UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIFE RIGHTS, INC.; JOHN COPELAND; and PEDRO PEREZ, Plaintiffs, -against- CYRUS VANCE, JR., in his Official Capacity as the New York County District Attorney; and CITY OF NEW YORK, Defendants.	No. 11 Civ. 3918 (BSJ) (RLE) ECF Case

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT CITY OF NEW YORK'S MOTION FOR JUDGMENT ON THE PLEADINGS

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The New York City Police Department ("NYPD") has dramatically expanded its interpretation of a State law that prohibits "gravity knives" to also cover ordinary folding pocket knives that *resist* opening from their closed and folded position. Although these knives are designed and intended *not* to open in response to gravity, inertia, or centrifugal force, NYPD officers now routinely stop people with ordinary folding knives and attempt to open their knives by forcefully "flicking" them downwards and then stopping abruptly. See Complaint ¶ 3. If an officer can manage to get the blade to "wrist-flick" open, then police assert that the folding knife is a prohibited gravity knife and charge Criminal Possession of a Weapon. See id.

This is an unconstitutionally vague application of the gravity knife law. The gravity knife law does not provide adequate notice that knives that are designed and intended *not* to open by gravity or centrifugal force might be prohibited, and the operative test employed by the NYPD is *entirely* subjective. *It is literally possible for one knife to be simultaneously legal and illegal, and a person has no means of conforming his or her conduct to the law's expectations.*

The City seeks judgment on the pleadings for lack of standing and for failure to state a claim. To do so, the City embarks on a fanciful journey that selectively ignores the extensive evidence (in affidavit form) Plaintiffs have provided supporting both standing and the validity of Plaintiffs' claims. However, Plaintiffs can easily show standing (and do so) because the City's expansive gravity knife definition has directly and significantly impacted each of them. Furthermore, the Complaint plainly states a claim, and the City cannot prevail on demurrer by selectively construing the facts in its own favor. Indeed, a fair analysis of the City's claims serves only to show why it is vague to apply the gravity knife law in the manner this case concerns. Finally, even assuming a deficiency in the pleading *en arguendo*, the defects asserted are technical and procedural, and Plaintiffs would clearly be entitled to amend.

The City raises many of the same grounds as Defendant District Attorney Vance ("DA Vance"). Hence, to avoid duplication, at several points Plaintiffs refer the Court to their response to DA Vance's motion (Doc. No. 28 or "Opposition to DA Motion").

STATUTORY BACKGROUND

a. The "Gravity Knife" Prohibition

New York law prohibits "gravity knives" as weapons that (like metal knuckles, switchblades, chukka sticks, and Kung Fu stars) are unlawful *per se*. See N.Y. Penal L. § 265.01 (1); People v. Brannon, 16 N.Y.3d 596, 599, 925 N.Y.S.2d 393 (2011). At the same time, "knives," including pocket knives, are generally lawful – unless one has a criminal intent, *viz.* "to use the same unlawfully against another." See N.Y. Penal L. § 265.01(2); Brannon, 16 N.Y.3d at 599 (gravity knife definition distinguishes "a similar, but legal object, such as a pocketknife").

State law defines a gravity knife as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." N.Y. Penal L. § 265.00(5). The two definitional elements are that the blade must be "released from the handle or sheath by the force of gravity or the application of centrifugal force" and must "lock[] in place by means of a button, spring, lever or other device." See, e.g., People v. Dolson, 142 Misc. 2d 779, 780, 538 N.Y.S.2d 393, 394 (Co. Ct., Onondaga Co. 1989).

b. Application to Common Folding Knives

This case concerns the application of the gravity knife law to folding knives that are designed to resist opening from the closed position. Today, almost all folding knives in America are built in this manner – their blades are designed to open when a person intentionally manipulates them to the open position with their fingers. Plaintiffs refer to folding knives that resist opening as "common folding knives." See Complaint ¶¶ 1, 3.

Plaintiffs explained in their response to the DA's motion that the gravity knife law lay in relative obscurity until the City dramatically expanded its interpretation of this law to include folding knives that can be opened using a so-called "wrist-flick" maneuver. Today, if NYPD officers can open the blade of a folding knife by forcefully "flicking" it downwards and then stopping it abruptly, even just once, then they will assert that the folding knife is a prohibited gravity knife and charge its owner with Criminal Possession of a Weapon. See Opposition to DA Motion pp. 3-6; see also Complaint ¶¶ 1, 3. Some of these pocket knife arrests have attracted media attention.[1]

It is significant that the ordinary meaning of "gravity knife" does *not* include a folding knife that is built to resist opening from the closed position. Indeed, the original "gravity knife" was not a folding knife at all, but instead had a blade that *fell* downward from its body when released. See Complaint ¶ 17; see also United States v. Irizarry, 509 F. Supp. 2d 198, 205 (E.D.N.Y. 2007). The original gravity knife literally opened by gravity – and a flick of the wrist could complete the operation if the blade failed to fall open all the way. See Irizarry, 509 F. Supp. 2d at 205. Some definitions define the term "gravity knife" to also include "false gravity knives," which are folding knives that that do *not* resist opening from the closed position. See Ex. A, Am. Knife & Tool Inst., AKTI Approved Knife Definitions at 4-5 (2011).[2] Again, this type of knife can be opened solely by gravity, or by a relatively light "centrifugal" thrust. This case does not concern the application of the gravity knife prohibition to *any* knife that fits these

[1] See, e.g., Brad Hamilton, "Busted exec 'knife fight' with DA," N.Y. Post (Nov. 20, 2011), available at http://www.nypost.com/p/news/local/brooklyn/busted_exec_knife_fight_with_da_EDjF1BEe0M1OUzpPgBiZHO (last visited Jan. 13, 2012); Rebecca Marx, "Nate Appleman Arrested for Weapons Possession . . . of a Two-Inch Pocket Knife," Village Voice (Apr. 5, 2010), available at http://blogs.villagevoice.com/forkintheroad/2010/04/nate_appleman_w_1.php (last visited Jan. 13, 2012).

[2] Another useful source is the Wikipedia entry, which is available at http://en.wikipedia.org/wiki/Gravity_knife (last visited Jan. 13, 2012)

ordinary and customary "gravity knife" definitions. Rather, this case concerns the application of the gravity knife law to folding knives that have mechanisms that *resist* opening.

c. Guidance from the New York Court of Appeals

A federal court reviewing a State law should *begin* by analyzing the decisions of the highest court of the State that construe the statute. See Wainwright v. Stone, 414 U.S. 21, 22-23 (1973). The Court "must take the statute as though it read precisely as the highest court of the State has interpreted it." Id. (quoting Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273 (1940)); see also Johnson v. Fankell, 520 U.S. 911, 916 (1997). A federal court should only resort to lower state-court decisions if it lacks authority from the State's high court. See Kolender v. Lawson, 461 U.S. 352, 355 n.4 (1983).

Although Plaintiffs pointed out the import of the court's decision in People v. Dreyden, 15 N.Y.3d 100, 905 N.Y.S.2d 542 (2010), in response to the DA's motion, and in the Complaint, the City essentially ignores it. In Dreyden, the Court of Appeals held that a charging document needed to include "nonconclusory allegations establishing the basis of the arresting officer's belief that defendant's knife was a gravity knife." Id. at 102. Significantly, the court explained that the statutory definition "distinguishes gravity knives from certain folding knives that cannot *readily* be opened by gravity or centrifugal force" – and a charging document was defective if it did not explain why the definition was met. Id. at 103-04 (emphasis added).

It is also significant that the Court of Appeals cited only one authority in support of its requirement that a folding knife open "readily" – the decision in United States v. Irizarry, 509 F. Supp. 2d 198 (E.D.N.Y. 2007). See Dreyden, 15 N.Y.3d at 104. In Irizarry, Judge Jack Weinstein had found that a folding knife was *not* a gravity knife, even though it was "capable of being opened by an adept person with the use of sufficient centrifugal force," and even though the arresting officer was able to perform the "wrist-flick" procedure in court. See Irizarry, 509 F.

Supp. 2d at 204. Judge Weinstein reasoned that the knife "was obviously not designed to be opened in this fashion and does not *readily* open through such force." Id. at 205 (emphasis added). This decision stands for the proposition that something *more* than the basic ability to open a folding knife with a "wrist-flick" is needed.

The City relegates analysis of Dreyden, and Irizarry, to footnotes. The City suggests that the rationale of Irizarry ought to be confined to the particular make and model of folding knife at issue in that particular case, and that the Dreyden court held only that the charging document was defective, without ever explaining *why* it was defective. See City Br. pp. 18 n.6, 21 n.7. The City then relies on its *oversimplified* characterization of New York law to argue that the statute provides clear notice that ordinary folding knives are prohibited – as a matter of law.

FACTUAL BACKGROUND

a. Charges Against Copeland and Perez

The circumstances of the individual plaintiffs in this action demonstrate the basic vagueness problem. Plaintiff John Copeland, a Manhattan resident and painter whose work is recognized around the world, previously carried a "Benchmade" brand folding knife that he used for utilitarian purposes, like cutting canvases from frames. See Complaint ¶¶ 11, 26-27, 31. Like virtually all other folding knives, Mr. Copeland's knife mechanically resisted opening from the closed position and was a "common" folding knife. See id. ¶ 26. Prior to October 2010, Mr. Copeland had previously shown his knife to NYPD officers on two occasions. See id. ¶ 28. Both times the officers had attempted to "wrist-flick" the knife open, and both times they could not, so they told him the knife was legal. See id. However, an NYPD officer who stopped Mr. Copeland in October 2010 *was* able to "wrist-flick" the knife open, so he charged Mr. Copeland with Criminal Possession of a Weapon. See id. ¶ 29.

Plaintiff Pedro Perez is a Manhattan art dealer who used to carry a "Gerber" brand folding knife that he used in his work. See id. ¶¶ 12, 34-35. Mr. Perez's knife was also a "common" folding knife that was built to resist opening from the closed position. See id. ¶ 34. In Mr. Perez's case, the NYPD officers who stopped him actually could not "wrist-flick" his knife open, at least in his presence, but they "asserted that it would (theoretically) be possible to do so" and they charged Mr. Perez with Criminal Possession of a Weapon. See id. ¶ 36. (The City assures that at least one police officer was ultimately able to "wrist-flick" Mr. Perez's knife open by the time he signed off on a criminal complaint to that effect. See City Br. p. 7.)

There is no real dispute that the City has adopted this practice. In its Answer, the City admits that it detained and charged both Mr. Copeland and Mr. Perez on the contention that their folding knives were in fact prohibited "gravity knives." See Answer (Doc. No. 15) ¶¶ 1 n.1, 22-23, 29-30. And, in its moving papers, the City positively asserts that its "wrist-flick" interpretation is actually "*the* statutory definition." City Br. p. 18 (emphasis added). Indeed, the City affirmatively contends that the gravity knife law unambiguously applies if any one person can "wrist-flick" a knife open any one time. See id. pp. 20-21. The City acknowledges that its definition can capture "knives . . . sold in local stores as 'folding knives' and designed as tools," but claims this is not an issue because "[t]he intended use or design of the knife by its manufacturer is not an element of the crime and is irrelevant." Id. (quoting People v. Fana, no. 2008NY086726, 2009 N.Y. Misc. LEXIS 956, *9 (Crim. Ct., N.Y. Co. Apr. 23, 2009)).

b. The Impact on Knife Rights

The City's expansion of the gravity knife law did not occur in a vacuum – rather, this policy is playing out in the lives of (many) real people who face Criminal Possession of a Weapon charges when found carrying pocket knives in the City. Understandably frightened and frustrated, some of these people have contacted Knife Rights for assistance. See Declaration of

Douglas S. Ritter (Doc. No. 22) ¶ 12; Second Declaration of Douglas S. Ritter ("2d Ritter Dec.") ¶¶ 2-3. Knife Rights has expended its time and energy to counsel these individuals on topics such as the retention of defense counsel and the likely resolution of the charges. See 2d Ritter Dec. ¶¶ 2, 9. In several cases, including that of Plaintiff Pedro Perez (and others specifically identified in Mr. Ritter's declaration), Knife Rights has expended its own funds to retain defense counsel to represent the individuals. See id. ¶¶ 3, 6. Knife Rights has also spent its time, energy, and money to respond to inquiries from its members and the general public, and to publish materials that warn of the City's expansive definition. See id. ¶¶ 7-9. For example, Knife Rights has published e-mail and website alerts advising members of the public (including its own members) of the risks of carrying folding knives in New York City. See id. ¶ 8. Finally, these expenditures have interfered with Knife Rights' ability to address its other priorities, identified in Mr. Ritter's declaration. See id. ¶¶ 10-13. To put it simply, the City's expansion of the gravity knife law has been a major drain on Knife Rights' resources.

ARGUMENT

POINT I:
THE CITY'S THREATENED ENFORCEMENT CAUSES INJURY THAT IS TRACEABLE AND REDRESSABLE, AND HENCE, PLAINTIFFS HAVE STANDING

Plaintiffs can readily show standing to challenge the City's expansion of the gravity knife law to cover common folding knives, as the practice causes palpable injury that is traceable to the City and redressable by this Court. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); accord Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 904 (2d Cir. 1993).

First, the City has already applied the gravity knife law against Plaintiffs Copeland and Perez, and in the same context this case concerns – folding knives that resist opening from the closed position. Notably, the City's motion does not dispute that Copeland and Perez have

standing to challenge its (conceded) ongoing threat to apply the gravity knife law to common folding knives. See City Br. pp. 8-11. Certainly, it is well established that a state actor's ongoing threat to enforce a penal law in an unconstitutional manner constitutes a cognizable injury in fact. See Ellis v. Dyson, 421 U.S. 426, 431-32 (1975); Steffel v. Thompson, 415 U.S. 452, 459 (1974); Am. Booksellers Found. v. Dean, 342 F.3d 96, 101 (2d Cir. 2003).

So long as at least one of the plaintiffs has standing – and Copeland and Perez plainly do – the Court does not need to pursue the standing issue further. See Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 (1977). Nevertheless, to the extent the Court deems it advisable to do so, Plaintiff Knife Rights can readily show standing on its own behalf, for the City's expansive definition directly results in significant impairments to its resources.

a. The Complaint Properly and Adequately Alleges the Standing of Knife Rights

The City claims (simply) that Plaintiff Knife Rights lacks standing, but the City's argument does not go to the substantive merits of standing. Rather, the City's argument is a *procedural* claim that the Complaint ought to include additional details. See City Br. p. 9 (equating alleged failure to include details in Complaint with "failure to satisfy the requirements for standing"); id. p. 10 ("Knife Rights has failed to articulate any 'injury in fact'"). However, the Federal Rules rely on "notice" pleading, and a Complaint only needs to include "a short and plain statement of the claim" and "the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a).

The Complaint provides adequate notice. First, the Complaint provides notice that the central issue in the case is the Defendants' application of State laws that prohibit switchblade and gravity knives to "common folding knives" – that is, to ordinary folding knives that resist opening from the closed position. See Complaint ¶ 1. The Complaint identifies two sets of enforcement actions. The first one, and the one most pertinent to this motion, is the NYPD's expansion of the gravity knife definition to cover common folding knives, as exemplified by the

cases of Plaintiffs Copeland and Perez. See Complaint ¶¶ 24-38. The Complaint alleges that Defendants have pursued charges against members and supporters of Knife Rights, and also that Knife Rights seeks "to vindicate the legal rights of individuals and businesses who are unable to act on their own behalf in light of the costs and time commitments involved in litigation." Complaint ¶¶ 43-44. Certainly, this is notice that the City's enforcement of the gravity knife law against individuals and businesses has resulted in the expenditure of Knife Rights' resources.

The City does not cite any support for its *sub silencio* argument that a Complaint must include a detailed description of the facts and circumstances that ultimately support a party's standing. Rather, in a section for "the standard for dismissal," the City (correctly) acknowledges that it is not entitled to dismissal unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief." City Br. p. 3 (quoting Staron v. McDonald's Corp., 51 F.3d 353, 355 (2d Cir. 1995) (internal quotations omitted)). The City further concedes that the Plaintiffs' allegations must be taken as true, and that all "reasonable inferences" must be drawn in Plaintiffs' favor. See City Br. pp. 3-4.

There is simply no basis for the City's claim to pleading specificity. To the contrary, in the context of standing, the Supreme Court has explained that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." Lujan, 504 U.S. at 561 (quotation and alteration omitted); accord Bennett v. Spear, 520 U.S. 154, 168 (1997). While a party must ultimately establish standing in fact, it can rely upon "affidavit or other evidence" and "evidence adduced at trial" to do so. Lujan, 504 U.S. at 561 (quotation omitted). The evidence submitted herewith, and in response to DA Vance's motion, amply demonstrates that standing *in fact* exists. Thus, to whatever extent the Court

might find the Complaint deficient, it should grant leave to amend. See Dougherty v. Bd. of Zoning Appeals, 282 F.3d 83, 89-92 (2d Cir. 2002).

b. There is No Basis for the City's "Core Purposes" Argument

The City asserts that "[t]o the extent the Complaint can be construed as alleging injury to Knife Rights arising from its use of its resources to advise and advocate for its members . . . such expenses are central to Knife Rights' 'core purpose'" of "'vindicat[ing] the legal rights of individuals and businesses.'" City Br. p. 10 (quoting Complaint ¶ 43).[3] According to the City, "[t]he use or depletion of [organizational] resources to accomplish the organization's 'core purpose' cannot be deemed to be an 'injury in fact.'" Id. The City supports this (remarkable) proposition with a citation to Nnebe v. Daus, 644 F.3d 147 (2d Cir. 2011). See City Br. p. 10.

The City's proffered rule of law is absurd, for it would mean that organizations would only have standing if their organizational purposes were *unrelated* to the issues in a case. It is therefore little surprise that the Nnebe case does *not* support the City's claimed rule. The organizational plaintiff in Nnebe was the New York Taxi Workers Alliance, and the Court of Appeals for the Second Circuit concluded that this organization *had* standing because it infrequently counseled its members who were impacted by the laws at issue. See Nnebe, 644 F.3d at 157. The District Court had found that the organization's purposes *included* this activity, and also that the organization had "more" priorities, including "to make systemic reform." Nnebe v. Daus, 665 F. Supp. 2d 311, 321 (S.D.N.Y. 2009) rev'd in part, 644 F.3d 147 (2d Cir. 2011). Yet, the District Court had found this injury inadequate because the organization's counseling activities were infrequent and the organization did not "identif[y] the priorities on which it was unable to focus" as a result. Id. The Second Circuit *reversed* this point, instead reasoning "[e]ven if only a few suspended drivers are counseled by NYTWA in a year, there is

[3] This argument seems to belie the City's claim that the Complaint does not allege injury to Plaintiff Knife Rights.

some perceptible opportunity cost expended by the Alliance, because the expenditure of resources that could be spent on *other* activities 'constitutes far more than simply a setback to [NYTWA's] abstract social interests.'" Nnebe, 644 F.3d at 157 (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)) (emphasis added; alteration in source).

This rationale *supports* standing in this case, for Knife Rights does not exist solely to address the NYPD's enforcement of the gravity knife law. Time, energy, and funds that Knife Rights spends responding to the NYPD's enforcement threat diminish the time, energy, and funds that are available for other matters. See 2d Ritter Dec. ¶¶ 10-13. Certainly, the decision does not support the notion that there is no injury where an organization's core purposes include addressing the conduct at issue in a case, for the premise was just the opposite.

While the City's "core purposes" argument fails on its merits, it also lacks a factual premise. Knife Rights was organized primarily for legislative purposes, and the organization did not originally anticipate taking legal action, either on behalf of individuals facing charges, or against municipalities and prosecutors. See id. ¶ 10. The City's expansion of the gravity knife law, and the resulting impact on individuals and business, caused Knife Rights to *re*prioritize and to begin diverting resources to addressing issues in New York City. See id. ¶ 11.

c. The City's Expansive Interpretation of the Gravity Knife Law has Significantly Impaired Knife Rights' Resources

While the Complaint provides ample notice, the question of standing goes to subject matter jurisdiction, and the Court must satisfy itself – at some point – that standing *in fact* exists. See generally 2 Moore's Federal Practice § 12.30[1] (3d ed. 2011). As the Supreme Court explained in Lujan, the Court can consider any competent evidence to make this ultimate determination. See Lujan, 504 U.S. at 561. And, there is abundant evidence to support the standing of Plaintiff Knife Rights.

Many people charged with violating the gravity knife law with common folding knives have contacted Knife Rights for assistance, and Knife Rights has expended its time and energy to counsel these individuals. See 2d Ritter Dec. ¶¶ 2, 9. In several cases, Knife Rights has referred these individuals to defense counsel, and it has supported their defense with funds, research, and information. See id. ¶¶ 3, 6. Knife Rights has also spent its time, energy, and money to publish materials that warn the public of the City's expansive (and unanticipated) interpretation of "gravity knife," and to provide general counseling and guidance to concerned individuals. See id. ¶¶ 7-9. And finally, the diversion of resources to respond to NYPD gravity knife arrests has impacted a number of other organizational priorities. See id. ¶¶ 10-13.

These injuries are more than enough to establish Knife Rights' standing. The Second Circuit has emphasized that "only a *perceptible impairment* of an organization's activities is necessary for there to be an injury in fact," Nnebe, 644 F.3d at 157 (emphasis added). Knife Rights' showing is far more substantial than that before the court in Nnebe, which found an adequately "perceptible" injury where the organization had "infrequently" counseled affected drivers, but could not identify any specific impact to organizational priorities. See id. And, it is also far more substantial than the showing before the court in Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993), which found a "perceptible" injury where the organization had spent time investigating the conduct and filing an administrative complaint. See id. at 905.

d. Representational Standing

The City seeks dismissal on the ground that Second Circuit precedents do not allow organizations to seek relief on behalf of their members. See City Br. pp. 8-9. As Plaintiffs explained in response to the District Attorney, Plaintiffs respectfully submit that there is a realistic chance that the rule of Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1974), will be overturned, and in the event this occurs, Knife Rights has pleaded *both* bases for standing in

order to preserve its claim. Any deficiency is moot because Knife Rights has independently demonstrated standing on its own behalf – and it only needs to satisfy *one* theory of standing to proceed with its case. See Nnebe, 644 F.3d at 156.

POINT II:
THE CITY IS SUBJECT TO SUIT FOR ITS PART IN DA VANCE'S ENFORCEMENT ACTIONS

While the NYPD has not taken the position that common folding knives can fall under the "switchblade" definition – at least not to Plaintiffs' knowledge – DA Vance *has*, and the Complaint alleges that the City was involved in the enforcement actions of his office. See Complaint ¶¶ 1, 3, 6. There is no basis for the City's claim (p. 11) that the Complaint contains "no specific allegations pertaining to" the City's use of the switchblade law.

Plaintiffs demonstrated that all of the Plaintiffs have standing to challenge DA Vance's threat to apply *both* laws – the switchblade law and the gravity knife law – to common folding knives. See Opposition to DA Motion pp. 2, 7-12. It would serve little purpose to repeat this showing here. The City's claim that it was not *in fact* involved in the DA's actions (Answer ¶ 4) is not amenable to a Rule 12 demurrer.

POINT III:
IT IS VAGUE TO APPLY THE GRAVITY KNIFE LAW TO COMMON FOLDING KNIVES, AND PLAINTIFFS STATE A VALID CLAIM

Plaintiffs have already explained how the facts and circumstances show that it is vague to apply the gravity knife law to folding knives that resist opening:

- The terms of the statute refer to a blade being "released . . . by the force of gravity or the application of centrifugal force," but this does not provide adequate notice that a knife that is designed *not* to release its blade in this manner is included.
- This conclusion is bolstered by the customary and ordinary meaning of "gravity knife," which does not include a folding knife that is designed to resist opening.

- The Court of Appeals has incorporated a requirement that a folding knife open "readily," but the DA and the City (concededly) do not follow this directive, and there is no established meaning for "readily," anyway.

- Proof of a violation turns on a police officer's ability to perform a physical maneuver that is highly variable between persons, and which may vary when performed multiple times by the *same* person.

- Because the maneuver is highly variable, one folding knife can be simultaneously legal and illegal, because some people can "wrist-flick" it open, while others cannot.

- A person can never have any assurance that a folding knife that locks open is legal because they cannot *know* that a yet-to-be-encountered police officer will not be able to perform the "wrist-flick" maneuver.

- The legislative history does not reflect any intent to include ordinary folding knives.

See Opposition to DA Motion pp. 13-22.

The City's Point III argument largely tracks DA Vance's argument, as both assert that *as a matter of law* it is *not* vague to apply the gravity knife law to common folding knives – which is actually the ultimate issue in this case. Accordingly, Plaintiffs rely on their prior briefing and respond here only to the points that are unique to, or emphasized by, the City's motion.

Preliminarily, the City's motion pays homage to the standards that govern a demurrer under Rule 12, conceding that all "reasonable inferences" must be drawn in Plaintiffs' favor, and that its motion must fail unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief." City Br. pp. 3, 4 (quotation omitted). However, the substance of the City's motion disregards these standards, and (like DA Vance) instead draws a series of inferences in its own favor. The City ignores some pertinent facts and considerations, adds nonexistent others, and arrives at the conclusion that Plaintiffs' claim will ultimately fail – and so, Plaintiffs must have failed to state a claim upon which relief may be granted. However, Defendants are not entitled to dismissal merely because they assert that they ultimately will not be found liable!

a. The Statutory Core is *Not* "One-Handed Operation"

Incredibly, the City's motion relies in substantial part on its attempt to introduce a *new* requirement to the gravity knife statute. In its brief, the City articulates a gravity knife as being "a knife that can be opened with centrifugal force and locks in the open position by means of a device *without the use of the other hand*." City Br. p. 17 (emphasis added); see also id. p. 22 ("knives can[] be opened and locked into a fully opened position *with one hand*." (emphasis added)). Hence, the City suggests that the ability to open a knife "with one hand" defines or narrows the gravity knife offense.

The City then relies on its newfound standard to argue that Copeland and Perez are both plainly within the prohibition because each sought out "'a knife he could open with one hand.'" Id. pp. 17-18 (quoting Complaint); see also id. p. 22. Because Copeland and Perez and their "one-hand opening" knives are right in the *heart* of the statutory language, the City concludes that, "as applied to plaintiffs," the gravity knife law provided fair notice and adequate enforcement standards. Id. p. 22.

This approach is backwards.

In order to determine whether it is vague to apply a prohibition in a specific factual context (*i.e.* "as applied"), a reviewing court must begin by finding the "core" of the prohibition at issue. See Skilling v. United States, 130 S. Ct. 2896, 2933 (2010); Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973). Vagueness issues often arise when – and because – statutes have been extended far beyond their basic core. See Skilling, 130 S. Ct. at 2933; see also Smith v. Goguen, 415 U.S. 566, 577-78 (1974) ("there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain"); Williams v. United States, 341 U.S. 97, 101 (1951) ("Many criminal statutes might be extended to circumstances so extreme as to make their application unconstitutional."). To

determine a statute's core, a reviewing court begins by reviewing the terms of the statute, as well as its history and application. See Skilling, 130 S. Ct. at 2928.

Here, the gravity knife statute makes *no* reference to the number of hands involved. Rather, the operative criteria under the statute is whether the "blade [ ] is released from the handle or sheath [ ] by the force of gravity or the application of centrifugal force" and whether it then "lock[s] in place by means of a button, spring, lever or other device." N.Y. Penal L. § 265.00(5). The City provides *no* authority that would justify reading in a new statutory requirement – and then using that new requirement to define the statute's *core*. Quite to the contrary, there is at least one State-court decision that reasons, in part, that the ability to "rapidly open a [ ] knife *with one hand*" does not establish a violation of the gravity knife law – as a gravity knife must "open *automatically* by operation of inertia, gravity or both." People v. Mott, 137 Misc. 2d 757, 522 N.Y.S.2d 429, amended at 1987 N.Y. Misc. LEXIS 2528, *2-3 (Co. Ct., Jefferson Co. 1987) (emphasis added). And, when the Court of Appeals construed the gravity knife law in People v. Dreyden, 15 N.Y.3d 100, 905 N.Y.S.2d 542 (2010), it explained that the "definition distinguishes gravity knives from certain folding knives that cannot readily be opened by gravity or centrifugal force," but said nothing about the number of hands involved. Id. at 104.

The legislative history (which the City also ignores) likewise does not reveal that "one-handed operation" was intended to be an aspect of the offense. Rather, the historical materials indicate that the "gravity knives" targeted by the legislature opened with very little exertion and were the functional equivalents of switchblade knives, which open "automatically." See Ex. B, 1958 N.Y. "Bill Jacket," A. 913-1796, at 3 (N.Y. 1958); see also Opposition to DA Motion pp. 3-4. There is no indication that the legislature sought to criminalize "one-handed operation."

A final consideration that is important in finding a statute's core is *ordinary meaning*. For example, in the Supreme Court's recent decision in Skilling v. United States, 130 S. Ct. 2896 (2010), the Court found the "core" of the statute by looking to both its legislative and judicial treatment, and then arriving at the meaning that had "always been as plain as a pikestaff." Id. at 2933 (quotations omitted). In Farrell v. Burke, 449 F.3d 470 (2d Cir. 2006), the Second Circuit relied on common sense to find that the materials under consideration lay clearly within the "core" of a probation restriction on "pornography," but noted that other materials lying closer to the margin would likely present vagueness issues. See id. at 492-94. Ordinary meaning is always a key part of vagueness analysis, for the operative question is whether a law "clearly 'delineates its reach *in words of common understanding*.'" Grayned v. Rockford, 408 U.S. 104, 112 (1972) (quoting Cameron v. Johnson, 390 U.S. 611, 616 (1968)) (emphasis added).

And plainly, the customary and ordinary meaning of the term "gravity knife" undercuts the City's "one-handed operation" argument, for the customary and ordinary meaning looks to whether a knife's mechanism is designed to resist opening – not to whether it can be opened with one hand. See *supra* p. 3. Indeed, by industry standards, a "suggested rule of thumb" is that if a knife "ha[s] a spring, detent or other mechanism providing bias toward closure, [then] it is not a gravity knife." Ex. A at 5. Certainly this indicates that the *core* of the statute is *not* occupied by folding knives that are designed to resist opening. In making this argument, the City has revealed the self-created, unfounded standard that it is applying in effecting wrongful arrests, and in the process has bolstered Plaintiffs' vagueness claim.

While the City's attempt to define "one-handed operation" as the core of the statute fails on its own merits, Plaintiffs note that the City's argument also overlooks a highly pertinent detail from the Complaint. The Complaint explains that Copeland and Perez selected knives that had

studs mounted to the blades that they could use to *manually* swivel the blades open with their thumbs. See Complaint ¶¶ 27, 35. The Complaint does *not* contend that Copeland and Perez sought out knives that could be opened with a "wrist-flick," or that could be "readily" opened by gravity or centrifugal force. Certainly the facts of John Copeland's case show that he did *not* want a knife that opened in this manner.

b. The Merits Turn on a Close Analysis of Factual Issues – and Demurrer is Improper

The City argues that *as a matter of law* the gravity knife definition provides fair warning that ordinary folding knives may be prohibited, as well as adequate enforcement standards to determine which ordinary folding knives are prohibited gravity knives. See City Br. pp. 12-15. The City's motion relies particularly on broad statements, like the Supreme Court's statement in Grayned v. Rockford, 408 U.S. 104 (1972), that "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." City Br. p. 15 (quoting Grayned, 408 U.S. at 110). Hence, the City argues that the language is "clear enough" – and that Plaintiffs claim therefore fails as a matter of law, without regard to the facts.

However, a close review of the cases the City cites shows why the City's position is *not* amenable to a Rule 12 motion. The determination of whether or not a law provides "fair" warning or "adequate" enforcement standards requires one to consider both the facts and the overarching legislative goals. "The degree of vagueness permitted varies with the nature of the enactment and the correlative needs for notice and protection from unequal enforcement." Ass'n of Int'l Auto. Mfgs. v. Abrams, 84 F.3d 602, 614 (2d Cir. 1996). And, Plaintiffs have previously demonstrated that a number of factual considerations – including the statutory and judicial history, the history of enforcement, the customary understanding of the term "gravity knife," the commonality of common folding knives, and the facts of the Plaintiffs' cases – all counsel in

favor of the conclusion that it is unconstitutionally vague to apply the gravity knife law to ordinary and common folding knives that resist opening from the closed position.

So, while it is true that the Due Process Clause does not require "'impossible standards' in the drafting of statutes" (City Br. p. 14 (quoting People v. Cruz, 48 N.Y.2d 419, 424, 423 N.Y.S.2d 625, 627 (1979))), whether a statute is *sufficiently* specific depends upon an examination of the law "as a whole," with a view to the legislative goals that underpin it. See Grayned, 408 U.S. at 110-11. In Grayned, for example, the Court considered an antinoise statute that prohibited "the making of any noise or diversion" on property "adjacent" to a public school, but only where the noise "disturbs or *tends to disturb* the peace or good order of such school session or class thereof." Grayned, 408 U.S. at 107-08 (emphasis added). A key part of the Court's reasoning upholding the law, notwithstanding some reservations, was its observation that the "tends to disturb" language served the overarching legislative goal of protecting schools because it focused on "whether normal school activity has been or is about to be disrupted." Id. at 111-12. A standard that looked to something else would not have adequately served this goal.

The City cites the Court of Appeals' decision in People v. Cruz, 48 N.Y.2d 419, 423 N.Y.S.2d 625 (1979) – and this decision also reflects this rationale. The Cruz decision concerned State laws that prohibited operating a vehicle while "impaired by the consumption of alcohol" or "in an intoxicated condition." Id. at 422, 423 N.Y.S.2d at 626. However, the State laws at issue *also* stipulated breath-alcohol-concentration levels that presumptively established whether or not a person was "impaired" or "intoxicated." See id. at 425, 423 N.Y.S.2d at 627-28. The defendant's challenge grew from the fact that he had *refused* to take a breathalyzer test – and had then asserted that without chemical testing, it was vague to apply the drunk-driving laws against him. See id. at 423, 423 N.Y.S.2d at 626. The court rejected this vagueness

challenge, and expressly noted that the legislature had eliminated chemical testing as a hard-and-fast requirement because otherwise drunk drivers would be able to "defeat[] a criminal prosecution for either offense by simply refusing to take the test." Id. at 425, 423 N.Y.S.2d at 627. Again, the court could not determine the vagueness issue in a vacuum, but instead had to consider both the factual context and the legislative goals at hand in order to determine whether the application at issue was unconstitutionally vague.

In Kolender v. Lawson, 461 U.S. 352 (1983), another decision the City relies upon (pp. 13-14), the Court stated that "due process does not require impossible standards of clarity." Id. at 357 (quotation omitted). However, the Court found the law at issue in that case was unconstitutional, in light of the circumstances and the legislative goals at issue, and observed that "this is not a case where further precision in the statutory language is either impossible or impractical." Id. Certainly, there is no reason to think that the State would be unable to ban "folding knives" identified as such (or for that matter, "folding knives that can be open with the thrust of an arm," or "folding knives that can be opened with one hand"), but the Court cannot determine whether the existent statutory definition provides adequate notice in the application at issue – without considering all of the relevant facts in the context of the legislative goals.

These cases show why the City's Rule 12 motion must fail. Whether a law is vague in a particular application depends upon the parameters of the law at issue, the factual context of the application at issue, and the legislative goals that the law seeks to address. It is only in this context that a Court can determine whether a law provides "fair" notice and whether the enforcement standards are "adequate." The City is errant to suggest that the Court can dispositively dismiss Plaintiffs' case as a matter of law, on the pleadings.

c. The Circumstances of Copeland and Perez Highlight the Vagueness Issue

While the circumstances of a person's case can show that the person's conduct was within the "core" of a prohibition, a person's circumstances can also serve to highlight the deficiency at issue. Compare Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525-26 (1994) (alleged "drug paraphernalia" was clearly within statute and included items specifically listed in the statute), with Gentile v. State Bar, 501 U.S. 1030, 1049-51 (1991) (vague aspects of the law frustrated petitioner's attempt to comply). The City seeks to use this principle in a wholly one-sided way, by asking this Court to infer that Copeland and Perez were within the "core" of the prohibition. While this argument fails in its own right, it should not draw attention away from the fact that the circumstances of Plaintiffs Copeland and Perez actually show why it is vague to apply the gravity knife law to folding knives that resist opening.

Copeland had attempted to comply with the law – he had shown his knife to other NYPD officers, and when they were unable to "wrist-flick" it open, they told him it was lawful. However, because there is no definite standard, Mr. Copeland faced charges when he encountered a NYPD officer who was capable of performing the maneuver. In the case of Mr. Perez, officers were not able to "wrist-flick" the knife open at all, at least at first – but the lack of any determinate standard likewise resulted in him facing charges.

While the City claims that this Court should conclude, as a matter of law, that Copeland and Perez were within the "core" of the gravity knife prohibition, and hence that the law was validly applied against them, the City is not entitled to have doubtful inferences drawn in its favor for purposes of a Rule 12 demurrer. To the contrary, the law requires inferences to be drawn in the Plaintiffs' favor. And even setting this directive aside, there are certainly abundant indications that Copeland and Perez were outside the "core" – meaning that the City cannot conclusively establish its defense as a matter of law.

d. The City's Cases Do *Not* Establish the Constitutionality of the City's Extension of the Gravity Knife Law

The City cites a slew of State-court cases to support the proposition that the gravity knife law "clearly" applies to common folding knives and is conclusively not vague in this application. See City Br. pp. 16-17. These decisions do little more than place the case at bar in context.

That context begins with the fact that the City has dramatically expanded its interpretation of the State law that prohibits gravity knives – knives with blades "released . . . by the force of gravity or the application of centrifugal force," N.Y. Penal L. § 265.00(5) – to also include folding knives that resist opening from the closed position. The City contends that "the statutory definition" of a gravity knife plainly and unambiguously includes any folding knife that any police officer can "wrist-flick" open any one time, without regard to ease, and without regard to whether anyone ever intended to open the knife in that manner. See, e.g., City Br. pp. 17, 20. The City's expansive interpretation has resulted in a number of legal decisions – which the City cites only selectively.

In one of the first of these decisions, a federal district court identified and discussed a basic vagueness problem at issue here – *any* folding knife can potentially be within the prohibition, and the determination of guilt or innocence turns on a question of subjective degree. See United States v. Irizarry, 50 F. Supp. 2d 198, 205 (E.D.N.Y. 2007). In that case, Judge Weinstein concluded that the folding knife under consideration was *not* a "gravity knife" within the meaning of § 265.00(5), even though it was "capable of being opened by an adept person with the use of sufficient centrifugal force," and even though the arresting officer was able to perform the "wrist-flick" procedure in court. Id. at 204. (In other words, even though the City's definition was met.) The court explained that the knife "was obviously not designed to be opened in this fashion and does not readily open through such force." Id. at 210.

Then, the New York Court of Appeals substantively construed the gravity knife law for the first time in its history. See People v. Dreyden, 15 N.Y.3d 100, 905 N.Y.S.2d 542 (2010). The Court of Appeals cited Irizarry as *its* sole support for the proposition that the "definition distinguishes gravity knives from certain folding knives that cannot *readily* be opened by gravity or centrifugal force." Id. at 104 (citing Irizarry, 509 F. Supp. 2d at 210) (emphasis added).

However, notwithstanding this, the City continues to maintain that there is no "readily" requirement, and charges anyone with a folding knife that can be flicked open at least once, by at least one police officer. See City Br. pp. 17, 20.

So, in this context, the City's citations to People v. Wang, 17 Misc. 3d 133A, 851 N.Y.S.2d 72 (Sup. Ct., App. Term 1st Dep't 2007), and People v. Voltaire, 18 Misc. 3d 408, 852 N.Y.S.2d 649 (Crim. Ct., Kings County 2007), are of little import. The Wang court ruled (significantly, before Dreyden) that the evidence was sufficient to uphold a conviction because "[t]he testifying police officer demonstrated at trial that the knives opened with the use of centrifugal force," even though it took more than one attempt. See Wang, 851 N.Y.S.2d at 72. The Criminal Court in Voltaire rejected a vagueness challenge that focused on intent, but significantly, much of the court's ruling rested on the fact that there was *no evidence* placed in the record to support the vagueness contentions the defendant made – a fact the decision explicitly observes, and a significant distinction from the circumstances here. See Voltaire, 18 Misc. 3d at 410, 852 N.Y.S.2d at 651. The decisions of the Court of Appeals in People v. Stuart, 100 N.Y.2d 412, 765 N.Y.S.2d 1 (2003), and People v. Munoz, 9 N.Y.2d 51, 211 N.Y.S.2d 146 (1961), also prior to Dreyden, had nothing to do with the gravity knife law at all. Finally, while the decision in People v. Herbin, 86 A.D.3d 446, 927 N.Y.S.2d 54 (1st Dep't 2011), addresses the issue of whether the gravity knife definition is vague, it analysis consists of only one

conclusory sentence: "This language provides notice to the public and clear guidelines to law enforcement as to the precise characteristics that bring a knife under the statutory proscription." Id. at 446-47, 927 N.Y.S.2d at 56.

Contrary to the City's claim, it can hardly be said that these cases conclusively establish that it is not vague to apply the gravity knife law to folding knives that resist opening. If anything, they show the extent to which the issue has not been adequately addressed.

One other citation deserves comment. The City cites United States v. Ochs, 461 F. Supp. 1 (S.D.N.Y. 1978), to support its claim that "[k]nives just as those described by plaintiffs have been found to be gravity knives." City Br. p. 18. Presumably, the City cites this case to create an inference that the City's current practice dates back to the 1970s. In any event, the Ochs court actually ruled *just the opposite*:

> A gravity knife differs from a penknife in that by depressing its button, accompanied by a flicking of the wrist, the blade exits the handle and locks into place. It can be opened and remain so without touching the lock. It is somewhat similar to a push-button switchblade knife without however the latter's spring to force the blade open; the force of gravity, and not a spring, forces the blade open and ends in a locked position.

Id. at 4. A "penknife" is a common folding knife, while "a push-button switchblade knife without . . . the . . . spring to force the blade open" is a "traditional" World War II gravity knife.

POINT IV:
THE COURT *CAN* GRANT EQUITABLE RELIEF BECAUSE
THE DEPRIVATION OF LIBERTY AND PROPERTY INTERESTS
UNDER A VAGUE CRIMINAL LAW *IS* IRREPARABLE INJURY

It is well established that constitutional deprivations are *per se* irreparable injuries for which there is no adequate remedy at law. See Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984). People are entitled to enjoy their constitutional rights *in fact*. The Supreme Court has repeatedly affirmed injunctions against the

threatened enforcement of vague laws. See, e.g., Kolender v. Lawson, 461 U.S. 352, 361 (1983) (loitering law); Colautti v. Franklin, 439 U.S. 379, 380-81 (1979) (abortion law).

There is no basis for the City's claim that this Court lacks power to issue an injunction. This case does not concern prosecution arising from *past* conduct, but rather, it concerns Plaintiffs ability to engage in conduct in the *future*, an issue that lies squarely within this Court's jurisdiction. See Steffel v. Thompson, 415 U.S. 452, 463 n.12 (1974). While the City cites the Eighth Circuit's decision in Bacon v. Near, 631 F.3d 875 (8th Cir. 2008), this (obviously) is not binding authority in the Second Circuit. More significantly, the City does not cite any cases overturning Kolender and Colautti, which enjoined the future enforcement of vague laws that, likewise, did not regulate matters protected by the First Amendment. There is no basis for the City's claim that this Court lacks the power to issue an injunction on an appropriate showing.

CONCLUSION

The ultimate question in this case is whether it is vague to apply the gravity knife law to common and ordinary folding knives that resist opening from the closed position. The City is not entitled to evade this question by unilaterally asserting that the laws are not in fact vague. Nor is the City entitled to evade judicial review merely because it can imagine additional details that could, theoretically, have been included in the Complaint. To the contrary, the Complaint easily meets the requirement of "a short and plain statement" and provides ample notice of the grounds for Plaintiffs' as-applied vagueness claim, the City's actions that give rise to it, and the connection between the City's actions and the Plaintiffs' injuries.

Plaintiffs have plainly stated a claim upon which relief can and should be granted.

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