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COURT OF APPEALS

STATE OF NEW YORK

OSTERWEIL,

Appellant,

-against-

No. 167

BARTLETT,

Respondent.

20 Eagle Street
Albany, New York 12207
September 12, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 167, Osterweil
2 v. Bartlett. Counsel?

3 Counsel, do you want any rebuttal time?

4 MR. SCHMUTTER: Yes, Your Honor, I'd like
5 to reserve two minutes of rebuttal time, please.

6 CHIEF JUDGE LIPPMAN: Two minutes, you have
7 it. Go ahead.

8 MR. SCHMUTTER: Thank you, Your Honor.

9 May it please the court, the State of New
10 York asks this court to decide the certified
11 question, but ignore - - -

12 CHIEF JUDGE LIPPMAN: Counsel, are - - -
13 are you in agreement on what we should decide in this
14 case?

15 MR. SCHMUTTER: Well, in terms of how the
16 court should go about it, I believe no.

17 CHIEF JUDGE LIPPMAN: No, but I mean, in
18 terms of the end result. Are you both - - - want the
19 same end result?

20 MR. SCHMUTTER: Your Honor, we think it's
21 important that - - -

22 JUDGE SMITH: You both say yes to the
23 question?

24 MR. SCHMUTTER: I think the answer's no,
25 fundamentally. I - - - yes, we both - - - yes, we

1 both believe - - - it seems like we both believe that
2 Mr. Osterweil is entitled to a permit. But the State
3 of New York believes - - -

4 CHIEF JUDGE LIPPMAN: You get there in
5 different ways; is that what you're saying?

6 MR. SCHMUTTER: Yeah, that's right.

7 CHIEF JUDGE LIPPMAN: Okay, fair enough.
8 But you both want the same result.

9 MR. SCHMUTTER: I believe that's correct.

10 CHIEF JUDGE LIPPMAN: Okay, go ahead.
11 Does your adversary agree to that?

12 MR. PLATTON: Yes, Your Honor.

13 CHIEF JUDGE LIPPMAN: Good, okay, now, go
14 ahead.

15 MR. SCHMUTTER: Thank you, Your Honor.

16 CHIEF JUDGE LIPPMAN: How do we get there?

17 MR. SCHMUTTER: Well, the State of New York
18 is asking this court to get there by ignoring the
19 main issue in the case. This is a fundamentally a
20 constitutional issue. The State of New York - - -

21 JUDGE SMITH: Were - - - were we asked any
22 constitution - - - about a constitutional issue?

23 MR. SCHMUTTER: The certified question
24 itself does not contain within it a constitutional
25 issue.

1 CHIEF JUDGE LIPPMAN: Isn't it - - - isn't
2 it a statutory question that we have in front of us?

3 MR. SCHMUTTER: You have a statutory
4 question that's - - -

5 CHIEF JUDGE LIPPMAN: Statutory
6 construction, no?

7 MR. SCHMUTTER: It's a - - - it's a - - -
8 correct, Judge. It's a statutory question that
9 requires constitutional analysis to arrive at the
10 correct result. And that's the prob - - -

11 JUDGE GRAFFEO: To interpret 400.00(3) we
12 have to look beyond our own case law?

13 MR. SCHMUTTER: I believe that's correct,
14 yes.

15 JUDGE PIGOTT: What - - - what then would
16 be the result in your view? I mean, if you both
17 agree he's going to end up with his - - - with his
18 gun, what - - - what - - - what do you think we
19 should be saying besides he's entitled to a gun?
20 That we don't have any gun laws in New York?

21 MR. SCHMUTTER: Your Honor, the court
22 should be - - - should recognize that the reason
23 there's no domicile - - - there can't be a domicile
24 requirement in the statute is because of the
25 compulsion of the Second Amendment. If it - - -

1 JUDGE SMITH: Suppose - - - suppose the
2 compulsion of the Second Amendment would - - - did
3 not exist, isn't the most natural reading of the - -
4 - of the statute on its face that - - - yeah, that
5 the place you reside is your residence? It's not
6 such a stretch.

7 MR. SCHMUTTER: Given the State of New York
8 law, we disagree. We believe that - - - ironically -
9 - -

10 JUDGE READ: So you - - - so you think
11 absent the Second Amendment, the most natural reading
12 of the statute is - - - means domicile?

13 MR. SCHMUTTER: Absent the Second
14 Amendment, the reading that New York law seems to
15 compel is domicile based upon Mahoney versus - - -

16 CHIEF JUDGE LIPPMAN: Isn't - - - isn't - -
17 - isn't the - - - the residency issue just really in
18 the application section of the statute?

19 MR. SCHMUTTER: You're correct that the
20 State of New York argues that it's simply - - - it's
21 not found in the substantive requirements, but
22 instead it's found in simply the procedural
23 requirements - - -

24 CHIEF JUDGE LIPPMAN: Yes, yes.

25 MR. SCHMUTTER: - - - of the statute.

1 However, it's important to realize the policy issues
2 that Mahoney recognized in the 1993 case.

3 JUDGE GRAFFEO: But I mean, you may - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but - - - but -
5 - - we un - - - go ahead.

6 JUDGE GRAFFEO: You may want us to make a
7 constitutional policy argument, but I don't see why
8 we can't look at our case law on residence and
9 domicile, and deter - - - and determine the case.
10 Isn't that what our court usually does? If there's a
11 narrower way to reach the resolution, that's what we
12 do.

13 MR. SCHMUTTER: I understand. The problem
14 here is that since Heller and McDonald, the State of
15 New York has undertaken a fundamental and concerted
16 effort to avoid the implications of those cases. The
17 Supreme - - -

18 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -
19 but this is a court of law. Give us the
20 justification as to why we need to make a
21 constitutional statement or decision when what
22 appears on its face, at least, is a statutory
23 question that - - - that, you know, can be resolved
24 in the normal way that this court determines
25 statutory issues.

1 MR. SCHMUTTER: Well, I think it's
2 important that the court recognize the history of the
3 New - - - of the State's position on this issue. I
4 mean, even if you go back to Bach v. Pataki, the
5 State of New York was very aggressively arguing in
6 favor of, for example, the need for a domicile
7 requirement - - -

8 CHIEF JUDGE LIPPMAN: You want us to
9 criticize? Punish? Do a court's decision on the
10 basis of whether we think the State of New York and
11 the public arena is taking one position or another
12 historically over the years? Or do we take the case
13 that's in front of us, and do a reading of the
14 statute, looking at our precedents, and make a
15 determination?

16 I mean, we don't - - - we don't decide
17 things that are not in front of us, so give us a
18 compelling reason, aside from - - - and I understand
19 what you're saying, that your view is, gee, the State
20 has not been - - - in your perspective - - - where it
21 should be on this issue. What does that have to do
22 with - - - with what we have in front of us and the
23 decision we have to make?

24 MR. SCHMUTTER: Well, Your Honor, this is -
25 - - this is an issue that's going to keep returning

1 to the - - - to the New York courts and to the
2 federal courts.

3 CHIEF JUDGE LIPPMAN: The statutory issue
4 may not keep on returning, if we resolve it in a
5 clear and direct way.

6 JUDGE PIGOTT: We have - - - it seems to me
7 we have three options. I mean, we can say that it
8 requires domicile and he doesn't get his weapon. We
9 can say it requires residency and he does. You have
10 a third option. How would you want us to write it?

11 MR. SCHMUTTER: It's not a third option,
12 Your Honor. It's - - - it's - - - it requires
13 residency, but the reason it requires residency is
14 because of the constitutional question. We did not -
15 - -

16 JUDGE GRAFFEO: So what's the - - -

17 JUDGE RIVERA: What is the requirement - -
18 -

19 JUDGE GRAFFEO: What's the pronouncement
20 that you want us to make? What's the constitutional
21 pronouncement that you want us to make? Outline the
22 decision.

23 MR. SCHMUTTER: What the court - - - what
24 we believe the court should do is - - - and really,
25 it's as the State of New York suggests, but the way

1 they suggest that the court do it is not correct.

2 They've invoked the principle of constitutional - - -

3 JUDGE GRAFFEO: No, I'm asking you what you
4 want us to do, not what you think the State wants.

5 MR. SCHMUTTER: No, I'm sorry; I was - - -
6 I was - - - I apologize. I - - - I seem to be going
7 in circles, but I was trying to answer the question.
8 I apologize. The - - - the technique of
9 constitutional avoidance ha - - - is supposed to
10 happen in a certain way. Now the State of New York
11 is asking the court to avoid the constitutional
12 question entirely by essentially ignoring it.

13 JUDGE PIGOTT: What do you - - - what do
14 you want us to do? How do you want to write it?

15 MR. SCHMUTTER: The right way to do it, we
16 believe, is to embrace the constitutional question
17 and first determine is there a serious constitutional
18 problem if the statute is - - - is construed in the
19 traditional way.

20 CHIEF JUDGE LIPPMAN: Yeah, but - - -

21 JUDGE ABDUS-SALAAM: But isn't that what
22 the Second Circuit is going to do once we answer the
23 question? Isn't that really what they're going to do
24 on the constitutional issue? We don't have to decide
25 that, do we?

1 MR. SCHMUTTER: No, in order - - - in order
2 to do constitutional avoidance - - - the process of
3 constitutional avoidance, a court is supposed to deal
4 with the constitutional question head on, decide
5 whether - - -

6 CHIEF JUDGE LIPPMAN: Counsel, counsel, are
7 you asking us to deal with it head on when it's not
8 necessary? Or are what you're - - - you're asking us
9 to do, do you want us to put dicta in the decision
10 that says the State has done something wrong or right
11 or in-between? Which are you really asking?

12 If we don't - - - if - - - if grappling
13 with the constitutional question is not necessary, if
14 we feel that we can decide the case on the basis of
15 the statute, is - - - is your back-up position that
16 you want us to in dicta say something about
17 constitutional avoidance or what the policy of New
18 York State has been over the years? What are you
19 really asking us to do?

20 MR. SCHMUTTER: Your Honor, what we're
21 asking the court to do is to recognize that in order
22 to get to the statutory question - - - the way it got
23 here is through the concept that the Second Amendment
24 compels it, because that's really why we're here
25 today. We - - -

1 JUDGE PIGOTT: So you want us - - - you
2 want us to say that under the Second Amendment of the
3 United States Constitution, Mr. Osterweil is entitled
4 to a weapon, regardless of whether he's a resident,
5 or regardless of whether he's a domiciliary, or what?

6 MR. SCHMUTTER: What we want the court to
7 do is what the United States Supreme Court basically
8 says when - - -

9 JUDGE PIGOTT: I know. I need you - - - I
10 need you to say it. I mean - - -

11 MR. SCHMUTTER: Right. We want the court
12 to say that reading the - - - construing the statute
13 as requiring domicile presents serious constitutional
14 problems with vis-à-vis the Second Amendment for
15 these reasons.

16 JUDGE SMITH: Okay, why - - - why - - - I
17 mean, I realize you're out of time, but - - - but - -
18 - but I think - - - why do we have to do - - - you
19 say, you can't get there without the doctrine of
20 constitutional avoidance, right? That is your
21 position?

22 MR. SCHMUTTER: That you should not get
23 there, because it would - - -

24 JUDGE SMITH: Or but you don't - - - should
25 - - - should not because the constitutional issue is

1 so important, or should not because it's not - - -
2 because otherwise you come out the other way?

3 MR. SCHMUTTER: Should not because for two
4 reasons. May I finish the - - - may I answer - - -

5 CHIEF JUDGE LIPPMAN: Yes, of course, the
6 Judge asked a question.

7 MR. SCHMUTTER: You should not for two
8 reasons. It's a - - - the constitutional question is
9 so important, but also it requires this court to kind
10 of do gymnastics to - - - to find a statutory
11 interpretation and sort of pretend that the
12 constitutional issue is not there.

13 JUDGE SMITH: Okay, so you - - - you - - -
14 you are saying that absent the United States
15 Constitution, the - - - you would read where - - -
16 where the applicant resides to mean the applicant's
17 domicile?

18 MR. SCHMUTTER: I'm saying, that absent the
19 United States Constitution, New York law - - -

20 JUDGE SMITH: Okay, can you give me a yes
21 or no on that one?

22 MR. SCHMUTTER: New York law - - -

23 JUDGE SMITH: Could you give me a yes or no
24 to that one? Are you saying, absent the con - - -
25 the - - - the cannon of constitutional avoidance, we

1 would - - - we should read where the appellant
2 resides to mean where the - - - where the applicant
3 resides to mean where the applicant is domiciled?

4 MR. SCHMUTTER: I - - - I believe that you
5 would - - - the court would read it that way - - -

6 JUDGE SMITH: Why?

7 MR. SCHMUTTER: - - - and would have in
8 1993 when Mahoney was decided, for sure.

9 JUDGE SMITH: Why?

10 MR. SCHMUTTER: Because of the - - - of the
11 privilege versus rights dichotomy that is recognized
12 in this - - - in this state. The - - - you know, the
13 - - - the - - - the Longwood Central School District
14 case, you know, that this court decided, recognizes
15 the very important difference between rights versus
16 privileges. And Mahoney v. Lewis, the Third
17 Department invokes that. And that's a real issue of
18 substantive law in New York.

19 CHIEF JUDGE LIPPMAN: Yeah, counsel, but I
20 think the point that - - - that some of us are making
21 is that it's not that we're unaware of the Heller
22 case or, you know, these constitutional issues that -
23 - - that may abound in relation to the right to bear
24 arms and other - - - and otherwise.

25 But it's the question that, again, we have

1 a case before us, that seems to be read - - - readily
2 able - - - in fact, you both agree on what the result
3 would be - - - and we don't necessarily try to reach
4 out to an issue that's not in front of us. So you'll
5 have more time to try and persuade us. Let's hear
6 from your adversary.

7 MR. SCHMUTTER: Thank you, Your Honor.

8 CHIEF JUDGE LIPPMAN: Okay.

9 Counsel, why don't we reach the
10 constitutional issues?

11 MR. PLATTON: May it please the court.
12 Your Honor, because this case can and should be
13 resolved. The certified question - - -

14 CHIEF JUDGE LIPPMAN: But he says you go to
15 into const - - - your adversary says you got to go
16 into constitutional avoidance and all of whatever his
17 grievance is in relation to the State. Why isn't he
18 right? Why don't we need that in order to
19 effectively decide the statutory question?

20 MR. PLATTON: Well, what Mr. Osterweil's
21 asserting isn't constitutional avoidance, Your Honor.
22 The cannon of constitutional avoidance requires this
23 court to resolve a question without reference to - -
24 - without deciding a constitutional question if it's
25 at all possible to do so. That's plainly the case

1 here.

2 JUDGE PIGOTT: Mr. Schmutter makes the
3 argument, he says, why waste time? We've got - - -
4 you know, you've got a lot of guns in the state. You
5 got to - - - this thing's going to keep coming back
6 and coming back. Here it is teed up perfectly by the
7 Appellate Division. Why not just get it over with?
8 Isn't there some attraction to that kind of an
9 argument?

10 MR. PLATTON: Well, I think that this court
11 should answer the question as a matter of statutory
12 interpretation that the statute requires residence.

13 JUDGE PIGOTT: But why can't we - - - why
14 can't we go a little bit farther, as Mr. Schmutter
15 says, and - - - and get this off our docket for the
16 next ten years?

17 MR. PLATTON: Go further and resolve the
18 constitution?

19 JUDGE PIGOTT: Yeah.

20 MR. PLATTON: Well, those questions are
21 before the Second Circuit, which would decide them.

22 JUDGE SMITH: In - - - in the abstract, he
23 has a point, doesn't he, that there certainly are
24 some issues of statutory interpretation that are
25 resolved the way they are resolved only because of a

1 - - - of a difficult constitutional question that
2 people want to avoid?

3 MR. PLATTON: There are cases in which - -
4 - oh, I'm sorry.

5 JUDGE SMITH: Okay, and in those cases,
6 obviously, you have to analyze the constitutional
7 question before you figure out what the statute
8 means. You don't have to decide the constitutional
9 question, but you do have to analyze it.

10 MR. PLATTON: Well, that's true, but - - -

11 JUDGE SMITH: And you say this is not such
12 a case.

13 MR. PLATTON: This is not such a case.

14 JUDGE SMITH: Why not?

15 MR. PLATTON: Well, first, it's enough to
16 trigger this cannon of constitutional avoidance to
17 recognize that there's a substantial constitutional
18 question, which the Second Circuit has already done
19 when it - - - in its decision certifying the - - -

20 JUDGE SMITH: So you concede that his claim
21 that the statute would be invalid if we read the word
22 "domicile" into it as a substantial one?

23 MR. PLATTON: The Second Cir - - - we do,
24 and the Second Circuit has already said that it's a
25 substantial question. We disagree with his - - - his

1 position on - - - on how that question should be
2 resolved. But this case isn't really even a close
3 one in terms of - - - it's a pure question of
4 statute.

5 CHIEF JUDGE LIPPMAN: Counsel, but - - -
6 but I think what he's sort of implying is that you
7 come to us with the position you're taking. Does
8 that have anything to do with the - - - with the
9 recent Supreme Court cases - - - United States
10 Supreme Court cases? In other words, do you get to
11 your position because of a recent constitutional law
12 set by the - - - by the Supreme Court?

13 MR. PLATTON: Well, those Supreme Court
14 cases are the occasion for that the federal
15 litigation, but they're not - - -

16 JUDGE SMITH: That's - - - that's what
17 makes the question substantial?

18 MR. PLATTON: No, it's that in that - - -
19 as the Second Circuit has stated in the wake of
20 Heller, there are - - - is a vast terra incognita. A
21 number of questions - - -

22 JUDGE SMITH: Well, let - - - let me ask it
23 differently. Suppose Heller had come out the other
24 way and the Supreme Court held there is no individual
25 right to bear arms, how would we read this statute?

1 MR. PLATTON: Exactly the same way, Your
2 Honor.

3 JUDGE SMITH: So - - - so we really don't
4 need the con - - - you're saying if you do
5 straightforward statutory interpretation, we avoid
6 the constitutional question as a bonus without even
7 trying?

8 MR. PLATTON: That's absolutely right.

9 JUDGE PIGOTT: Your concern, though, is
10 that if - - - if - - - if we take up Mr. Schmutter's
11 challenge, 400 could be found unconstitutional and
12 now you've got a problem with you statute, right?

13 MR. PLATTON: Well, I - - - no, I think our
14 position is that it's - - - that this case can be
15 resolved without reference to any - - -

16 JUDGE PIGOTT: Right.

17 MR. PLATTON: - - - constitutional
18 question.

19 JUDGE PIGOTT: But if we - - - if we decide
20 we do not want to avoid and we are going to say that
21 this requires domicile, and if the Second Circuit
22 says domicile makes the statute unconstitutional,
23 then we've got a hole in our law then, don't we?

24 MR. PLATTON: That's true, but - - - and -
25 - - but we believe that - - - that the residency is

1 what the legislature intended.

2 JUDGE RIVERA: So - - - so it - - - I'm a
3 little confused. So is in part your argument that
4 the statutory interpretation exercise that we have to
5 go through to answer this question is really focused
6 solely on the word "residency". It has nothing do
7 with what exactly is being regulated.

8 MR. PLATTON: Well, I think it has to do
9 with - - - with how the statute is structured, Your
10 Honor. And it's not specific to the fact that this
11 is a handgun license right - - - provision. I think
12 that - - - and this - - - this decision - - - the
13 certified question could be answered without any
14 reference to the Second Amendment. And Mr. Schmutter
15 - - -

16 JUDGE SMITH: Do you - - - you say - - -

17 JUDGE GRAFFEO: You don't - - - you don't
18 want us to refer to the Heller case at all in our
19 writing?

20 MR. PLATTON: I don't think it's necessary
21 at all, Your Honor. And in the cannon of
22 constitutional avoidance would suggest that you
23 resolve this, if you can, without any reference to
24 the constitutional question.

25 JUDGE SMITH: You say that - - -

1 CHIEF JUDGE LIPPMAN: But your position has
2 evolved on this, right? The State's position has
3 evolved?

4 MR. PLATTON: That's true, it has, Your
5 Honor.

6 JUDGE SMITH: Do you now say the Mahoney
7 case is wrong and was wrong the day it was decided?

8 MR. PLATTON: Yes.

9 JUDGE SMITH: Even though you - - - you
10 relied on it originally, yes, in the District Court?

11 MR. PLATTON: It's true, we took it as
12 authoritative in the District Court and didn't until
13 the appeal recognize that there was a question that
14 perhaps Mahoney was wrong when decided.

15 CHIEF JUDGE LIPPMAN: But - - - but you
16 agree that the 300-pound gorilla in the room is
17 Heller, no? I mean, doesn't that cast a kind of
18 umbrella as - - - you know, on this case, which may
19 be one strictly of statutory construction, but Heller
20 is out there, right? It colors the discussion that
21 we're having today.

22 MR. PLATTON: Well, undoubtedly, Heller is
23 the reason that there's a federal litigation going on
24 right now. But in terms of answering the certified
25 question, it's entirely unnecessary to consider the

1 fact that Heller was decided. This case could come
2 up without Heller being decided, and this would still
3 be a residency requirement. Mr. Schmutter was - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but - - - but -
5 - - but we couldn't really - - - I mean, we could,
6 obviously, and we might, but we wouldn't be deciding
7 this case in a vacuum without a recognition as to
8 what's happened at the high court of the country's -
9 - - in relation to this issue of the right to bear
10 arms?

11 MR. PLATTON: If it's - - -

12 CHIEF JUDGE LIPPMAN: Again, it's the - - -
13 I guess what I'm saying is it's the context within
14 which now we take this statutory construction case
15 from the Second Circuit.

16 MR. PLATTON: Well, I agree that it is the
17 context at the moment, but if - - - if Mr. Osterweil
18 or anyone else had taken an Article 78 challenge to
19 denial of a license for lack of domicile - - -

20 CHIEF JUDGE LIPPMAN: If it didn't come
21 through a certified question?

22 MR. PLATTON: If - - - that's right. If
23 it - - - if anytime since Mahoney was decided,
24 someone had brought an Article 78 challenge,
25 asserting that this was a residence requirement, not

1 domicile, it would have come to this court, and this
2 court could have and - - -

3 CHIEF JUDGE LIPPMAN: And Heller would have
4 much less resonance in terms of what's - - - this
5 particular case?

6 MR. PLATTON: That's right. The outcome
7 would have been the same whether that Article 78 came
8 to this court before or after Heller.

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. PLATTON: All right. Thank you, Your
11 Honor.

12 CHIEF JUDGE LIPPMAN: Thank you, counsel.
13 Counselor, why isn't that a good point,
14 that your adversary is making, that what if it came
15 to us not in a certified question? What if it just
16 came from an Article 78, raising exactly the same
17 issue of statutory construction? Would that change
18 your view of what we should be doing or not doing?
19 Or the way we should be deciding this case? Or how
20 we should be getting to deciding this case?

21 MR. SCHMUTTER: No, Your Honor, it's really
22 the same case. And it's still a case that's
23 fundamentally driven by the Second Amendment in
24 Heller and McDonald.

25 The State of New York desperately wants

1 this court to issue an opinion that doesn't have the
2 word "Heller" in it. And what they will argue is - -
3 - so if this court - - - if this court answers the
4 certified question in the affirmative and rules that
5 - - - and strike - - - and essentially overturns
6 Mahoney and rules that residence means residence and
7 not domicile, they will - - - and without mentioning
8 the Second Amendment in a meaningful way, they will
9 then have a - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but whether you
11 agree with what the State of New York has done or not
12 done in the area of gun control or the right to bear
13 arms, you know, obviously, your - - - your right to
14 do that, but again, I don't quite see how that
15 totally guides us as to the way we should be
16 attacking this very specific program - - - problem
17 that comes to us in a very directed kind of
18 prescribed form.

19 Again, so what? I mean, you disagree, you
20 agree. These are policy issues. They're in the
21 public arena, and all very important, and important
22 that it be discussed. How is it important in a high
23 court decision that we make today, and why wouldn't
24 it be the court reaching beyond its natural way of
25 deciding cases - - - its jurisprudence just based

1 upon taking cases in front of us and determining them
2 based on - - - on what we have?

3 MR. SCHMUTTER: Your Honor, this is
4 fundamentally a civil rights case, and it's not an
5 easy call to say this is purely a statutory - - - a
6 question of statutory construction, the - - - the
7 policy - - - the New York legislative policy of
8 rights versus privileges, and in construing residence
9 to mean domicile - - -

10 CHIEF JUDGE LIPPMAN: Yes, but the court's
11 not going to determine New York State policy - - -

12 MR. SCHMUTTER: That's correct.

13 CHIEF JUDGE LIPPMAN: - - - and the right
14 to bear arms.

15 MR. SCHMUTTER: That is correct.

16 CHIEF JUDGE LIPPMAN: And you wouldn't want
17 us to. That's for the policy-making branches of
18 government.

19 MR. SCHMUTTER: Yes, Your Honor.

20 CHIEF JUDGE LIPPMAN: This is a court of
21 law.

22 MR. SCHMUTTER: Yes, Your Honor. But
23 there's a very, very strongly stated policy from the
24 legislature that - - - to limit the universe of
25 people who are entitled to receive privileges, and

1 what Maho - - - the Mahoney case reflects is that
2 very strong legislative policy.

3 So what the Third Department did in Mahoney
4 is not trivial. And for the State of New York to
5 say, well, this is an easy call, it's really just
6 statutory interpretation, I think, gives short shrift
7 to the important pol - - - legi - - - New York State
8 policy of allocating rights and privileges very
9 differently. And the cases that this court has
10 decided, as well as the Appellate Division, make this
11 important distinction between "residence" and
12 "domicile" to effect that policy.

13 I see my time is up. May I just sum up?

14 CHIEF JUDGE LIPPMAN: If there are no other
15 questions? Yup, thank you, counsel.

16 MR. SCHMUTTER: Thank you, Your Honor.

17 Fundamentally, Mr. Osterweil - - -

18 CHIEF JUDGE LIPPMAN: Counsel, go ahead.

19 You can - - - go ahead, finish your thought, but then
20 - - -

21 MR. SCHMUTTER: Mr. Osterweil has had his
22 constitutional rights denied for five years. We ask
23 this court to - - - to provide him a ruling that
24 vindicates his rights. Thank you.

25 CHIEF JUDGE LIPPMAN: Okay, thanks. Thank

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you both. Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Osterweil v. Bartlett, No. 167 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: September 20, 2013