persons whose interests in possessing firearms are at the Amendment's core. The commission of a felony is a failure to abide by laws that our government has deemed especially important. *See Felony*, Black's Law Dictionary (10th ed. 2014) (defining felony as a "serious crime"). The Supreme Court recognized this fact in specifically identifying felon bans as "presumptively lawful." *Heller*, 554 U.S. at 627. There is no reason to depart from that presumption here, given that Jimenez was court martialed for, among other things, trafficking in stolen firearms, conduct for which civilians can be convicted of a felony pursuant to 18 U.S.C. § 922(a)(1).

Though Jimenez objects to the lesser procedural protections of military tribunals, it is well established that "the requirements of the Constitution are not violated where…a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged." *Solorio v. United States*, 483 U.S. 435, 450-51 (1987). "It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance." *Grafton v. United States*, 206 U.S. 333, 345 (1907); *see also United States v. Dixon*, 509 U.S. 688, 726 (1993) ("*Grafton*, and the principle it embodies, are controlling."); *see also Ortiz v. United States*, 585 U.S. ___ (2018) (slip op. at 2, 6) (discussing how the "court-martial system" resembles "civilian structures of justice" such that "the judicial character and constitutional pedigree" thereof "enable [the Supreme] Court…to review the decisions of the court sitting at its apex") Thus, those convicted of felony-equivalent conduct by a military tribunal have been duly removed from the category of "law-abiding" as that term is used in *Heller*.

Though Jimenez's interest is outside the core protections of the Second Amendment, it is burdened substantially. Section 922(g)(6) makes it "unlawful for any person…who has been discharged from the Armed Forces under dishonorable conditions…to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(6). Jimenez was dishonorably discharged. This law thus prohibits Jimenez from possessing firearms or ammunition of any kind for any purpose. It leaves him *no* alternative means of doing so, let alone *adequate* alternatives. *See NYSRP v. City*, 883 F.3d at 56, 60 (discussing the role of "adequate alternatives" in determining the burden).

We have usually analyzed substantial burdens on non-core rights with intermediate scrutiny. *See NYSRP v. Cuomo*, 804 F.3d at 258-60; *Kachalsky*, 701 F.3d at 96.

**B. Applying Intermediate Scrutiny**

To withstand intermediate scrutiny, a law must generally be "substantially related to the achievement of an important governmental interest." *NYSRP v. City*, 883 F.3d at 62. Jimenez "concedes the importance of the government's

interest," Appellant's Br. at 51, as he must, since we have repeatedly held that "[t]he regulation of firearms is a paramount issue of public safety," *Osterweil v. Bartlett*, 706 F.3d 139, 143 (2d Cir. 2013), which is always a "compelling" governmental interest. *NYSRP v. City*, 883 F.3d at 62; *NYSRP v. Cuomo*, 804 F.3d at 261; *Kwong*, 723 F.3d at 169; *Kachalsky*, 701. F.3d at 97; *see also*, *e.g.*, *United States v. Reese*, 627 F.3d 792, 804 n.4 (10th Cir. 2010); *Tyler*, 837 F.3d at 693. Because "state regulation of the right to bear arms has always been more robust than analogous regulation of other constitutional rights," we have found a substantial relation between the means chosen and the compelling end of safety "[s]o long as the [government] produce[s] evidence that fairly supports [its] rationale." *NYSRP v. Cuomo*, 804 F.3d at 261 (alterations and citations omitted).

Jimenez argues that, as to Section 922(g)(6), "the mismatch between means and end is comical." Appellant's Br. at 51. Specifically, he points to the fact that the government presents "no studies, no empirical data, no expert testimony, no legislative findings…to substantiate the belief that no dishonorably discharged veteran may be trusted with a bullet." *Id.* He is correct that the government does not present any statistical evidence about the propensity for violence among the dishonorably discharged. Instead, the government relies on the fact that those

convicted of felonies have been widely found to be more dangerous with deadly weapons. Since Jimenez was discharged for felony-equivalent conduct, the government argues, the reasoning that applies in those cases applies here.[2]

We agree with the government. Section 922(g)(6) became law as part of the Gun Control Act of 1968, which creates similar bans for other "special risk groups": felons, fugitives, illegal drug users and addicts, the mentally incompetent, those who have "been committed to a mental institution," undocumented immigrants, individuals with nonimmigrant visas, those who have renounced United States citizenship, those subject to a domestic violence order of protection, and those convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(1)-(9); Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. Legal Stud. 133, 152 (1975) (using the term "special risk groups" to describe this list). When the military discharge provision of the Gun Control Act was introduced, it was treated as of a piece with all of

[2] Much of the briefs argue over the wisdom of preventing those dishonorably discharged for non-felony-equivalent conduct from possessing firearms. We do not reach these arguments or the questions they present. Since we find that the statute is constitutionally applied to those, like Jimenez, who have been dishonorably discharged for felony-equivalent conduct, Jimenez does not have standing to raise questions about other applications of the statute.

these special risk groups and specifically with the felon ban. *See* 114 Cong. Rec. 13,868-69 (1968) (statement of Sen. Long). That portion of the Gun Control Act was meant to deprive those who had demonstrated an inability or unwillingness to take others' safety into account, or otherwise might be especially dangerous with a gun, from possessing deadly weapons.

There is no reason to think that Jimenez is more likely to handle a gun responsibly just because his conviction for dealing drugs and stolen military equipment (including firearms) occurred in a military tribunal rather than in state or federal court. Dishonorable discharges are generally reserved for members of the military who have "been convicted [by court-martial] of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment."[3] Manual for Courts-Martial United States

[3] There are two other forms of "punitive separation": a "dismissal," which is reserved for commissioned officers, and a "bad-conduct discharge," which is generally for less serious offenses. Manual for Courts-Martial United States (2016 ed.) Rule 1003(b)(8)(A), (C); *see also* 53A Am. Jur. 2d Military and Civil Defense § 164. The legislative history of Section 922(g)(6) suggests that all of these discharges as well as any other discharge "on conditions less than honorable" were meant to be included. 114 Cong. Rec. 13,868 (1968) (statement of Sen. Long). Because Jimenez was dishonorably discharged, we focus on that form of separation. We leave it up to future courts to determine which others fall within

(2016 ed.) Rule 1003(b)(8)(B).[4] Those who, while in the military, receive extensive training on how to use deadly weapons are likely to be more dangerous with firearms should they be thoughtless or heartless enough to turn them onto civilians. Section 922(g)(6) was added to the Gun Control Act at least in part based on the example of Lee Harvey Oswald, who used his Marine marksmanship training to assassinate President John F. Kennedy. *See* 114 Cong. Rec. 13,868-69 (1968) (statement of Sen. Long) (discussing Oswald's discharge and noting that he would be prohibited from owning a gun under the Act); Report of the President's Commission on the Assassination of President Kennedy, 191-92 (1964) (discussing Oswald's marksmanship training).

That military tribunals have fewer procedural protections than civilian courts does not by itself make Congress's reliance on those tribunals for a determination of who should and should not be dishonorably discharged unreasonable. As discussed above, those tribunals have been found to operate

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the meaning of "discharged from the Armed Forces under dishonorable conditions." 18 U.S.C. § 922(g)(6).

[4] This manual has guided courts-martial since enacted by executive order in 1984. *See* Exec. Order 12473, 49 Fed. Reg. 17152 (Apr. 13, 1984). It is amended every year. *See*, *e.g.*, Exec. Order No. 13825, 83 FR 9889 (Mar. 1, 2018). The provisions on punitive separation seem to have remained unchanged since 1984.

consistently with the Constitution and their judgments bar subsequent civilian prosecution for charges resolved therein. Moreover, the Supreme Court has previously approved of Congress's reliance on convictions by courts-martial in determining which members of the military are subject to civil disabilities such as mandatory sex-offender registration. *See United States v. Kebodeaux*, 570 U.S. 387 (2013). As we have said before, "[i]n the context of firearm regulation, the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers of carrying firearms and the manner to combat those risks." *Kachalsky*, 701 F.3d at 97 (internal quotation marks omitted). It was reasonable for Congress to rely upon the military's determination that one of its members is no longer responsible enough to bear arms on the battlefield as a basis for preventing that person from bearing arms in civilian life.

Finally, Jimenez contends that his conviction for possession of ammunition rather than firearms changes the analysis. He argues that "[a] bullet is categorically less dangerous than a gun" since "even an unloaded gun can be used to menace, threaten, or strike a victim." Appellant's Br. at 45-46. We are not convinced. Congress is just as justified in banning certain people from possessing

ammunition as it is in banning them from possessing guns. Guns are not regulated because they can be used as blunt objects: tire irons and baseball bats remain legal. Guns are regulated because of their capacity to launch bullets at speeds sufficient to cleave flesh and shatter bone. Without bullets, guns do not have that capacity. Congress has the same interest in regulating bullet possession as firearm possession.

## CONCLUSION

Jimenez's conviction for possessing a bullet after being dishonorably discharged for felony-equivalent conduct does not violate the Second Amendment. The judgment of the district court is AFFIRMED.